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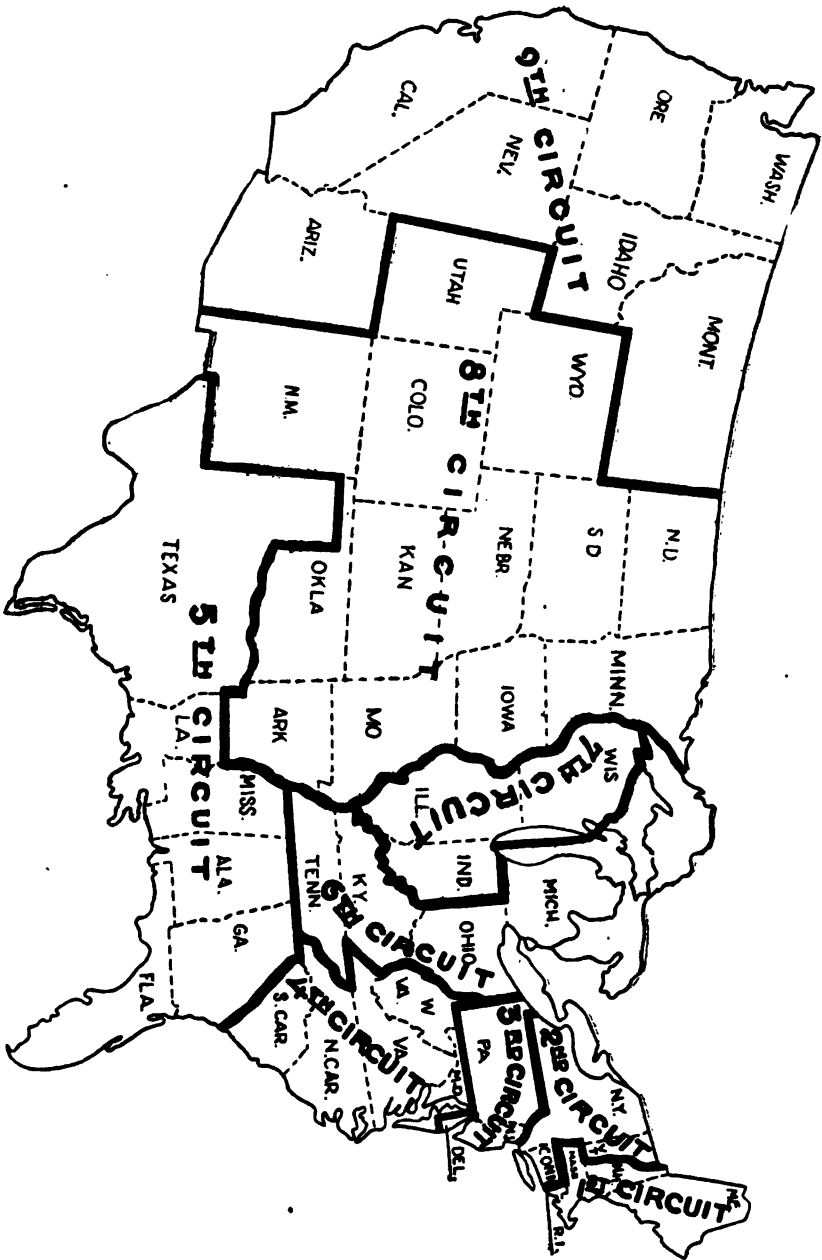
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<sup>1</sup> Died May 7, 1922.<sup>2</sup> Resigned March 1, 1922.

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\* Died January 27, 1922.

\* Appointed January 31, 1922, to succeed Hon. Walter I. Smith.

\* Appointed February 21, 1922.

\* Appointed February 2, 1922.



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# CASES

ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS, AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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### MARKLEY et al. v. SHEATZ.\*

(Circuit Court of Appeals, Third Circuit. January 3, 1922. Rehearing Denied February 24, 1922.)

No. 2747.

1. Corporations  $\S$  433(1)—Evidence held not to warrant submitting issue of officer's authority to accept partial assignment.

Evidence held insufficient to warrant submitting to jury issue as to authority of the secretary of a corporation to bind it by acceptance of an assignment of a portion only of debt owed by it.

2. Corporations  $\S$  432(12)—Evidence held not to show ratification of agent's assent to assignment of portion of debt owed by company.

Evidence that, after secretary assented to a partial assignment of a debt owed by a company, it delivered stock subscription contracts mentioned in the contract to the assignees, held not to establish ratification of the assent, in absence of evidence that when such contracts were delivered the company knew of the arrangement.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by John R. Markley and another, to the use of E. Kirby-Smith, against John O. Sheatz, receiver of the International Lumber & Development Company. Judgment for defendant on a directed verdict, and plaintiffs bring error. Affirmed.

Vernon R. Loucks, of Chicago, Ill., and Henry J. Scott, of Philadelphia, Pa., for plaintiffs in error.

Owen J. Roberts, of Philadelphia, Pa., for defendant in error.

Before WOOLLEY and DAVIS, Circuit Judges, and LYNCH, District Judge.

WOOLLEY, Circuit Judge. This case is here on a second writ of error, raising again the question of McMahon's authority to bind his company by accepting a partial assignment of its debt, before decided adversely to the plaintiff on grounds appearing in an opinion reported

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\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 253 U. S. —, 42 Sup. Ct. 463, 66 L. Ed. —.

at 249 Fed. 315, 161 C. C. A. 323. Referring to the opinion for a statement of the case, it is sufficient to say that Markley and Miller entered into a contract with the International Lumber & Development Company whereby they undertook, for a long period at a large return, to develop and bring to bearing the company's plantations in Mexico. In performing the contract, they had become indebted to E. Kirby-Smith—their manager on the ground—in a sum, the amount of which was in dispute. In compromise, Markley and Miller gave Kirby-Smith several notes in different amounts aggregating \$105,000, accompanied by drafts upon the company for like amounts falling due on the same dates, the whole to be secured by stock subscription contracts of the company. It is in evidence that when this adjustment was made, McMahon, the company's secretary and treasurer, was present; that he represented the indebtedness of the company to Markley and Miller to be in excess of the amount assigned by them to Kirby-Smith; that, acting for the company, he agreed to accept the partial assignment of its indebtedness and pay the Kirby-Smith drafts when presented; and also to furnish Markley and Miller stock subscription contracts for use as collateral to Kirby-Smith. One draft was presented and honored; payment of the remainder was refused. Later, Markley and Miller brought this action against the receiver of the International Lumber & Development Company, for the use of E. Kirby-Smith.

At the trial the court submitted to the jury the question of McMahon's authority to bind the company by his acceptance of the partial assignment. After judgment for the plaintiff the case came here on writ of error.

This court followed closely the rule in federal courts that unless a debtor agrees to accept the partial assignment of a debt due by him, he is not bound thereby, *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; 1 Rose's Notes (Rev. Ed.) 1041; 2 R. C. L. 618, § 26; and, holding the plaintiff must prove that the company had accepted Markley's and Miller's assignment, inquired into McMahon's authority to speak for the company.

This court found that the evidence did not disclose express authority from the company to McMahon so to bind the company, or any authority to be gathered from conduct of the company in holding out McMahon as its agent or officer. Neither could it discover ratification by the company of McMahon's unauthorized act. The judgment was reversed and a new trial awarded. The plaintiff at the second trial sought to cure the defects in the evidence of the first trial by proving not only what he had proved before but something more. This he regarded as sufficient to establish McMahon's authority. The learned trial judge was of another opinion and accordingly directed a verdict for the defendant. Hence the present writ of error.

In reaching a decision on this writ of error, we have taken the case on the first writ as the starting point and have pursued the inquiry whether on the second trial there was enough new evidence to raise the case out of its situation at the first trial. This involved an appreciation of all the facts and admissible inferences in the case for the purpose of determining whether there was evidence which, if it had

been submitted to the jury, would have sustained a finding that McMahon had authority, express or implied, to bind the company by agreeing to accept a partial assignment of its debt, or, a finding that, being without antecedent authority, the company subsequently ratified his act.

This controversy had its beginning in the affairs of the International Lumber & Development Company. While wrongdoing is not, in this instance, imputed to any of the parties before us, reference to what were at least informalities in the business transactions of that adventurous concern explains the difficulty this court has twice had in reaching a decision. The difficulty is, perhaps, one of judicial procedure. If no rights were involved except those of the actors in the transaction and we were at liberty to follow their line of conduct in all its irregularities, we might, in a search for equities, incline to the conclusion insisted upon by the plaintiff. If, however, we are to follow rules of law—as we must—and, laying them on the transaction as we find it, determine the law of the case by their measure, we are driven to a result which, though involving hardship, is nevertheless inevitable. The trouble, we feel, is with the case, not with the law.

[1] To strengthen the case of express authority in McMahon to accept the partial assignment in question, the plaintiff at the second trial introduced the company's by-laws showing the duties and authority of its secretary and treasurer—the position held by McMahon—and showing also the appointment of an executive committee—of which McMahon was a member—defining its duties and authority. Without reciting this evidence or repeating here the consideration we have given it, it is sufficient to state our conclusion that the evidence weakens rather than strengthens the claim of McMahon's authority.

Feeling that the court might not find authority expressly given by the company to McMahon, as its secretary and treasurer, to execute a contract on its behalf imposing on it the exceptional obligation of paying a part of its debt to one other than its creditor, the plaintiff at the second trial introduced evidence to show such authority from conduct of the company in holding out McMahon as its general officer or managing agent vested with power, *prima facie*, to do anything which the company could authorize or ratify. Bearing on the question of McMahon's authority derived from conduct of the company in holding him out as one clothed with such authority, counsel for the plaintiff, by commendable diligence, have called to our attention many cases. We shall not stop to pass them in review. It is enough to say that we have attentively considered them in close relation with the evidence. This evidence, or so much of it as is new and therefore to be weighed with the evidence which at the first trial we thought insufficient, consists mainly of an estimate by McMahon's secretary of the breadth of his authority gathered from the diversity of his transactions. These transactions relate chiefly to the sale of stock—apparently the company's main business—with reference to which McMahon had a contract with the company in whose performance there arose the next new matter introduced in evidence, namely, the adjustment of death claims, payment for which McMahon, under his contract, was liable. Hence his active interest in dealing with counsel

and contestants. This line of evidence illumines the character of the company's business without establishing McMahon's authority to bind the company outside its scope.

[2] The remaining question concerns the company's subsequent ratification of McMahon's unauthorized acceptance of the assignment. The act on which ratification is based was the delivery by McMahon to Markley and Miller of a certain number of stock subscription contracts later pledged with Kirby-Smith as collateral security for the assignment. These contracts represented obligations by subscribers for stock to pay for the same in installments and by the company to issue full-paid stock when all installments were paid. The contracts in question were full paid. They were signed by officers of the company, as such contracts were customarily signed, and were, on McMahon's order, turned over to Markley and Miller and charged against their account under their plantation development contract. Later, the contracts were delivered by Markley and Miller to Kirby-Smith. But at the second trial there was really no more evidence than at the first showing what knowledge of or what participation in this transaction the company had.

On the two writs of error coming here, the plaintiff has had the advantage of the court being differently constituted on each writ. Yet the court as now composed, after a careful study of the present record in comparison with the former one, is forced, as before, to the conclusion that the evidence, had it been submitted, would not have sustained a verdict for the plaintiff.

This conclusion renders discussion of the remaining assignments of error unnecessary.

The judgment below is affirmed.

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### MCCARROLL v. NEWSHAM.

(Circuit Court of Appeals, Fifth Circuit. January 26, 1922.)  
No. 3723.

1. Evidence ⇐320—Calculation based on testimony of others is not objectionable as hearsay.

Where those who had at defendant's request cut the timber on land sold to plaintiff testified that they pointed out to plaintiff's son the stumps from which the timber had been cut, and an expert timber estimator testified he could tell from the stumps what timber had been cut since the sale to plaintiff, testimony by plaintiff's son as to a calculation by him of the quantity of timber cut was not objectionable as hearsay.

2. Witnesses ⇐240(2)—Objection to question as leading is addressed to trial court's discretion.

The ruling on an objection to a question asked a witness on the ground that the question was leading is within the discretion of the trial court.

3. Appeal and error ⇐1052(5)—Evidence as to loss of chattels on property sold held harmless, in view of the verdict.

In action by a purchaser against his vendor to recover for timber cut on the premises after the sale and for the removal of certain personal property therefrom, the admission of evidence that one of two circular

saws on the premises had been broken and another loaned to a neighbor, though erroneous, was not prejudicial to defendant, where the fact that the personal property had been unlawfully disposed of was abundantly shown by other testimony, and the jury awarded plaintiff a verdict for less than the value of the timber as shown by the evidence.

4. Appeal and error ⇨977(5)—New trial ⇨6—Denial of new trial is not assignable as error.

Denial of a motion for a new trial rests within the discretion of the trial court, and is not assignable as error.

5. Compromise and settlement ⇨24—Testimony settlement was procured by fraud raises jury question.

In an action for the cutting of timber on land sold to plaintiff, where the defendant alleged a settlement, testimony on behalf of plaintiff that the settlement was based on defendant's representations of the amount of timber cut by him, which representations were shown by undisputed evidence to be false, raises a jury question whether the settlement was binding on plaintiff.

6. Vendor and purchaser ⇨203—Vendor cannot commit waste after giving option.

Even if a contract between plaintiff and defendant was a mere option to plaintiff to purchase the land, it was the duty of defendant to maintain the property in the condition it was when he gave the option, and not to commit waste by cutting the timber thereon; and on the exercise of the option by plaintiff his rights related back to its date, and he can recover for the timber cut in the meantime.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by James A. Newsham against Thomas O. McCarroll to recover damages for the cutting of timber on property sold by defendant to plaintiff. Judgment for plaintiff, and defendant brings error. Affirmed.

B. B. Purser, of Amite, La., for plaintiff in error.

George Janvier, of New Orleans, La., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. August 6, 1919, plaintiff in error (hereinafter called defendant) executed and delivered to defendant in error (hereinafter called plaintiff) the following written instrument:

"In consideration of twelve hundred dollars, the same being 10 per cent. of the price of my farm, I hereby give to J. A. Newsham, of city of New Orleans, La., the option to purchase my farm of about 200 acres, more or less, located east of Tickfaw, La. The purchase price to be \$12,000, which includes the improvements thereon. The titles to pass, as soon as titles are found to be O. K. Possession to be given in January, 1920. Terms of sale to be one-half cash, and balance on terms of \$1,000, annually. Int. 8 per cent. per annum.

"Dated Aug. 6/19."

November 26, 1919, by act of sale, title to the real property was conveyed by the plaintiff to the defendant, and also title to farm implements, "and such other personal property as has been mutually agreed upon." Plaintiff sued to recover the value of certain timber, which he alleged the defendant had cut and removed from the lands

after the execution of the contract above set out. Included in the petition also was a claim for the value of certain described movable property.

By his answer the defendant put in issue the material allegations of the petition, and also pleaded that he had removed some timber with the plaintiff's consent, and that the plaintiff had accepted the sum of \$346 in full settlement. According to the plaintiff's evidence, a large number of pine, cypress, gum and magnolia trees, containing 150,000 feet or more of lumber, and a few oak trees, were cut by defendant, and had been manufactured into lumber and sold. Witnesses who claimed to have cut the timber for the defendant testified that they pointed out to the plaintiff and his son stumps from which the timber had been cut. There was also testimony that the plaintiff and his son made an estimate of the contents of the timber, based upon information received by them from the witnesses who testified that they had cut it. Evidence was furnished by a timber estimator of much experience, and admitted to be an expert by the defendant at the trial, to the effect that he was able to determine whether the timber had been cut since the summer of 1919, and that he had examined the stumps and treetops. His testimony corroborated in large degree the other evidence as to the amount of timber taken from the lands.

The plaintiff went into possession in January, 1920. It is admitted that shortly thereafter he made claim against the defendant for timber wrongfully taken, and accepted in settlement the sum of \$346. But the plaintiff testified that this settlement was made upon the defendant's representation that he had removed only a small quantity of the trees of a value less than \$800; that the settlement was made before he had made an examination, and in the belief that defendant's representation was true. Testimony was admitted, over the defendant's objection and exception, that two circular saws were on the place before it was sold, one of which was afterwards broken and the other was lent to a neighbor.

The defendant gave testimony of the settlement for the timber removed, and also as to the value of timber and lumber at that time. The jury found for the plaintiff, and judgment was entered upon their verdict.

[1] Error is assigned upon the admission of plaintiff's testimony as to the quantity of timber removed, upon the ground that it was hearsay, and based upon the record kept by plaintiff's son. We are of the opinion that the testimony was admissible when taken in connection with other testimony in the case. The testimony of the plaintiff's son as to the quantity of timber was likewise objected to, also upon the ground that it was hearsay, in that it was based upon information received from the witnesses who cut the timber. Neither the testimony of this witness nor that of the plaintiff was objected to upon the ground that it was nothing more than calculations which the jury itself could make. The witnesses who cut the timber testified that they pointed out to plaintiff and his son the stumps of the logs they cut. It was permissible—indeed, it was necessary—for some one to make the calculations, in order to enable the jury to find the quantity of timber removed.

[2] There is an assignment of error to the effect that the court overruled an objection to a question on the ground that it was leading. It is too well settled to justify a citation of authorities that such questions are within the discretion of the trial court.

[3] The overruling of an objection to testimony as to the two circular saws is also assigned as error. We are of opinion that the objection to the question calling for this evidence should have been sustained, but the error appears to have been harmless. The answer, to the effect that one of the saws had been broken, and the other lent out was not reasonably calculated to affect the case. It is true, as argued, that it had a tendency to show the unlawful disposition of plaintiff's property; but that fact was abundantly shown by other testimony which was admitted, and to which no objection was or could have been made. It affirmatively appears that the jury was not prejudiced; for the verdict was for less than the value of the timber wrongfully cut and removed.

[4] The denial of a motion for new trial rests within the discretion of the trial court, and is not assignable as error.

[5] It is contended that the court should have instructed the jury that the settlement was binding upon the plaintiff, and operated to defeat his cause of action. The plaintiff's testimony, that the settlement was made in the belief that the defendant's statement of the amount of timber removed was true, and the undisputed proof that it was not true, afforded full justification for the submission of the case to the jury.

[6] The real defense in this case is based, not upon the contention that the defendant removed timber with plaintiff's consent, nor upon subsequent approval, ratification, and settlement, but upon the proposition that pending a completed sale the defendant had the lawful right to remove timber, and as much of it as he desired, because the plaintiff only had an option to buy under the terms of the instrument executed by the defendant in August, 1919. It makes no difference in this case whether that instrument was an option or a contract of sale. In either event, it was the duty of plaintiff to maintain the property in its then condition. He had no right to commit waste by stripping the land of timber upon it. Upon the exercise of an option the rights of the parties relate back to its date. *Newman v. Mountain Park Land Co.*, 85 Ark. 208, 107 S. W. 391, 122 Am. St. Rep. 27; *Weakland v. Hoffman*, 50 Pa. 513, 88 Am. Dec. 560.

There was a motion to award damages as for a frivolous appeal, which is denied; it appearing to our satisfaction that the writ of error was sued out in good faith.

The judgment is affirmed.

**ORANGE ICE, LIGHT & WATER CO. et al. v. TEXAS COMPENSATION  
INS. CO.**

(Circuit Court of Appeals, Fifth Circuit. January 25, 1922.)

No. 3762.

1. Courts  $\S$ 312(1)—Suit by subrogated compensation insurance company held not one by parties to whose rights company subrogated, as respects federal jurisdiction.

The federal court has jurisdiction of an action in Texas under Texas Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—47) by the Texas Compensation Insurance Company, a Delaware corporation, against Texas corporations for pain and suffering and subsequent death of an employé of another corporation, a subscriber under the Texas Workmen's Compensation Act carrying insurance with plaintiff company; the compensation insurance company being subrogated to the rights of the employé and his wife, and the company, and not the employé and wife, being the real plaintiff, as the statute vests entire legal title to the cause of action in it primarily for its own security.

2. Master and servant  $\S$ 394½, New, vol. 5A Key-No. Series—Cause of action against wrongdoer for compensable injuries within Texas statute not abated by employé's death.

Texas Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—35), providing that the cause of action survives "in all cases of injuries resulting in death" of employé, does not refer to suits against an employer who has taken out insurance; the right of action against such employer being taken away by part 1, section 3 (art. 5246—3) of the act, but is intended to preserve causes of action arising from those accidents to which the employer's insurance is applicable; i. e., injuries to employés for which third persons are liable under article 5246—47 to the subrogated insurer, and to prevent such causes of action against third persons not insured from abatement by death.

3. Master and servant  $\S$ 354—Employé sustaining compensable injury entitled to sue wrongdoer.

Where telephone company's employé sustained a compensable injury by being thrown from a telephone pole through coming in contact with guy wire of paper mill company, charged with electricity from defectively insulated high-tension wires of a light company, if he had a cause of action against the telephone company for failure to furnish him a safe place to work, he none the less had a good cause of action against the light company and paper mill for causing the place to be unsafe, as their fault preceded and caused the fault, if any, of the telephone company.

In Error to the District Court of the United States for the Eastern District of Texas; W. L. Estes, Judge.

Action by the Texas Compensation Insurance Company against the Orange Ice, Light & Water Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

George E. Holland, of Orange, Tex., for plaintiffs in error.

George D. Anderson, of Beaumont, Tex., Joseph D. Frank, of Dallas, Tex., and James A. Harrison, of Beaumont, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

KING, Circuit Judge. The Texas Compensation Insurance Company, a corporation (hereinafter styled plaintiff), a citizen of Delaware, brought suit against the Orange Ice, Light & Water Company (hereinafter styled Light company) and Yellow Pine Paper Mill Company (hereinafter styled paper mill), two corporations, each a citizen of Texas, as defendants, to recover for injuries inflicted on Jesse L. Dowdell, and for his death, resulting therefrom, under the provisions of the Texas Workmen's Compensation Law. Vernon's Complete Texas Statutes. art. 5246, subsections 1-91, inclusive.

Dowdell was employed by the Southwestern Telephone & Telegraph Company (hereinafter styled telephone company), which carried insurance with the plaintiff, and is what is styled a subscriber under said Texas Workmen's Compensation Act. Dowdell suffered injuries from being thrown from a pole of the telephone company through coming in contact with a guy wire of the paper mill fastened to a pole erected by said mill a few feet from the telephone company's pole which guy wire passed within 4 inches of said telephone pole. The guy wire extended about 150 feet from the telephone pole, just under the high-tension wires of the light company which carried 2,300 volts of electricity. These high-tension wires were permitted to become slack and to rest on the guy wire for so long a time that the insulation was worn and the guy wires charged. The guy wire had no circuit breakers, or any other device to prevent it becoming highly charged. Dowdell had no knowledge of the presence of electricity on the guy wire. His foot came in contact with the guy wire, and he was so shocked that he was thrown from the telephone pole, was badly injured, and after some months died from the effects of his injuries.

The Texas workmen's compensation statute provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may, at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this act; if compensation be claimed under this act by the injured employé or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employé in so far as may be necessary and may enforce in the name of the injured employé or of his legal beneficiaries or in its own name and for the joint use and benefit of said employé or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employé or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employé or his beneficiaries." Vernon's Complete Texas Statutes, art. 5246-47.

Said Dowdell during his lifetime elected to receive compensation from the plaintiff association and after his death his widow claimed compensation from it which was adjusted and paid. During Dowdell's lifetime the plaintiff association brought suit against the light company and the paper mill in the United States District Court for the Eastern District of Texas, in its own name, to recover damages for the joint

use of itself and said Dowdell. After his death and the payment made to his widow, plaintiff filed an amended petition alleging said Dowdell's death on March 23, 1919, leaving his widow, Ina Dowdell, as his sole beneficiary, that plaintiff had settled with his widow for her claims under its policy of insurance, that the cause of action of Jesse L. Dowdell for pain and suffering survived to said widow, and that she had her cause of action for his death, that under the said compensation statute plaintiff was subrogated to said causes of action and filed this amended petition seeking to recover \$10,000 for said pain and suffering and \$40,000 for said death of said Dowdell, for the use of itself and said Ina Dowdell, who was then a citizen of Mississippi, from which recovery plaintiff should reimburse itself the sums it had paid to said Jesse L. Dowdell and Ina Dowdell and its reasonable attorney's fees. It averred it had contracted to pay a contingent fee of one third of the recovery, which was reasonable, the balance recovered, if any, to be for the benefit of Ina Dowdell.

The trial resulted in a verdict for the plaintiff against both defendants for \$5,000 for the pain and suffering, and \$7,000 for the death, of said Dowdell. The defendants seek to reverse a judgment on such verdict, authorizing the plaintiff to reimburse itself by retaining the sum of \$331.94 paid to Jesse Dowdell, \$2,614.92 doctor's bills and other expenses in his care until his death, and \$3,564.17 paid by it to Mrs. Dowdell, and \$4,000 as attorney's fees to its attorneys, and the balance to go to Mrs. Dowdell.

[1] 1. The first point urged is that the United States court was without jurisdiction because, while the plaintiff is a citizen of Delaware and defendants citizens of Texas, Jesse L. Dowdell and Mrs. Ina Dowdell are to be considered for the purpose of jurisdiction as joint plaintiffs, and that at the time the original suit was filed they were citizens of Texas. We do not think this point is well taken. Here the plaintiff, because of payments made and contracts entered into, had become pecuniarily interested in this cause of action. The statute of Texas had deprived the employé and his representatives, who elected to hold the insurance association of all right to institute an action against a wrongdoer. The right to institute suit was by the statute lodged in the association. It was subrogated to all rights of the employé and his representatives, is authorized to sue in its own name, with the right to reimburse itself all sums it had paid and its reasonable attorney's fee, as fixed by the court, and was accountable only for any surplus then left to the legal beneficiary. The entire legal title to the cause of action was under this statute vested in the association primarily for its own security. This made it the sole party plaintiff on whose citizenship the jurisdiction depended. As has been said by the Supreme Court of the United States:

"Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated

assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, however, the state, or the governor of a state, is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply." *New Orleans v. Gaines' Administrator*, 138 U. S. 595, 606, 11 Sup. Ct. 428, 431 (34 L. Ed. 1102).

Though other persons may be interested in the recovery and named in the complaint as usees, they are not parties to the action and their citizenship is not to be considered in determining jurisdiction, where the legal title is vested in a party with a substantial interest.

Where a statute of Texas and decisions of her highest court gave to a general guardian of a minor the legal right to bring a suit in the state courts in his own name to recover for personal injuries sustained by the minor, it is held that such guardian, a citizen and resident of Texas, appointed by the proper court of Texas, can bring such suit against a corporation of another state in the United States courts, although the minor and his parents were residents and citizens of another state, and therefore could not bring such suit in said United States court, and although such minor could sue in the state courts in his own name by next friend. The court said:

"If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend. He is liable for costs in the event of failure to recover and for attorney's fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond." *Mexican Central Ry. Co. v. Eckman*, 187 U. S. 429, 434, 23 Sup. Ct. 211, 213 (47 L. Ed. 245).

See, also, *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; *Dodge v. Tulleys*, 144 U. S. 451, 455, 12 Sup. Ct. 728, 36 L. Ed. 501.

[2] 2. The cause of action of Jesse L. Dowdell for pain and suffering and other damages up to the time of his death was not abated by such death but was expressly preserved by the Sixteenth section of said Compensation Act. *Vernon's Complete Texas Statutes*, art. 5246—35. This is evident by a comparison of the language of this section with the statute previously governing abatement by death of causes of action for injuries.

Prior to the Act of May 4, 1895 (*Vernon's Complete Texas Statutes*, art. 5686), the common-law rule seems to have prevailed in Texas, and actions for personal injuries were abated by the plaintiff's death. (*Fitzgerald v. Western Union Telegraph Co.*, 15 Tex. Civ. App. 143, 40 S. W. 421; *City of Marshall v. McAllister*, 18 Tex. Civ. App. 159, 43 S. W. 1043). By said statute the Legislature provided that "causes of action \* \* \* for personal injuries other than those resulting in death \* \* \* shall not abate by reason of \* \* \* death" of either party but shall survive, etc.

This act was construed as confining survivorship to causes of action, where deceased's death was not caused by the injury. *Ellyson*

v. I. & G. N. R. R. Co., 33 Tex. Civ. App. 1, 75 S. W. 868; Black v. Texas & Pacific Ry. Co. (Tex. Civ. App.) 161 S. W. 1077. In the light of these decisions it would seem that this section of the Workmen's Compensation Act had been passed to extend the preservation of causes of action for personal injuries sustained in course of employment, to those which resulted fatally. Its language is:

"In all cases of injuries resulting in death, where such injury was sustained in course of employment, cause of action shall survive." Act 1917, § 16; Vernon's Complete Texas Statutes, art. 5246—35.

Said section 16 of the act of 1917 does not refer to suits brought against the employer. The act gives no right of recovery against the employer who has taken out the insurance. Such right of action is taken away by section 3 of part 1 of said act. It would be inconsistent with every idea of insurance and subrogation. *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 594, 4 Sup. Ct. 566, 28 L. Ed. 527.

The language is intended to preserve causes of action arising from those accidents to which the insurance is applicable—i. e., injuries sustained in course of employment, for which third parties are liable—and to prevent such causes of action against third persons not insured, from abatement by death. The surviving cause of action could not properly be the right of the widow to sue for the value of the life of the deceased. Such cause of action never arose until the death of her husband. It is true it exists only by virtue of statute, and not at common law; that fact but emphasizes the statement that no cause of action existed in her prior to her husband's death, and there was no cause previously existing in her to be abated by such death.

The statute, in respect to this preservation of the cause of action of the deceased for injuries inflicted on him prior to and up to the date of his death, is very like the federal Employers' Liability Act (35 Stat. 65, c. 149; 36 Stat. 291, c. 143 (U. S. Comp. St. §§ 8657—8665)). That act at first contained no provision providing that the employé's right of action should survive his death, and his death was held to abate it, leaving only the right of the dependent relatives to recover their pecuniary loss occasioned by his death. 35 Stat. 65, c. 149. The act, however, was amended, as follows:

"Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury." 36 Stat. 291, c. 143 (U. S. Comp. St. § 8665).

Passing on this amendment, the United States Supreme Court holds:

"No change was made in section 1. *Taylor v. Taylor*, 232 U. S. 363, 370. It continues, as before, to provide for two distinct rights of action: One in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative 'for the benefit

of the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. \* \* \* And when this provision and section 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." *St. Louis & Iron Mtn. Ry. v. Craft*, 237 U. S. 648, 657, 658, 35 Sup. Ct. 704, 706 (59 L. Ed. 1160).

[3] 3. If Dowdell might have sued the telephone company, had there been no insurance this does not render the light company and paper mill any the less liable. If he had a cause of action against the telephone company for failure to furnish him a safe place in which to work, he and his widow certainly had a good cause of action against the light company and paper mill for causing the place to be unsafe. Their fault preceded, and caused the fault, if any, which may have existed on the part of the telephone company.

4. Whether the deceased, Dowdell, was guilty of any contributory negligence, was a question for the jury, and the issue was properly submitted to them by the court.

5. The cause was fairly submitted to the jury, under a charge which properly presented every issue. The charges requested, where not given, were either fully covered by the charge given, or were properly refused.

The evidence was sufficient to warrant the verdict of the jury, and the judgment of the District Court is affirmed.

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**PRODUCERS' NAVAL STORES CO. et al. v. McALLISTER.\***

**In re BLUE CREEK CO.**

(Circuit Court of Appeals, Fifth Circuit. January 25, 1922.)

No. 3733.

**1. Corporations ¶657(7)—Contract by foreign corporation without Florida permit is voidable only.**

Under Laws Fla. c. 5717, as enacted in 1907, requiring foreign corporations to secure permits to do business within the state, a mortgage given by a domestic corporation to a foreign corporation which had not secured a permit, if it can be held a contract relating to property within the state under the terms of that act, is voidable only, and not void, under the construction placed on the act by the Supreme Court of Florida.

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¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Cartiorari denied 257 U. S. —, 42 Sup. Ct. 383, 66 L. Ed. —.

**2. Corporations ~~641~~—Legislature can validate voidable mortgage to foreign corporation.**

Where a mortgage is voidable only, and not void, because the mortgagee had no permit to do business within the state, the Legislature had power to validate the mortgage.

**3. Statutes ~~113~~(1)—Title to act validating voidable contracts of foreign corporation held sufficient.**

The title to Laws Fla. c. 6875, enacted in 1915, "An act to remove under certain conditions invalidity created by chapter 5717 of contracts made by foreign corporations," is sufficient under Const. Fla. art. 3, § 16, to express the subject of the act, which purported to remove the invalidity of the designated contracts.

**4. Statutes ~~113~~(4)—Title to act amending three sections of other act is sufficient.**

The title to Laws Fla. c. 6876, enacted in 1915, "An act to amend sections 1, 4 and 7" of an act of 1907, is sufficient.

**5. Corporations ~~659~~—Conveyance expressly subject to voidable mortgage validates mortgage.**

If a mortgage given to a foreign corporation prior to the enactment in 1915 of Laws Fla. cc. 6875, 6876, was voidable at the option of the mortgagor, it was validated by a conveyance by the mortgagor, after the enactment of those statutes removing the disability of the mortgagee, joining in a conveyance of certain rights of way over the mortgaged lands, reciting that the lands were subject to the mortgage lien.

**6. Mortgages ~~497~~(1)—Foreclosure after failure to assert defense making voidable is conclusive.**

Even if a mortgage is voidable at the option of mortgagor, a decree for foreclosure and sale, entered after the mortgagor had failed to assert the defense in foreclosure suit, is conclusive on all the parties to that suit.

**7. Bankruptcy ~~188~~(1)—Sale under voidable mortgage, validated by bankrupt, held good against trustee.**

Even if a mortgage given by the bankrupt was voidable when executed, the trustee in bankruptcy cannot have a sale thereunder set aside where, more than four months before the bankruptcy, the mortgage had been validated, either by a conveyance expressly subject thereto or by failure to assert the defense in a foreclosure suit, though the decree of foreclosure and the sale thereunder were subsequent to the bankruptcy.

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Suit by Felo McAllister, as trustee of the estate of the Blue Creek Company, bankrupt, against the Producers' Naval Stores Company and others. Decree for complainant, and defendants appeal. Reversed, with directions to dismiss the bill.

William L. Clay, Samuel B. Adams, and A. Pratt Adams, all of Savannah, Ga., William H. Baker, of Jacksonville, Fla., and William B. Stephens, of Savannah, Ga., for appellants.

Sam R. Marks, of Jacksonville, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. February 28, 1914, the Blue Creek Company, a Florida corporation, executed its negotiable notes, aggregating \$200,000, and a mortgage upon lands in Florida to secure the same,

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

to the Producers' Naval Stores Company, a Georgia corporation. The mortgage contained a covenant that the mortgagee should have the right to assign it to a trustee. March 28, 1914, the Producers' Naval Stores Company indorsed the notes and assigned the mortgage to the Citizens' & Southern Bank of Savannah, a Georgia corporation, as trustee, for the equal benefit of the holders of the promissory notes. The Blue Creek Company, for the purpose of evidencing its assent to the trust created, joined in the execution of the assignment of the mortgage. The notes were executed, indorsed, and delivered, and the mortgage and assignment thereof were executed and delivered, at Savannah. July 14, 1917, the Blue Creek Company granted certain rights of way and privileges on the mortgaged lands to one Rentz and to the Carpenter-O'Brien Company by an instrument under seal, which recited that:

"The lands of the Blue Creek Company are subject to the lien of the mortgage held by the Citizens' & Southern Bank of Savannah, Ga., as the owner and holder of the indebtedness secured by such mortgage."

December 30, 1917, the Citizens' & Southern Bank of Savannah instituted foreclosure proceedings in the proper state court of Florida. March 11, 1918, a final decree of foreclosure was rendered, under which a sale of the mortgaged property was made on May 6, 1915, to Courtney Thorpe, and thereafter the sale was approved and confirmed by the state court. May 3, 1918, a petition in bankruptcy was filed against the Blue Creek Company, and at the same time application to enjoin the foreclosure sale was denied by the court below.

February 24, 1919, appellee, as trustee in bankruptcy of the Blue Creek Company, filed its suits against the appellants, Producers' Naval Stores Company, Citizens' & Southern Bank of Savannah, and Courtney Thorpe, purchaser at the foreclosure sale, praying that the mortgage and assignment thereof, the decree of foreclosure, and special master's deed, all be declared null and void, and that Thorpe be required to execute a deed to appellee, and thereby remove from the record title the apparent cloud upon it. After the taking of evidence, a final decree was entered granting the relief prayed, and canceling the mortgage and the deed to Thorpe as clouds upon appellant's title.

The decree of the District Court, holding void the mortgage and the foreclosure proceedings had thereunder, is based upon chapter 5717, Laws of Florida, enacted in 1907 (Comp. Laws 1914, § 2682a et seq.). Sections 1, 4, and 7 of that statute were amended by chapter 6876, approved June 4, 1915. Section 1 was as follows:

"That no foreign corporation shall transact business or acquire, hold or dispose of property in this state until it shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have received from him a permit to transact business in this state."

It was amended by adding:

"And any foreign corporation which shall violate the provisions of this section shall render itself, its officers and agents severally liable to the penalties and fines provided in section 8 of this act, but no violation of this act

shall affect the title to property thus acquired, held or disposed of in violation of the provisions hereof."

Section 4 was as follows:

"Every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state before it shall have complied with the provisions of this act shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

It was amended to read:

"That the failure of any such foreign corporation to comply with the provisions of this act shall not affect the validity of any contract with such foreign corporation, but no action shall be maintained or recovery had in any of the courts of this state by any such corporation, or its successors or assigns, so long as such foreign corporation fails to comply with the provisions of this act."

Section 7 was as follows:

"A foreign corporation is defined to be a corporation incorporated by or under the laws of any other state or territory or of any other country."

It was amended by adding:

"But nothing in this act shall apply to or include banking or trust companies incorporated under the laws of any other state, territory or other country."

Other sections of the act of 1907 provide that the secretary of state shall issue permits to foreign corporations to transact business in the state, upon the filing by them of their charters or articles of incorporation, and the payment by them of the charter fees required of domestic corporations, and that foreign corporations which transact business or fail to pay charter fees and secure permits shall be punished by fine or imprisonment.

By chapter 6875, approved June 5, 1915, it was further enacted that "the invalidity created by chapter 5717, Laws of Florida 1907," should be removed as to contracts of foreign corporations which should comply within a specified time with the requirements relating to the securing of permits and the payment of charter fees. The invalidity of conveyances of real property to foreign corporations, as to trustees and as to grantees of such corporations who were innocent purchasers for value, is removed unconditionally, and therefore, in the absence of a compliance with the requirements to secure permits and pay charter fees by the offending corporations.

[1] The Supreme Court of Florida has held that contracts made by foreign corporations in violation of the provisions of chapter 5717 are voidable, and not void. In *Commercial Bank v. Jordan*, 71 Fla. 566, 71 South. 760, that court, in construing this statute and in reviewing its former decisions, used the following language:

"The statute does not in express terms declare that all contracts, notes or other securities, made by or on behalf of any foreign corporation before it shall have complied with the statutory requirements shall be absolutely void or of no effect whatsoever, nor did this court in the *Ulmer Case*, 61 Fla. 460, 55 South. 405, hold that such was the legislative intention. The language of the court was: 'If the statute has been violated by the foreign corporation in acquiring the note or in making a contract of which the note is a part, the corporation cannot enforce the payment of the note in the courts of the state;

and if the note was taken by the indorsee bank with notice of and subject to its infirmities under the existing laws the bank cannot recover through the courts.'

"In the case of *Campbell v. Daniel*, 68 Fla. 282, 67 South. 90, this court, having under consideration the same statute and speaking through Mr. Justice Cockrell, said: 'The statute does not forbid the municipality or any citizen of the state entering into a contract with a nonregistered foreign corporation; to the contrary the statute in terms permits the enforcement of the contract on its behalf.' Here the essential difference between a void and a voidable contract was pointed out. The clear legislative purpose was to render such contracts unenforceable in the hands of the corporation or its assigns, but enforceable against it or them. The use of the word 'void' in the statute in connection with those following necessarily conveys a meaning different from what would have been the word's significance had it stood alone. While the statute uses the word 'void,' it describes a 'voidable' contract."

[2] Giving effect to the rule announced by the highest court of the state, and conceding for the purposes of this case that a mortgage is a contract relating to property within the state, it follows that the mortgage here involved was not void, but only voidable. The mortgage being only voidable at most, the power of the Legislature to validate it is not open to serious question. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; *West Side R. R. Co. v. Pittsburgh Construction Co.*, 219 U. S. 92, 31 Sup. Ct. 196, 55 L. Ed. 107; *Pensacola & Atlantic R. R. Co. v. State*, 45 Fla. 86, 33 South. 985, 110 Am. St. Rep. 67.

[3] It is equally clear that the Legislature, by the amendatory acts of 1915, intended to exercise its power of validating contracts which were voidable under the act of 1907. Section 16 of article 3 of the Constitution of Florida requires the subject of an act of the Legislature to be expressed in its title. Chapter 6875 is entitled:

"An act to remove, under certain terms and conditions, the invalidity created by chapter 5717, Laws of Florida 1907, as to certain classes of contracts heretofore made to, by or in behalf of any foreign corporation."

The act itself purports to remove the invalidity theretofore existing in notes, deeds, and other conveyances of real property, and contracts generally. The terms and conditions mentioned in the act refer to securing permits and paying charter fees required by the earlier act within a specified time. No terms and conditions, as already stated, are imposed as to conveyances of real property, the title to which has been or shall thereafter be acquired by innocent purchasers for value.

[4] Chapter 6876 is entitled "An act to amend sections 1, 4 and 7" of the act of 1907. The amendment to section 1 undertakes to make valid the title to property, though acquired, held, or disposed of in violation of the original act. Section 4, which is directly involved in this case, was entirely changed, so as to provide specifically that a violation of the act as amended should not affect the validity of any contract, and it was provided that no action should be maintained in any of the courts of the state by a foreign corporation so long as it should fail to comply with the provisions relating to the securing of permits and the payment of charter fees. It was undertaken to relieve banks and trust companies entirely from a compliance with the

provisions, terms, and conditions upon which business might be transacted or contracts made in the state of Florida.

Limiting our observations to the case before us, we are of opinion that the intention of the Legislature, as expressed in the amendatory acts, was made effective to accomplish the purposes sought. No reason is suggested for a different conclusion, unless the mortgage is held to be absolutely void and incapable of validation. It is suggested, however, that the Citizens' & Southern Bank of Savannah has never secured a permit to do business, or filed its charter with the secretary of state. But it was relieved from doing that, as a bank under chapter 6876, and as an innocent purchaser under chapter 6875.

[5] We are of opinion, therefore, that after the passage of the acts of 1915 the mortgage constituted a valid lien upon the real property which the trustee in bankruptcy claims as an asset of the bankrupt estate. If, however, there remained anything voidable in it, the mortgagor ratified the mortgage by joining the Citizens' & Southern Bank in the execution of an instrument under seal conveying certain rights of way over the mortgaged lands to Rentz and the Carpenter-O'Brien Company. The instrument recited that the lands were then subject to the lien of the mortgage. It was held by this court in *Turner Construction Co. v. Union Terminal Co.*, 229 Fed. 702, 144 C. C. A. 112, in construing the right of a foreign corporation under the act of 1907, here involved:

That "after both the parties were free of any disability they could make a new contract and recognize the instrument already signed as embodying the terms of it."

[6] But, if it be conceded that, when the suit was brought to foreclose the mortgage, a successful defense could have been interposed by the mortgagor, upon the ground that the mortgage continued to be voidable, a failure to assert such defense concluded its right thereafter to attack the foreclosure proceedings. The state court in which the foreclosure was had was a court of general jurisdiction, and its decree became binding upon all the parties to the suit.

[7] The trustee in bankruptcy acquired no rights additional to those possessed by the bankrupt. It is not correct to say that the lien of the mortgage was created within four months of the bankruptcy proceedings. In any view of the case, the lien of the mortgage attached more than four months before the filing of the petition in bankruptcy, and was not affected thereby. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. Our conclusion is that appellee is not entitled to the relief prayed, or to any relief.

The decree of the District Court is therefore reversed, with directions to dismiss the bill of complaint.

NORRIS, Inc., v. M. H. REED & CO.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1922.)

No. 3620.

1. Sales ¶32—Contract made by correspondence cannot be avoided by insisting on different terms in formal written contract.

Where a valid contract of sale has been made by the exchange of letters or telegrams, but with the understanding that it shall be embodied in a formal writing signed by the parties, neither party can defeat it or avoid its obligations by insisting on other or different terms in such writing and refusing otherwise to sign it.

2. Sales ¶377—Petition held to authorize damages based on market price at time of delivery.

In an action by a seller for refusal by the purchaser to receive and pay for the goods contracted for, the petition held sufficient to authorize the recovery of damages measured by the difference between the contract price and the market price at the time fixed for delivery, though it prayed for the difference between the contract price and the market price at the time the contract was repudiated "and for all other relief" to which plaintiff might be entitled.

3. Appearance ¶19 (1)—Filing demurrer and pleading to merits held to constitute general appearance.

A defendant not served, and who appeared specially, but filed a demurrer and numerous special exceptions and pleaded to the merits, held to have waived objection to the jurisdiction over his person.

In Error to the District Court of the United States for the Austin Division of the Western District of Texas; Duval West, Judge.

Action at law by M. H. Reed & Co. against Norris, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

T. B. McCormick, of Dallas, Tex. (Francis Marion Etheridge, Joseph Manson McCormick, and Henry Louie Bromberg, all of Dallas, Tex., on the brief), for plaintiff in error.

Dudley K. Woodward, Jr., of Austin, Tex. (Victor L. Brooks and James H. Hart, both of Austin, Tex., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. November 17, 1919, defendant in error, herein called plaintiff, brought suit in a state court against plaintiff in error, herein called defendant, to recover damages for breach of a contract whereby it is alleged plaintiff agreed to sell and defendant agreed to buy three carloads of pecans, one carload to be delivered in December, 1919, and two carloads to be delivered in January, 1920, at the price of 18½ cents per pound. The petition alleged that on November 7, 1919, the defendant repudiated said contract, and that the market value of the pecans was then 12 cents per pound. Plaintiff prayed that—

"he have judgment for his damages in the sum of \$5,850, as aforesaid, for his costs of suit, and for all other relief to which he may be entitled in the premises."

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

Defendant being a nonresident of Texas, personal service was not had, but a certified copy of plaintiff's petition was served upon it, and by writs of garnishment served upon residents of Texas within the jurisdiction where the suit was brought funds of defendant aggregating \$1,960.27 were impounded. Thereafter the defendant presented to the state court a petition for removal to the United States District Court, and appearing in the latter court, "specially and for the sole and only purpose of protecting its title to the property sought to be impounded by proceedings in the nature of proceedings in rem herein, and declining to appear generally, or for any other purpose than such special purpose," filed a general demurrer, and an answer denying the allegations of the plaintiff's petition, and subsequently, while in like manner reciting that it appeared specially, filed numerous exceptions to the petition.

In the month of October, 1919, correspondence took place between the parties as follows:

On the 7th of that month the plaintiff wrote a letter to the defendant, stating that he had pecans to sell in carload lots, and soliciting an order, which letter defendant replied to on the following day, stating that it was in the market for pecans, requesting plaintiff to send samples, and to quote prices on three carloads, one to be delivered at once, one in March, and one in May. On the 13th plaintiff acknowledged receipt of defendant's letter, stated that he did not have storage facilities sufficient to enable him to carry the pecans until March and May, but that he could ship one carload at once, and two carloads in December. He further stated that he was sending samples, quoted prices, and expressed the hope that defendant would send an order by telegram. On the 16th defendant replied to plaintiff's letter of the 13th, stating that it had received the samples of pecans, but found that the meat did not entirely fill out the shells, and that there was a quantity of faulty nuts, and then continued:

"Counting the entire amount cracked, including the bad ones, the yield of meat is only 38 per cent. We should procure from seedling pecans at least 40 per cent. meats, and we are therefore reluctant in placing an order with you. If you can supply us with the quality we require, we can use two cars in December at the price quoted, but prefer one car shipped in December and one in January."

October 20, 1919, the parties exchanged the following telegrams:  
From plaintiff to defendant:

"Referring our letter thirteenth yours sixteenth suggest you let us book three cars price quoted shipment one car each October, December, January. Leave the quality to us and we will guarantee good shelling stock today. Wire acceptance."

From defendant to plaintiff:

"Your wire even date. Will take three cars pecans eighteen one half cents f. o. b. your city, packed in double bags, one car December, two cars January. Wire."

October 21, 1919, plaintiff sent to defendant a telegram reading as follows:

"Confirm sale three cars. Mailing contracts can not you use Oct. car."

These telegrams were promptly delivered as sent. Immediately thereafter the defendant inclosed a signed order in which the following appeared: "Crack guaranteed not less than 40 per cent;" while the plaintiff wrote a letter confirming the sale and stating: "Pecans guaranteed to be good shelling stock," etc. Thereafter defendant wrote to plaintiff, complaining that the contract sent by the latter did not include the guaranty, while the plaintiff, on the other hand, objected to the guaranty which defendant had included in its order, and which is above quoted. The parties continued to correspond with each other for several days, and not being able to agree upon the form of a contract which they were willing to sign, defendant finally on November 7, 1919, sent to plaintiff a telegram reading as follows:

"We have consummated no contract with you. Samples not up to representation. Do not ship us any goods."

It was admitted that a minimum carload of pecans would weigh 30,000 pounds. There was evidence that the market price of pecans of the quality ordered was from 12 to 16 cents per pound in December, 1919, and 12 cents per pound in January, 1920.

There was testimony for defendant that it received a sample of pecans from plaintiff about October 28th, and that a chemist's report showed that only 36 per cent. were good. The defendant used pecans in its business of candy manufacturer, but claimed that it could not profitably use pecans such as the sample sent by plaintiff contained. On the other hand, there was testimony for plaintiff that the pecans were of good quality, and contained a greater percentage of meat than demanded. The court charged the jury to find for defendant, if they believed that the minds of the parties did not fully meet, or that it was the intention of either that no contract should be considered as consummated until a formal written contract or further writing should be signed, or if they believed that defendant understood and intended that there should be included in the contract a guaranty that the pecans should contain at least 40 per cent. meats, or if they believed the contract was based upon samples which should be satisfactory to the defendant. The foregoing charges were given at defendant's request. As to the measure of damages, the court instructed the jury that it would be the difference between the contract price and the market price at the times specified for delivery. Plaintiff had verdict and judgment for \$2,925.

[1] The principal contention, presented by numerous assignments of error, is that the minds of the parties never met, and that consequently no contract was ever consummated. It is urged that the telegrams, whether considered separately or in connection with the letters to which reference is therein made, amounted to nothing more than negotiations. The letters of October 7th and 8th are undoubtedly of that character, and have been referred to solely for the purpose of showing the manner in which the parties began their dealings with each other. Plaintiff's letter of October 13th is likewise unimportant, because the offer of sale therein contained was not accepted. Indeed, the only significance to be attached to defendant's letter of October 16th is the statement that it desired a guaranty that the pecans would

yield 40 per cent. meats. The negotiations became important upon the sending of plaintiff's telegram of October 20th, in which the defendant was in effect requested not to insist upon its requirement for pecans containing 40 per cent. meats, but instead of that to rely on the warranty of "good shelling stock," which plaintiff then definitely offered to make. Defendant's telegram in reply was in direct response, and constituted a counter offer to buy three carloads of pecans at a designated price, and, it seems to us, to forego the requirement of quality theretofore insisted upon, and to rely instead upon plaintiff's warranty as to quality. This definite offer by the defendant was accepted unconditionally and unequivocally by the plaintiff, and we are of opinion that a binding contract resulted. The parties themselves apparently intended to evidence their contract by telegrams. When the plaintiff submitted his offer, he requested the defendant to "wire acceptance," and in submitting its counter offer the defendant made the same request. A binding contract having been entered into, neither party could defeat it or evade its obligations by refusing thereafter to sign a formal writing evidencing it, or by tendering to the other for execution drafts of a contract containing different or other terms and provisions.

In *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, it is well said:

"Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule, the contract would never be completed in cases where by changes in the market, or other events occurring subsequent to the written negotiations, it became to the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law."

Where the meaning of a contract is obscure, and its construction depends upon extrinsic facts, the question of interpretation may be submitted to a jury, and it was doubtless upon that theory that the trial court left it to the jury in this case to find the intention of defendant—whether plaintiff guaranteed the quality of the pecans, and whether the contract was based upon samples. It is not contended that the question was not fairly submitted to the jury, but that the evidence considered as a whole did not warrant a verdict for the plaintiff.

[2] The charge of the court, that the measure of damages was the difference between the contract price and the market price at the times specified in the contract for delivery, is assigned as error. It is conceded that the true measure of damages was as declared by the court, but it is insisted that plaintiff was precluded from recovery, because he sued for the difference between the contract price and the market price as of November 7, 1919, which was the date upon which the defendant repudiated the contract. Special damages were not pleaded, and we are of opinion that general damages are recoverable under the

petition as framed. *Roehm v. Horst*, 178 U. S. 14, 20 Sup. Ct. 780, 44 L. Ed. 953; 17 C. J. 1000; 8 R. C. L. 611; 23 R. C. L. 1412; *Fish v. Sadler* (Tex. Civ. App.) 155 S. W. 1185.

[3] An assignment of error is based upon the fact that the judgment is a personal one and in excess of the amounts impounded by the writs of the garnishment. Although defendant recited that it appeared specially for the purpose of protecting its property, it filed a general demurrer and numerous special exceptions, and pleaded to the merits. We are of opinion that by so doing it waived its objection to the jurisdiction of the court. *Thames & Mersey Insurance Co. v. United States*, 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.

Error is not made to appear by any of the assignments, and the judgment is affirmed.

KING, Circuit Judge (concurring). The evidence in this case, in my opinion, left it a disputable question whether a contract was finally concluded between the parties by the telegrams exchanged, or was to be thereafter consummated by a written contract. The court therefore properly submitted this question to the jury. *Williston on Contracts*, Section 28; *United States v. P. J. Carlin Construction Co.*, 224 Fed. 859, 862, 138 C. C. A. 449; *Whitted & Co. v. Fairfield Cotton Mills*, 210 Fed. 725, 732, 128 C. C. A. 219; *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 656, 77 C. C. A. 625.

There was sufficient evidence to warrant the verdict.

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**INMON, Sheriff, et al. v. STATE OF MISSISSIPPI, to Use of Ivy.**

(Circuit Court of Appeals, Fifth Circuit. January 18, 1922.)

No. 3778.-

1. Appeal and error  $\S$  997(3)—Finding on cross-motions for directed verdict not reviewable, if supported by any evidence.

Motions by both parties for a directed verdict on an issue amounts to a submission to the court of all questions of fact involved in that issue, and, if there is any evidence to sustain the court's finding, it must stand.

2. False imprisonment  $\S$  7(3)—Officer not protected by warrant obtained at his instance.

A sheriff is not protected from liability for an illegal arrest and imprisonment by a warrant issued on his own affidavit charging an offense which he knew the accused had not committed.

3. False imprisonment  $\S$  7(3)—Sheriff acting on telegram held liable.

A sheriff held liable for false imprisonment where, acting on a telegram from another state asking the arrest of a person named and described, he arrested and held plaintiff on a warrant obtained on his own affidavit, charging a fictitious crime in his own county, though plaintiff did not answer the description, and, while having the same surname, had a different given name, and where, though assured by plaintiff and his kinsmen, who were residents of the county, that plaintiff was not the man wanted, he neglected or refused to make any inquiry which would have disclosed that the fugitive was a different person.

In Error to the District Court of the United States for the Northern District of Mississippi; Edwin R. Holmes, Judge.

Action at law by the State of Mississippi, for the use of Walter Lee Ivy, against Will Inmon, Sheriff, and the surety on his bond. Judgment for plaintiff, and defendants bring error. Affirmed.

George T. Mitchell, of Tupelo, Miss., for plaintiffs in error.

J. W. P. Boggan, of Tupelo, Miss., and Thomas Fite Paine, of Aberdeen, Miss., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Walter Lee Ivy, a citizen of Arkansas, sued in the name of the state of Mississippi, for his use (as plaintiff), Will Inmon, a citizen of Mississippi, sheriff of Lee county, Miss., and the United States Fidelity & Guaranty Company, a corporation chartered under the laws, and a citizen, of Maryland, on his bond, as defendants, in the United States District Court of the Northern District of Mississippi, to recover damages for an alleged false imprisonment resulting from the arrest and detention by said sheriff of plaintiff. The facts averred were that said sheriff, on January 6, 1920, received a telegram from a Florida sheriff, asking him to arrest and hold one W. B. Ivy, who claimed to have been in the army and had with one Kirk Griebler stolen a Hudson automobile in Florida. The telegram described Ivy as a blond, with blue eyes, who was making his way to his father's, R. A. Ivey's, home at Verona, Miss. On January 7, 1920, the Florida sheriff telegraphed Inmon, sheriff, that he had recovered the car, but urged the capture and detention of W. B. Ivy, who was again stated to be on his way to his father's, R. A. Ivey, at Verona, Miss., accompanied by Griebler.

On January 14th, said Inmon appeared before a justice of the peace for Lee county, and made affidavit accusing one Walter Ivy with stealing a Hudson car belonging to one Glynn, in Lee county, Miss., and procured a warrant for the arrest of Walter Ivy for grand larceny. Said Inmon executed said warrant by arresting one Walter Lee Ivy, and informed him he was wanted for stealing a Hudson car in Florida. He took him to Tupelo, Miss., and detained him in jail from January 16th to January 18th, when he was released; the sheriff becoming convinced that he was not W. B. Ivy. Walter Lee Ivy then brought this suit against Inmon, as sheriff, and his surety on his official bond.

The facts were proven as above, with the addition that the plaintiff, Walter Lee Ivy, was born in Tennessee, and had lived in and around Verona for about 11 years; that he had then moved to Arkansas and had since lived there; his father was one J. F. Ivy, who had died in 1917; that since December 22, 1919, he had been visiting relatives near Verona, coming there from Arkansas; that, when arrested by the sheriff, he told him that his name was Walter Lee Ivy, that he was on a visit from Arkansas, and had never been in Florida, and had never been in the army.

It was also shown that there was a family of Iveys in the county, one of whom was a youth named Willie Dell Ivey, who enlisted in the army. He had a father named J. F. Ivey, living near Verona, Miss.;

his mother's name was R. A. Ivey. He was a blond, and the description in the testimony of his father answered to that given by the Florida sheriff in his telegram. When last heard of, he was in Florida, and had shipped thence a box of oranges to his mother as Mrs. R. A. Ivey. There was a conflict of evidence as to what transpired about the plaintiff, or his friends, asking if they could give bond.

The plaintiff described the incidents of his arrest, of his being taken to Tupelo, and of his imprisonment there. It was proved that, on the defendant sheriff advising plaintiff he could get a speedier hearing by agreeing to go to Florida without formal requisition, he agreed to do so. Inmon testified that he made no further effort to discover if the Ivey arrested was the party wanted, after he was informed by him that he was not and had never been in Florida.

On the conclusion of the testimony, each side moved the court to give a peremptory instruction to the jury on the issue of liability. After hearing argument, the court decided that the defendants were liable, and submitted to the jury the case on the question of actual damages under a charge to which no objection was taken in the presence of the jury. The jury found for the plaintiff, and assessed his damages at \$1,800.

[1] As both parties moved for a peremptory instruction on the issue of liability, this amounted to a submission to the decision of the court of all questions of fact involved in this issue, and if there is any evidence to sustain the court's finding it must stand. *Sena v. American Turquoise Co.*, 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559; *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654.

So far as the arrest could have been made on the charge of stealing the automobile in Florida, it is quite manifest that the Walter Lee Ivy was not the W. B. Ivey against whom the proceedings in that state were instituted. There was such a person, who answered the description given by the Florida sheriff in his telegram, who was a blond with blue eyes, and who had been in the army, none of which characteristics fitted the Walter Lee Ivy arrested. *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643; *Vice v. Holley*, 88 Miss. 572, 574, 41 South. 7; *Wolf v. Perryman*, 82 Tex. 112, 123, 17 S. W. 772.

[2] The plaintiffs in error, however, contest their liability, upon the ground that the arrest of the plaintiff was under a warrant, issued by a justice of the peace of Lee county, Miss.; that the party for whose arrest that warrant was issued was the person arrested; that whether he was the party wanted in Florida, or not, he was the party intended in the Mississippi warrant; and that the sheriff was therefore justified in making such arrest under such warrant. The reply to this is that, while it is true as a general rule that, where an officer arrests under a warrant regular on its face, issued by an officer authorized to issue warrants for such an offense, the warrant protects the officer, the reason of the rule rests on the duty of the officer to execute such warrant, and on the fact that he is not responsible for the antecedent steps which have led to its issuance.

But here the arresting officer himself procured the warrant for an offense he knew had not been committed. He made the affidavit on which the warrant was based, charging the larceny of the automobile

as committed in Lee county, Miss., when he knew that the larceny of it was committed in Florida, and that the car had been recovered in Florida by the Florida sheriff. We think that, where an arresting officer himself procures on his own affidavit a warrant for an offense he knows has not been committed, he cannot justify an arrest of a person on such a warrant, because he has reason to consider him as having committed a similar offense in another state.

The rule that a sheriff is bound to execute process issued from a court having jurisdiction, regular on its face, applies as well in civil as in criminal proceedings. In a civil case the sheriff caused an execution to be issued for his fees, and thereunder levied on a wagon. He was sued for the conversion of the wagon, and justified under the above execution. It appeared that, when issued, the entire judgment had been paid off, and that the sheriff was using said execution to collect fees claimed by him in another cause. On these facts the court, while recognizing the general rule to be as above stated, held:

"But this rule of 'process fair on its face' is one of protection merely, and personal to the officer himself, and affords him no shelter when he is the moving party in causing it to be wrongfully issued solely for his own benefit and where he knows the judgment upon which it is issued to have been paid and satisfied." *Johnson v. Randall*, 74 Minn. 44, 47, 76 N. W. 791.

An action for false imprisonment for arrest of a defendant on a ca. sa., issued on a judgment which had been paid, is maintainable against the parties. As to the levying officer it is held:

"If a judgment or execution has been satisfied, and that fact does not appear upon the execution or of record, the officer who levies the execution a second time would undoubtedly be protected, if he had no knowledge of the first payment; for he is bound to execute all process, regular in its form, which is delivered to him, and has ordinarily no means of determining whether an execution has been paid or not (*Pulsen v. Gale*, 8 Vt. 511, 5 Wend. 240); and this, even if first paid to an officer. If the officer had knowledge, he would be liable; but notice when about to levy is not knowledge." *Breck v. Blanchard*, 20 N. H. 323, 331, 51 Am. Dec. 222.

In this case the officer arrested the plaintiff on a warrant procured by himself on an affidavit charging him with an offense committed in Lee county, Miss., which he knew had not been committed. We are of the opinion that process so obtained by the officer himself affords no justification to him for the arrest.

[3] There was evidence, also, from which the court in determining the question of the justification of this arrest could have found that the officer, Inmon, failed to exercise proper diligence in investigating the identity of the plaintiff with the party whom he was seeking to hold. There is no doubt that Inmon intended to hold the Ivey who had been in Florida and was charged with having there stolen an automobile. He swore out a warrant charging a Walter Ivey with such theft in Lee county, Miss., intending such warrant for the fugitive from Florida. While at the time he thought the plaintiff was such fugitive, he had no purpose of accusing any other person than the fugitive from Florida with the crime.

Some courts hold that a mistake of an officer in arresting the wrong person, where there are two persons of the same name, is at his peril,

regardless of his diligence or good faith. *Ryburn v. Moore*, 72 Tex. 85, 10 S. W. 393. The decisions more favorable to the officer hold:

"If there be two or more persons of the same name within the bailiwick, the officer may make diligent inquiry as to the identity of the person named in the warrant; and if he make such inquiry and arrests a person of that name in good faith, believing he is the person named in the warrant, the officer is also protected. \* \* \* Good faith will protect the officer. Personal spite or a reckless disregard of the rights of others would amount to bad faith. But the officer may not be animated by spite, his conduct may not be reckless, and still bad faith may exist. Good faith implies due diligence. Good faith may be negated by evidence of negligence. The failure to exercise ordinary care in a transaction like the one under consideration is inconsistent with good faith." *Blocker v. Clark, Sheriff*, 126 Ga. 484, 489, 490, 54 S. E. 1022, 7 L. R. A. (N. S.) 268, 8 Ann. Cas. 81.

Inmon admits that he made no further inquiry as to plaintiff's identity, when assured by the plaintiff and his kinsman that plaintiff was not the man he wanted. He had been telegraphed that the man he wanted was on his way to his father's, R. A. Ivey's. He was informed that the father of the plaintiff he was arresting was dead, and that his name had been J. F. Ivy. The plaintiff had a number of relatives accessible by whom his identity could have easily been established. The District Court may have concluded that proper diligence in this behalf would have informed Inmon in a short time that the criminal was another man. There is nothing in the record to indicate that the court did not correctly submit to the jury the question of damages, nor are any exceptions reserved to the charge of the court.

The judgment of the District Court is affirmed.

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MAYER v. GARVAN, Alien Property Custodian, et al.

GARVAN, Alien Property Custodian, et al. v. MAYER.

(Circuit Court of Appeals, First Circuit. January 17, 1922.)

Nos. 1517, 1518.

**1. Partnership §268—War dissolves partnership with enemy subjects.**

Under the law of the United States, war dissolves a partnership between a citizen and subjects of the enemy.

**2. Partnership §2—Governed by American law as to American members and business.**

A partnership between an American citizen and subjects of the enemy is governed by the law of the United States, in so far as it related to the American partner and the business conducted here.

**3. International law §10—Foreign court cannot appoint absence trustee for American citizen.**

A German court was without authority to appoint an absence trustee for an American citizen in matters relating to the dissolution of a partnership between the citizen and German subjects.

**4. War §15—Trading with enemy unlawful before enactment of statute.**

After the declaration of war, all trading or commercial intercourse between American and German partners was unlawful, and opposed to the public policy of United States, even before the enactment of Trading with

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the Enemy Act, Oct. 6, 1917, section 7(b) of which (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), recognized that previous trading with the enemy was illegal.

**5. Partnership ⚡261—Executory agreement to dissolve partnership with enemy in contemplation of war is invalid.**

An executory agreement made between an American citizen and German subjects, after the severance of diplomatic relations and in contemplation of war between the two countries, which provided a method for dissolution of the partnership, to become effective on the declaration of war, was invalid to transfer to the American partner the interest of the German partner.

**6. Partnership ⚡261—Act of enemy partners cannot raise implied agreement, which they could not make.**

Since an express agreement by German partners to transfer their interest in this country to an American partner after the declaration of war would be invalid, no such agreement can be implied from the conduct of the German partners in taking possession of the German assets and conducting the business as if the American was no longer a member of the firm.

**7. War ⚡15—Bill before peace cannot ratify act which could not have been authorized.**

Since an American citizen could not, before the declaration of peace with Germany, have agreed with his German partners as to disposition of the firm assets, the filing by him of a bill to reclaim from the Alien Property Custodian the firm assets in this country, which had been seized by the Custodian, cannot be given effect as a ratification of the acts of the German partners in transferring the American assets to the American partner.

**8. War ⚡15—Ratification of contract dissolving partnership is "completing contract, agreement, or obligation"; "trade."**

In Trading with the Enemy Act Oct. 6, 1917, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½aa), defining the words "to trade" as entering into, carrying on, or completing any contract, agreement, or obligation, the ratification of a contract made by enemy partners dissolving the partnership would be the completing of a contract, agreement, or obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trade.]

**9. Partnership ⚡282—American partner has lien on assets of foreign firm.**

An American citizen, who had been in partnership with German subjects before the war, has a lien on the assets of the firm in this country for his share of the capital and profits.

**10. War ⚡12—American partner held entitled to possession of firm assets.**

An American citizen, who had been in partnership with German subjects before the war, is entitled to recover possession of such assets from the Alien Property Custodian by a bill under Trading with the Enemy Act Oct. 6, 1917, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), but must account to the Alien Property Custodian for the interests of his enemy partners, under section 8(a), being section 3115½dd.

Anderson, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the district of Massachusetts; George H. Bingham, Judge.

Suit by Richard Mayer against Francis P. Garvan, Alien Property Custodian, and others, to claim property seized by the custodian. From a decree requiring redelivery of the property to the plaintiff, for

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

dissolution of the partnership, and for an accounting of the interest of enemy partners therein, both parties appeal. Modified and affirmed.

Edward F. McClennen, of Boston, Mass. (Guy Murchie and Murray F. Hall, both of Boston, Mass., on the brief), for plaintiff.

Elias Field, Sp. Asst. Atty. Gen. (Dean Hill Stanley, Sp. Asst. Atty. Gen., on the brief), for defendants.

Before JOHNSON and ANDERSON, Circuit Judges, and HALE, District Judge.

JOHNSON, Circuit Judge. These are appeals from a final decree in equity of the District Court of Massachusetts upon a bill brought under section 9 of chapter 106, Act of October 6, 1917, 40 Statutes at Large 411 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), known as the Trading with the Enemy Act. By section 7 (c) of the act, as amended (Comp. St. Ann. Supp. 1919, § 3115½d), it is provided:

"If the President shall so require any money or other property \* \* \* choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian."

At the end of the war with Germany any claim of an enemy or ally of an enemy to said property is to be settled as Congress may direct. The only action taken by Congress in regard to such property was that contained in its joint resolution of July 2, 1921, terminating the state of war, in which it is provided in substance that all enemy property which had been seized should be retained by the United States until the governments with which the United States had been at war shall have made suitable provision for the satisfaction of all claims of citizens of the United States against them growing out of the war or otherwise.

Section 9 of the act authorizes one not an enemy or an ally of an enemy, who claims any interest in the property transferred or seized under the act, to institute a suit in equity in the District Court of the United States for the district in which he resides to establish his claim.

Section 2 (a) of the act defines the word "enemy" as an individual partnership or other body of individuals of any nationality resident within the territory, including that occupied by the military and naval forces of any nation with which the United States is at war.

By executive order of February 26, 1918, the title and interest of the enemy property which may be seized is defined to include "such as might or would exist if the existing state of war had not occurred."

On May 18 and September 20, 1918, the Alien Property Custodian, after due investigation and determination, took possession in the district of Massachusetts of the capital stock of two Massachusetts corporations and also of certain securities and notes receivable, as the property of Reis & Co., a partnership, whose address was Heidelberg,

Germany. The book value of all of this property approximates \$910,000.

The firm of Reis & Co., prior to 1913, consisted of Edwin Reis and Ludwig Reis, residents of Germany, and Karl B. Strauss, a naturalized citizen of Great Britain, but a German by birth. This firm had succeeded to the business of importing cotton waste from America into Germany, formerly conducted by Wilhelm Reis, father of Edwin and Ludwig Reis.

Richard Mayer was born in Germany, but took out naturalization papers in the United States in 1912. In 1898 he was sent to Boston by the firm of Reis & Co. to take the place of an agent there and continued in its employ until 1907 or 1908, having a bonus interest in profits. After leaving the employ of this firm he organized a similar business which he conducted on his own account. In 1913 he went to Germany and entered the firm of Reis & Co. as an "additional, personal, liable partner."

In the articles of partnership executed at that time the following introductory statement appears:

"Under the firm name of Reis & Co., with the main seat at Friedrichsfeld, branch at Heidelberg, there exists a partnership."

The names of the personal, liable partners are then given, and also that of a special partner, Mrs. Wilhelm Reis. In its first paragraph it is provided that Mr. Mayer shall take his domicile in Boston and conduct the American business of the partnership. The articles of partnership also provided that Mr. Mayer should bring into the partnership his firm business which he had conducted in Boston, with all its assets and liabilities, appraised at 200,000 marks; that Edwin Reis should contribute to the capital of the firm 1,179,845.03 marks, Ludwig Reis, 1,136,867.26 marks, and Karl B. Strauss 348,313.24 marks. The amount contributed by Mrs. Wilhelm Reis as a special partner did not appear; but it was provided that she was to have interest on her investment, whatever it was, at  $4\frac{1}{2}$  per cent., but should not participate in gain or loss. Each of the partners was to receive interest at  $4\frac{1}{2}$  per cent. upon the capital he furnished and a fixed salary, and was entitled to draw in the course of each partnership year from the firm an amount equal to his salary and the interest due him on his investment. The participation in gain or loss was to be as follows: Edwin Reis,  $27\frac{1}{2}$  per cent.; Ludwig Reis,  $27\frac{1}{2}$  per cent.; Karl B. Strauss, 25 per cent.; and Richard Mayer, 20 per cent. Shares of profit, as well as any amount due for compensation not drawn by any partner during the partnership year, and interest, were to be credited to the capital account of the partners.

In October, 1914, the complainant caused the Richard Mayer Company, one of the corporations whose stock was transferred to the Alien Property Custodian, to be organized as a Massachusetts corporation, and paid in all the capital stock of that company from the assets of Reis & Co. in his hands.

In 1915 he caused the organization, under the laws of Massachusetts, of the Anglo-American Cotton Company, the other corporation,

and paid in all the capital stock of that company from the assets of Reis & Co.

During the latter part of the year 1914 and the early part of 1915 the German partners remitted to the complainant at Boston about \$2,500,000, for the purchase of cotton waste for export. With this money some cargoes of cotton waste were purchased and shipped to Europe, and the balance was used in paying for the capital stock of the corporations that were organized and in the purchase of the securities that were seized.

At the death of Mrs. Wilhelm Reis, in 1916, it became necessary under German law to secure the signatures of the surviving partners to a declaration that she was no longer a member of the firm, and, as it was not possible at that time to reach Richard Mayer, his brother, Karl Mayer, a resident of Germany, was appointed his "absence trustee" under German law.

February 3, 1917, diplomatic relations with Germany were broken off by the United States.

On February 7, 1917, members, in Germany, of the firm of Reis & Co. and the "absence trustee," appreciating that war between Germany and the United States was imminent, signed the following document:

"Friedrichsfeld, February 7, 1917.

"Reis & Co. Friedrichsfeld (Baden):

"In consideration of the present disturbed condition and the possibility of a warlike entanglement with the United States of America the undersigned reached to-day the following agreement:

"In case of a war between the United States and Germany, Mr. Richard Mayer separates himself from the firm of Reis & Co. The distribution of the partnership's assets which then becomes necessary, is agreed to take place on the following basis:

"Mr. Richard Mayer renounces all of his claims that he may have against the assets of the firm of Reis & Co. in so far as they are located in Europe, in favor of the remaining partners: Edwin Reis, Ludwig Reis, and Karl B. Strauss.

"On the other hand, the partners, Edwin Reis, Ludwig Reis, and Karl B. Strauss, renounce any claims they may have against the assets of the firm of Reis & Co. as far as those assets are located in the United States, in favor of Mr. Richard Mayer.

"With the taking over by Mr. Richard Mayer of all of the assets of the firm of Reis & Co., which are located in the United States of America, any and all claims on the part of Mr. Richard Mayer against the complete assets of the firm of Reis & Co. are once and for all settled.

"On the other hand, the partners Edwin Reis, Ludwig Reis, and Karl B. Strauss declare that, with their taking over of that part of the European assets of the firm which represents Mr. Richard Mayer's share, they renounced unequivocally all claims against any assets of Reis & Co. located in the United States of America.

"This agreement has been issued in quadruplicate and a copy handed to each of the contracting parties.

"Friedrichsfeld, February 7, 1917.

"Edwin Reis.

"Ludwig Reis.

"Karl B. Strauss,

"Karl Mayer,

"As Legal Absence Trustee for Richard Mayer of Boston."

Richard Mayer did not learn of the existence of this document until the spring of 1919, and it does not appear that he had any knowl-

edge until then that an "absence trustee" had been appointed for him.

War was declared by the United States against Germany April 6, 1917, and after that date the German partners treated the German assets as their own and conducted the business in Europe as if Richard Mayer had no interest in it.

[1] The District Court has ruled that war dissolves a partnership under the law of England and the United States, and this ruling is fully supported by the authorities cited, among which are *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583; *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *The Anglo-Mexican*, 118 L. T. N. S. 260 (Privy Council); *Hugh Stevenson & Sons, Ltd., v. Aktiengesellschaft Für Cartonnagen Industrie*, [1918] A. C. 239, 118 L. T. N. S. 126 (House of Lords), 115 L. T. N. S. 594 (C. of A.).

[2, 3] The District Court further ruled that the contract of partnership, so far as it related to the American partner and the business conducted here, was in case of war to be governed by the law of the United States, which "does not sanction continuation of business relations between its citizens and citizens of a nation with which it is at war"; that the agreement of February 7, 1917, was invalid under German law, because it lacked judicial or notarial authentication; and that, as Richard Mayer was not a subject of Germany, the German court was without authority to appoint an "absence trustee" for him.

We are satisfied with these rulings and the reasoning by which they are supported; but, for additional reasons, we think the agreement, if valid under German law, was ineffective to transfer the interest of the German partners in the American assets to Richard Mayer. It was executory, and made, as stated therein, in contemplation of war, and to take effect only in the event that war was declared.

Mr. Strauss, one of the partners, testified that it was made for the purpose of preventing the confiscation of partnership assets by Germany, and it is so obvious that, if valid, it would defeat the right of the United States as a belligerent to seize the interests of German partners in American assets, that this also seems to have been its purpose.

[4] After the declaration of war, and before the passage of the act, all trading or commercial intercourse between the American and German partners was unlawful and opposed to the public policy of the United States. *The Rapid*, 8 Cranch, 155, 3 L. Ed. 520; *The Julia*, 8 Cranch, 181, 193, 3 L. Ed. 528; *United States v. Grossmayer*, 9, Wall. 72, 19 L. Ed. 627; *Insurance Co. v. Davis*, 95 U. S. 425, 429, 24 L. Ed. 453, in which Justice Bradley said:

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last 15 years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an

alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war, though, if so transmitted without the debtor's connivance, he will not be responsible for it."

It is evident from the act itself that Congress realized that, without the passage of the act and at common law, trading with the enemy was illegal, for it provided in section 7 (b) that nothing in the act shall be taken "to recognize as valid or legal" trade with the enemy before passage of the act and after the beginning of the war, and it further expressly provides that contracts made in contemplation of war shall not be included among those which, though executed before the war, but to be performed after its declaration, are recognized as legal.

In order to make certain that the title of enemy property which might be seized should not be affected by the declaration of war, the President, by executive order of February 26, 1918, defined the title and interest of enemy property which may be seized to include "such as might or would exist if the existing state of war had not occurred."

[5, 6] The German partners could make no agreement with the complainant after a declaration of war that would be recognized as valid in our courts, and therefore no executory agreement entered into before the war, and in contemplation of it, could be effective to transfer their interest to him in the American assets after war had been declared. This case is distinguishable from *Wilson v. Ragosine & Co.*, [1915, K. B.] 113 L. T. N. S. 47, because in that case the agreement for dissolution of the partnership was made on the day before the declaration of war and was completely executed before war was declared. The fact that the German partners took possession of all of the assets of the firm in Germany, and conducted the business there as if the complainant were no longer a member of the firm, could not transfer their interests in the American assets to him; for, if no contract made by them after war had been declared, to transfer such interests, would receive the sanction of an American court, no such contract or agreement could be implied from their acts after the declaration of war. They could not do by acts what they could not do by words.

[7] It is contended that complainant, by filing this bill, ratified the agreement of February 7, 1917; but he was under the same disabilities as his partners in regard to commercial intercourse between them, and there was no time after the declaration of war until Congress declared the state of war to be at an end, July 2, 1921, that he could have, by any communication or negotiation with his former partners, ratified the alleged agreement, and if he could not ratify by communication or negotiation with them, he could not by the act of filing this bill.

[8] In the Trading with the Enemy Act, Congress, in section 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½aa), defines the words "to trade":

"(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation."

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

"(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

"(e) To have any form of business or commercial communication or intercourse with."

Ratification of the alleged agreement would certainly be the completion of a "contract, agreement, or obligation."

[9] Whether title to the American assets after the declaration of war was in the partnership as a legal entity, or in the former partners as joint owners in proportion to the shares to which each might be entitled after liquidation, complainant had an equitable lien upon all the American assets to secure the distributive share which might be due him after liquidation, and also to secure the payment of partnership debts.

Under the partnership articles the complainant is entitled upon distribution to have repaid him out of the assets of the partnership the amount of his capital investment, with interest, and also 20 per cent. of the net profits which had been earned by the partnership, and he is liable for 20 per cent. of all losses.

The District Court has found and decreed:

"That, upon the present state of the evidence, this court is unable to state an account as between the parties, or Richard Mayer and the Alien Property Custodian, there being no evidence of the actual value of the American property or of the German or English property, and there being no evidence of the liabilities of the firm."

We think this finding and decree is fully sustained by the record.

[10] Because of complainant's equitable lien as a partner, he was entitled to possession on April 6, 1917, of all the partnership property under section 8 (a) of the act (section 3115½dd), the material parts of which are as follows:

"That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand \* \* \* may continue to hold said property, and after default may dispose of the property in accordance with law \* \* \* under such rules and regulations as the President shall prescribe. \* \* \* Provided further, that if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further orders."

Under this section the District Court has decreed:

"That the complainant on the dissolution of the partnership with the outbreak of war had a lien on the American assets and their proceeds for what was due him from the partnership on an accounting of the affairs of the partnership and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting."

"That the plaintiff is entitled to the immediate repossession of all property so seized and the net proceeds arising therefrom; that the plaintiff shall hold possession of the money and property so delivered to him under the terms and provisions of section 8 (a) of the Trading with the Enemy Act, and

of the rights and duties in respect thereof which are set forth in paragraph 10 of this decree."

It was not the purpose of Congress in the passage of the act to deprive an American citizen of his property rights or to so administer the act as to cause him unnecessary financial loss. It can be easily conceived that the American partner, because of his knowledge of the partnership business and the value of its assets, could realize more from the firm assets upon liquidation than the Alien Property Custodian; and a serious financial loss might be caused him if the liquidation were conducted by one with no experience in the business of the partnership and with less knowledge of the values of the firm assets than that possessed by him.

The decree of the District Court is amended by striking therefrom paragraphs 12 and 13, and inserting in place thereof the following:

"12. That the defendant Francis P. Garvan, as Alien Property Custodian, is entitled, out of the surplus of the money and property in controversy in this cause which may remain after the satisfaction of the distributive share of the plaintiff on accounting, to the allowance of reasonable fees and expenses for services herein rendered by Elias Field, Esq., who appeared as his counsel in this behalf; that the sum of \$10,000 is found to be a reasonable allowance for said Elias Field to cover his services and expenses in this behalf; and that no allowance be made for the services of George P. Rowell.

"13. It is therefore adjudged, ordered, and decreed as follows:

"First. That such allowances shall not be deemed to be an obligation of the said Garvan individually, or as such Custodian, but merely a charge against such credits as he may be entitled to upon an accounting by the plaintiff.

"Second. That all of the property in the hands of the said defendants, Alien Property Custodian and Treasurer of the United States, be by them respectively delivered into the possession of the plaintiff.

"Third. That the plaintiff shall hold possession of the money and property, so delivered to him, under the terms and provisions of section 8(a) of the Trading with the Enemy Act and with the rights and duties in respect thereof which are set forth in paragraph 10 of this decree."

So modified, the decree of the District Court is affirmed, with costs to neither party, and the case is remanded to that court for further action not inconsistent with this opinion.

ANDERSON, Circuit Judge (dissenting). I regret that I cannot concur in the result reached by the majority of the court. I think it so perverts the Trading with the Enemy Act as to make it unnecessarily harmful to American citizens and probably ultimately advantageous to Germans.

At the outset it should be held clearly in mind that the case before us does not involve the right of the Custodian to seize the property in question. It involves only his right to retain it, or, as the case now stands, to retake a portion of it after accounting by the plaintiff. This anomalous and somewhat confusing situation—of a right to seize what may not be lawfully retained—arises out of the necessities of war. It is expressly contemplated by the act. Compare *Central Trust Co. v. Garvan*, 254 U. S. 554, 566, 41 Sup. Ct. 214, 65 L. Ed. 403, where, for the purposes of immediate possession, the determination of the Custodian was held conclusive, "whether right or wrong." In some cases, including the opinion of the court below, are expressions

as to the Custodian's right to seize, when what is really meant is the Custodian's right to retain. It is solely with the right to retain, or condemn as alien enemy property, that this case is concerned. The seizure by the Custodian neither made, destroyed, nor affected any rights now in question.

In the view I take of this case, the salient facts are within narrow scope. Many of the details set forth in the majority opinion seem to me to have no bearing on the real case.

In 1916, Reis & Co. was a partnership made up of one American and two (or three) Germans. A part of the assets were in America, under the direct control of the American partner, the rest in Europe. Dissatisfied with the business relations, the American partner, through an agent indicated in 1916 to the German partners a tentative desire to dissolve the partnership and to liquidate without a detailed accounting; he taking all the American assets, and they all the German assets.

On February 7, 1917, after the breach of diplomatic relations, and while communication with Germany was impossible, the German partners executed a document, set forth in full in the majority opinion, intended to be an agreement in contemplation of war, for the dissolution and liquidation (both) of the partnership affairs—to take effect contemporaneously with the outbreak of war—on exactly the terms indicated by the American partner a year before. At that time, as the District Court found, the American assets were, so far as the Germans knew, not far from the American partner's proportion of the total American and European assets. This document was signed by the American partner's brother, purporting to act as "absence trustee" under a court appointment. It was to take effect, not after, but eo instanti with, war. This distinction is important, and seems to be overlooked by the majority. It purports to release the American assets from all claims of the Germans, while asserting for them full title in all the European assets, and the Germans thereupon appropriated to their own use all the European assets in such fashion, as to make it probably impossible thereafter to state an account with even approximate accuracy.

The decision here, as in the court below, goes upon the theory that the agreement of dissolution and liquidation was void; that it had no effect upon the rights of the German partners to an ultimate accounting for the American assets; that, therefore, the plaintiff must now account for "enemy property" in the American assets.

I cannot accept that theory. I think that agreement was consonant with our public policy—indeed, in aid of it. By it the parties simply agreed to the dissolution which the law would have made, if the parties had not.

They also agreed to an instant liquidation, in specie—now claimed to be advantageous to the American partner. I cannot understand how our public policy can be impaired by an agreement giving an American citizen his share in full, or even overflowing, measure. Such an agreement certainly lends no aid to the public enemy; it is very helpful to our own citizen.

See the pungent opinion of Halsbury, L. C., in *Jansen v. Dreifontein Mines Co.*, [1902] A. C. 484, 489 et seq.

See the case of *Hugh Stevenson, etc., v. Aktiengesellschaft*, [1918] A. C. 239; same case in the court below, [1917] 1 K. B. 842. In the seven opinions of the Lords and Lord Justices dealing with the results of the outbreak of war on such a partnership, most aspects of the questions now involved are expressly or impliedly dealt with.

Consider the situation that the outbreak of the war would have left the partners in, without any agreement: Under American law, the partnership would have been dissolved; the American partner would hold the American assets as his own up to the amount of his interest, and no more. The ultimate right of the Germans to a full accounting would, unless the United States decided to confiscate, be simply suspended during the war. Under German law the partnership was not dissolved. The Germans were, nevertheless, as this record shows, in danger of having their business seized by the German government, because of alleged American interests in it. Under such circumstances, the interests of the parties drove them to exactly the course that the law required: A severance of their business relations, advantageous, at least during the war, to the nationals of both countries. There was only one way they could sever. Communication was impossible; they guessed, or roughly estimated, the amount of assets, and divided the assets, American and European, on national lines, in specie. It happened, as the government contends, that the American got the better of the bargain. But, if he had got the worst of the bargain, he would, in this country, be remediless. In that event he could keep as his own the American assets, and, now that the war is ended, resort to litigation in Germany for the balance due.

Otherwise put: The agreement, if bad, is bad solely because the American assets happened to equal or exceed the American partner's share in a liquidation made strictly in accordance with the partnership articles.

No case is cited by the majority of the court, or by counsel for the Custodian, in support of the proposition that such agreements in contemplation of war are contrary to public policy. There is no allegation by the Custodian that Mayer was to take a surplus on secret trust for the Germans. So far as this record shows, all Mayer has done throughout is to comply with all the demands of the Custodian and bring this suit—in which he was not even called as a witness. We must assume that, if the government could show that the liquidation was in any way intended for the benefit of alien enemies, it would have alleged and proved it. On this record, we are making rulings as applicable to Mayflower descendants as to naturalized Germans.

So far as the agreement of dissolution and liquidation in contemplation of war is concerned, the case is on all fours with *Wilson v. Ragosine Co.*, [1915, K. B.] 113 L. T. N. S. 47, where a similar agreement as to dissolution and liquidation was made on August 3, 1914, the day before Great Britain declared war, and was sustained by the court. On the same point, see, also, *Jansen v. Dreifontein Mines Co.*, supra.

Judge Bingham in the District Court does not seem to have regarded an agreement advantageous to an American citizen as contrary to public policy. But he held it void because of failure to comply with the technical requirements of the German Code as to absence trustees.

In my view, the German Code has no application. I think the contract as to the American assets must, as all of us in both courts hold as to dissolution of the partnership by war, be construed under American law—the law of the place of performance. See *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; *Hamlyn v. Talisker*, 1894, A. C. 202. The authorities would warrant us in holding that plaintiff's brother acted as agent of necessity. *Buford v. Speed*, 74 Ky. (9 Bush) 338; *Mayer v. United States*, 3 Ct. Cl. 249; *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693; *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; *Sheanon v. Insurance Co.*, 83 Wis. 507, 53 N. W. 878.

But if the plaintiff's brother acted as previously unauthorized agent, so that his act may require ratification by conduct or otherwise, I think there was such ratification, as the District Court found, by bringing this suit. In this suit the court, not the plaintiff, caused notice to be given to the German partners. For an American citizen to bring a suit in the courts of his own country, alleging his contentment with a liquidation of his former partnership, made by his former partners, is not trading with the enemy. *Jansen v. Driefontein Consol. Mines*, *supra*. Notice having been given by the court to the Germans of Mayer's acquiescence in what the Germans had done, I cannot see why Mayer is not now bound, precisely as though he had originally authorized his brother to act as his agent in that transaction. At any rate until he disaffirms, if he can disaffirm, the liquidation stands. He has not disaffirmed. How could Mayer disaffirm, when he could not legally communicate with the Germans? To have attempted disaffirmation before peace was made might well have been held trading with the enemy. Was it his duty to disaffirm in this suit?

The Germans, therefore, have and had at the time of the seizure no rights in the American assets. There was no "enemy property" within the meaning of the act. Only positive acts of disaffirmance by Mayer after full knowledge would reinstate the Germans in their original rights to a full accounting. The seizure neither created nor affected any rights now under consideration. It may, as the government contends, have been "analogous to an attachment" (*Kohn v. Kohn, Inc.* [D. C.] 264 Fed. 253) to make sure the property is "forthcoming if finally condemned," but it "does no more" (*Central Trust Co. v. Garvan*, 254 U. S. 554, 569, 41 Sup. Ct. 214, 65 L. Ed. 403). The analogy is not complete, it may mislead. The seizure was not a right-creating proceeding; it was merely a right-securing proceeding. What, if anything, the Germans had, the Custodian seized, and may retain until Congress otherwise provides. But the measure of the Custodian's right to hold is the extent of the Germans' rights; and they had and have none as to the American assets. If, as is argued, the liquidation agreed to by the Germans, and made by them so far as they could make it, was advantageous to the American, can the Custodian

compel the American citizen to disaffirm—for the ultimate benefit of our former enemies—unless we abandon our traditional policy as to confiscation? Compare *Kershaw v. Kelsey*, 100 Mass. 561, 570, 97 Am. Dec. 124, 1 Am. Rep. 142, where there is a long and learned review of enemy trading law by Mr. Justice Gray. See, also, *Brown v. United States*, 8 Cranch, 110, 3 L. Ed. 502; *Hanger v. Abbott*, 6 Wall. 532, 537, 18 L. Ed. 939.

But, entirely apart from ratification by bringing this suit, the Germans were barred by what they signed and did. For present purposes it was not necessary that the contract of liquidation should be contemporaneously bilateral. In *re Portuguese Mines*, 45 Ch. Div. 16; *Thompson v. Williams*, 58 N. H. 248; *Manchester Street Ry. Co. v. Williams*, 71 N. H. 312, 320, 52 Atl. 461.

Whether we regard the transaction of February 7, 1917, as a waiver, a release, or an option to Mayer by the Germans, it is clear that until, after full knowledge of what had been done, Mayer had insisted on a full accounting, the Germans could maintain against him no bill for an accounting. What they signed and did ended their rights in the American assets, unless and until Mayer asserted continuing rights in the European assets.

Test the question by assuming that peace had been made in September, 1917, before the Trading with the Enemy Act was passed, restoring to the Germans all their ante bellum rights in our courts and as to property in this country, and that they had then brought against Mayer a bill for a full accounting of all the partnership assets, American and European, that Mayer had pleaded the agreement of February 7, 1917, and their appropriation of all the European assets to their own use, and that he had seasonably, after knowledge, ratified such liquidation in specie; would any court have sustained the Germans' bill for an accounting?

Plainly, the majority opinion goes on the theory that there should be an accounting because, and only because, the liquidation made by the Germans was advantageous to the American. If the accounting to the expense of which we are to subject the American partner shows no surplus for the Germans, the Custodian takes nothing. Nor is there any provision to reimburse the American for expenses incurred in an accounting for the prospective benefit of our (former) enemies.

But the act was intended to cripple German enemies, not to harm American citizens. A construction so inconsistent with its manifest purpose should not be adopted, even if there were—as there is not—language even superficially capable of such meaning. Compare *Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; and cases cited and reviewed. *Douglas v. United States*, 14 Ct. Cl. 1.

I repeat, the Custodian can now retain (or retake after an accounting) nothing that the Germans could not, assuming the war barriers removed, recover in a suit for an accounting.

Reverting again to the proposition that the government acquired by the seizure rights in the American assets that could not be cut off by the ratification—the point where my views diverge from Judge

BINGHAM'S—as I read the opinion of the Supreme Court in *Central Trust Co. v. Garvan*, 254 U. S. 554, 569, 41 Sup. Ct. 214, 65 L. Ed. 403, the court there held that seizure created no rights, certainly no rights beneficial primarily or ultimately to enemies. Undoubtedly the Custodian, if he has seized property shown finally to belong to American citizens, may, having “all the powers of a common-law trustee,” sell it, remitting the owner to a claim for the proceeds. Damage from such proceeding is one of the risks the war imposed on our own citizens. But I find nothing in section 9, nor elsewhere in the act, indicating that seizure, either “with the strong hand” (254 U. S. 568, 41 Sup. Ct. 214, 65 L. Ed. 403) or by “resort to the courts,” transmutes citizen property into enemy property or otherwise broadens the power of final condemnation. The closing sentences in the opinion of Mr. Justice Holmes in *Central Trust Co. v. Garvan*, *supra*, sustaining the right of the Custodian to maintain “purely possessory actions,” are:

“The present proceeding gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more.”

*Douglas v. United States*, 14 Ct. Cl. 1, and *Mayer v. United States*, 3 Ct. Cl. 338, look the same way in favor of such construction of trading with the enemy acts as not to invalidate transactions beneficial to citizens unless actually lending aid to enemies. The views expressed by Mr. Justice Gray in *Kershaw v. Kelsey*, *supra*, on full review of the authorities, lend further support for my conclusions. In 100 Mass. 573, 97 Am. Dec. 124, 1 Am. Rep. 142, Mr. Justice Gray said:

“At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.”

In the majority opinion it is said:

“Mr. Strauss, one of the partners, testified that it was made for the purpose of preventing the confiscation of German assets by Germany, and it is so obvious that, if valid, it would defeat the right of the United States as a belligerent to seize the interests of German partners in American assets, that this also would seem to have been its purpose.”

I do not so construe the record. The purposes as shown both by the evidence and by the agreement were to leave no American interest in German assets which might cause the German government to seize the business over there on the same theory upon which our government has proceeded against the business here.

Another Strauss, an expert on German law, testified that the German government would not object to the dissolution and liquidation agreement, “because German nationals would acquire additional property.” This seems to me the sound view. Nor would the agreement “defeat the rights of the United States as a belligerent to seize the interest of German partners as American assets,” except as ending business relations between Germans and Americans that ought to have been ended would lessen the occasions for sequestration. Seizure and (possible) subsequent confiscation are merely aids to the general policy

of nonintercourse between enemies, and of furnishing a means of crippling and punishing enemies, not of injuring citizens.

The act was not intended to cause the accumulation in the Custodian's hands of a huge conglomeration of properties largely of American ownership, or to prevent Germans and Americans from completely severing business relations on the outbreak of war, so that each set of nationals might be free from temptation for disloyal dealing with enemies. It was not intended to prevent Germans from releasing, if and when war should be declared, possibly valuable rights to Americans. The *William Bagaley*, 5 Wall. 377, 407, 408, 18 L. Ed. 583; *The Anglo-Mexican*, [1918] A. C. 422.

In my view, the agreement of February 7, 1917, is one that ought to be sustained, as directly in furtherance of public policy.

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PAGE et al. v. UNITED STATES.\*

(Circuit Court of Appeals, Ninth Circuit. January 16, 1922.)

No. 3677.

1. Intoxicating liquors ¶236 (6½, 9)—Evidence held to sustain conviction of club member and officer.

In a prosecution for unlawful possession of intoxicating liquor and maintaining a common nuisance for the sale of such liquor at a club, evidence that one of the defendants was a member and officer of the club and that he occasionally tended the bar, though that was generally done by others, and that he was present on the night of the raid, held sufficient to warrant the jury in convicting that defendant.

2. Constitutional law ¶50—Congress has implied powers to adopt reasonable means to effectuate express powers.

Under Const. art. 1, § 8, cl. 18, giving Congress power to make all laws necessary and proper for carrying into execution the powers vested in it, Congress has implied power to adopt any means which are appropriate and adapted to effectuate an express object, so long as such means are not prohibited, but consist with the Constitution, and these implied powers extend to the enforcement of the Eighteenth Amendment, as well as to other parts of the Constitution.

3. Intoxicating liquors ¶23½, New, vol. 8A Key-No. Series—Restriction on possession is reasonably necessary to enforce Prohibition Amendment.

The restrictions on the possession of intoxicating liquors contained in National Prohibition Act, tit. 2, § 3, are reasonably adapted to the enforcement of the prohibition against the unlawful manufacture, sale, or transportation of intoxicating liquors under the Eighteenth Amendment, so that such restrictions are not beyond the power of Congress to enact.

4. Intoxicating liquors ¶242—Possession is punishable under general penalty clause.

Though National Prohibition Act, tit. 2, § 3, prescribes no penalty for the unlawful possession of intoxicating liquor, such possession is punishable under section 29, imposing a penalty of a fine of not more than \$500 for the violation of any of the provisions of the act for which a special penalty is not prescribed, so that the remedy for unlawful possession is not restricted to the seizure and destruction of the liquor under section 25.

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\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 461, 66 L. Ed. —.

5. Criminal law ~~C~~—197—Evidence held to show maintaining nuisance, in addition to possession charged in another count, so that conviction on first count did not bar conviction on second.

Where the indictment charged unlawful possession of intoxicating liquors in one count, and maintaining a nuisance for the unlawful sale of intoxicating liquor in a second count, evidence which, in addition to establishing the possession as alleged, tended to show sales to various individuals on different occasions, *held* sufficient to establish the offense of maintaining a nuisance, apart from the offense of possessing the liquor, so that conviction on the first count did not bar conviction on the second.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

William Page and others were convicted of unlawfully possessing intoxicating liquor, and of maintaining a common nuisance for the unlawful sale of intoxicating liquor, and they bring error. Affirmed.

Frank J. Murphy and Oscar Hudson, both of San Francisco, Cal., for plaintiffs in error.

Robert O'Connor, U. S. Atty., and Mark L. Herron, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellants were charged, by an information filed November 10, 1920, with violating sections 3 and 21 of title 2 of the act commonly known as the "National Prohibition Act." The information contained two counts. The first count charged:

"That one William Page, Ernest Burr, Milton Brown, and William Finley, whose full and true names, other than as herein stated, are to affiant unknown, late of the Northern division of the Southern district of California, heretofore, to wit, on or about the 30th day of October, A. D. 1920, at a certain place commonly known as 'Douglas Club,' No. 1211 F. street, in the city of Fresno, county of Fresno, within the Northern division of the Southern district of California, and within the jurisdiction of this honorable court, did knowingly, willfully, and unlawfully have in their possession, and did knowingly, willfully, and unlawfully aid, assist, and abet each other to have in their possession, for beverage purposes certain intoxicating liquor, to wit, one pint bottle of jackass brandy, containing alcohol in excess of one-half of one per cent. by volume, in violation of section 3, title 2, of the Act of October 28, 1919, commonly known as the National Prohibition Act."

The second count charged that the defendants—

"on or about the 30th day of October, A. D. 1920, did knowingly, willfully, and unlawfully maintain a common nuisance, that is to say, a room and place, and did knowingly, willfully, and unlawfully aid, assist, and abet each other to unlawfully maintain a common nuisance, that is to say, a room and place at what is commonly known as Douglas Club, No. 1211 F street, in the city of Fresno, county of Fresno, in the state and Northern division of the Southern district of California, and within the jurisdiction of this honorable court, where intoxicating liquor, to wit, one pint bottle of jackass brandy, containing alcohol in excess of one-half of one per cent. by volume, was sold, kept, and bartered, in violation of section 21, title 2, Act of October 28, 1919, commonly known as the National Prohibition Act."

Upon the trial of the cause all of the defendants were convicted. Judgment was entered accordingly, and from this judgment appellants prosecute this writ.

[1] It is contended in behalf of the appellant Ernest Burr that there is no evidence in the record to support the judgment against him on either of the counts in the information. William Page, one of the defendants, testified:

"Mr. Burr was connected with this club, but not now. He used to sell soft drinks there, and the same situation existed in regard to Mr. Brown. \* \* \* Mr. William Finley was vice president. I recall the night the officers went in there. \* \* \* All four of us had the management of the bar, or anybody else in the club. Mr. Burr, Brown and Finley and I stayed behind the bar more than anybody else, but anybody could stay behind there. All these members were club members and they are now."

Harry Erickson, city license collector, testified that the license of the Fred Douglas Club was issued to Burr and Finley as owners. Mr. Burr admits that he was present at the club the night of the raid and that he was at that time a member of the club. He admitted that he and another person originally leased the building where the club was conducted. If the jury believed this testimony, the court is of the opinion that it was sufficient, with the natural and reasonable inferences to be drawn therefrom, to warrant the verdict of the jury.

It is next contended that the Eighteenth Amendment to the Constitution of the United States confers no power upon Congress to legislate against the possession of intoxicating liquor, the manufacture, sale, and transportation being the only things prohibited, and that therefore section 3 of title 2 of the National Prohibition Act (41 Stat. 305, 308), under which the prosecution upon the first count in the information is based, is invalid and unconstitutional.

The Eighteenth Amendment to the Constitution of the United States provides as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors, within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The Act of October 28, 1919 (41 Stat. 305), provides, in title 2, section 3, page 308, that—

"No person shall on and after the date when the Eighteenth Amendment \* \* \* goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

[2] The objection that a statute is unconstitutional which is not authorized by the express letter of the Constitution is not new. Article 1, § 8, cl. 18, of the Constitution provides that Congress shall have power—

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution

in the government of the United States or in any department or officer thereof."

In *McCulloch v. Maryland*, 4 Wheat. 316, 420, 4 L. Ed. 579, Marshall, the great Chief Justice, commenting upon the power of Congress to provide the means for carrying into effect a constitutional provision, declared a rule of construction which has been followed since. He said:

"We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with \* \* \* the Constitution, are constitutional."

[3] This rule is applicable to the construction of the section of the National Prohibition Act under consideration. If, in order to enforce the constitutional amendment, it is necessary to restrict the possession of intoxicating liquor to those having permits to possess the same and to private houses when intended for the sole use of the owner and his family and for bona fide guests, it is within the discretion of Congress to prohibit the possession as a means for the enforcement of the amendment. As said by the Circuit Court of Appeals for the Sixth Circuit in *Rose v. United States*, 274 Fed. 245:

"Congress in the exercise of its power has determined that it is essential and appropriate to the enforcement of this constitutional amendment to restrict the possession of intoxicating liquors to those having permits to keep and possess the same and to private homes when intended for the sole use of the owner and his family and their bona fide guests. The possession of intoxicating liquors is the first essential to its barter and sale as a beverage. Intoxicating liquors, stored in the same building in which the owner or occupant of the building is conducting a business with the public generally, not only furnishes opportunities for the violation of the provisions of this constitutional amendment, but would also tend to hinder, delay, and prevent the detection of unlawful traffic therein. It would therefore appear that this provision of the National Prohibition Act has a substantial relation to the enforcement of national prohibition, and that Congress has not in this respect transcended its power or abused the discretion conferred upon it by the second section of the Eighteenth Amendment."

[4] It is objected that the only penalty provided in the case of unlawful possession of intoxicating liquor is the seizure of the liquor and its destruction under the provisions of section 25 of title 2 of the act. There is no penalty either special or otherwise provided in section 3 of title 2 of the act for the possession of intoxicating liquor, but it is made unlawful, and in section 29 of the act it is provided that—

"Any person \* \* \* who \* \* \* violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for the first offense not more than \$500."

The defendants were each fined \$100 under this section of the act. The penalty was properly imposed.

[5] It is objected that both of the counts of the information are supported by the same evidence and that therefore conviction on the first count is a bar to conviction on the second count. The objection cannot

be sustained. The second count charges that the defendants maintained a common nuisance at the Douglas Club, No. 1211 F street, in the city of Fresno, in violation of section 21 of the act. There is abundant evidence in the record to support this charge in addition to the evidence relating to the "possession by the defendants of one pint bottle of jack-ass brandy" charged in the first count.

Le Roy Toast testified that in August he purchased at the club, of these defendants, a half pint of brandy from a man introduced to him by his cousin, a member of the club, and that also he smelled liquor and wine at the same club. Ray Palmer testified that in September he was told by Lee Toast that he could get liquor at the club, and that Toast, the man who told him, took his money, stationed the witness at the front, and came out of the back way; that he paid the sum of \$10 for a bottle, and received it in the alley back of the club; also that on another occasion he purchased in the kitchen of the club from a man employed there as cook, a drink of jackass brandy, paying 50 cents for it and giving the man who served him 50 cents by way of a tip.

Guy Shoun, a police officer of the city of Fresno, testified that Mr. Finley, one of the defendants, told him that he had been selling liquor for four months at 35 cents a drink, and that Page told him the same. Mr. Page said to the witness that he, Finley, Burr, and Brown, but mostly Mr. Brown, had been selling the liquor, as he was the bartender and paid to do that. He did not say he meant the entire club; he said those four were the ones who had the management of the club. He said they served the drinks of the booze; he was sure he said "jackass" or liquor; \* \* \* that he asked who sold the liquor, and he (Finley) said Brown sold it, and when Brown wasn't there, Burr sold it, and when Burr wasn't there, Page sold it, and so on, but that Brown sells it as he is the bartender; that he is sure he said to Finley: "Who sells this liquor?" and not "drinks." This statement is corroborated by the testimony of A. D. Truesdell, a police inspector of the city of Fresno.

Frank Traux, the chief of police of the city of Fresno, testified:

"I had a conversation with the defendants after their arrest. No offers of immunity were made to defendants, and we did not compel them to testify by threats or intimidation. Their statements were voluntarily made. \* \* \* I told Mr. Page that I wanted to know how long they had been selling moonshine liquor; I think I called it jackass brandy at the time; and he said off and on since the country had gone dry, but off and on for the last three months they had been selling it to men whom they knew. I told them they had gotten past pretty easy; that we had been after them for quite a while; and he said, 'Yes, we had nearly gotten them two or three times, but they had always gotten it hid. \* \* \* I said we understood they had some of the liquor hid, and brought it in one bottle at a time, and he said, 'Yes,' but we hadn't found it."

Mrs. Ida Hensley, residing at 1707 F. street in the city of Fresno, testified that she visited the Douglas Club on or about the 29th of October, and that Mr. Page offered her a drink, which she took and drank; that she is familiar with the odor and taste of liquor; that the contents of the glass handed her looked like liquor, had the taste of liquor, and smelled like liquor.

This evidence shows that the defendants maintained a common nuisance, as distinguished from a single unlawful act of possession. The

charges in the information were sufficient to acquaint the defendants with the nature of the offense for which they were tried, and the evidence was sufficient to support the charges contained in both counts.

The judgment of the District Court is affirmed.

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**KING COUNTY, WASH., v. SEATTLE SCHOOL DIST. NO. 1.**

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3718.

1. **Schools and school districts**  $\S$  114—District may maintain suit to recover its proportion of a fund held in trust by the county for school purposes.

A district, made by statute a body corporate, with power to sue and be sued, and charged with administration of its schools and the funds appropriated therefor, may maintain a suit to recover its proportionate share of a fund held in trust by the county for the benefit of the public schools therein, and which the county is diverting to other purposes.

2. **Attorney General**  $\S$  7—Schools and school districts  $\S$  118—Attorney General represents public only where community rights involved, and is not proper party to bring suit to enforce rights of school district against county.

It is the province of an Attorney General to represent the general public, where the rights of the entire community are involved, and not those only of a limited portion thereof, and the Attorney General of a state is not the proper party to bring a suit against a county to enforce rights of a school district, which is under the statute a body corporate, with power to sue and be sued.

3. **Woods and forests**  $\S$  8—Government held not interested in suit by school district against county concerning fund received from forest reserve.

Where money received from a forest reserve has been paid by the Treasurer of the United States to a state "for the benefit of the public schools and the public roads of the county or counties in which the forest reserve is situated," as required by Act May 23, 1908 (Comp. St. § 5149), and by the state to a county in trust for the same purpose, as provided by a state statute, a controversy between the county and a school district over the administration of the trust fund is not one between the general government and the state, but a matter of local concern only.

4. **Courts**  $\S$  284—Federal court of equity has jurisdiction of a suit involving construction of a federal statute creating a trust fund.

A suit by a school district against the county to enforce its right to a share of a fund paid by the United States to a state from the receipts of a forest reserve, under Act May 23, 1908 (Comp. St. § 5149), "for the benefit of the public schools and public roads" of the county, and paid by the state to the county, under a state statute for the same purpose, is within the jurisdiction of a federal court of equity, as involving the construction of a trust created by the federal statute.

5. **Woods and forests**  $\S$  8—Funds from reserves given state for roads and schools to be divided equally.

Act May 23, 1908 (Comp. St. § 5149), providing that one-fourth of the receipts from a forest reserve shall be paid to the state, to be expended "for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated," held to require the apportionment of the fund equally between the schools and roads of the county.

Appeal from the District Court of the United States for the District of Washington; Jeremiah Neterer, Judge.

Suit in equity by Seattle School District No. 1 against King County, Wash. Decree for complainant, and defendant appeals. Affirmed.

Malcolm Douglas and Howard A. Hanson, both of Seattle, Wash., for appellant.

Henry W. Pennock, of Seattle, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. The controversy here grows out of the following situation:

By acts of Congress of March 4, 1907 (34 Stat. 1270), and May 23, 1908 (35 Stat. 260 [Comp. St. § 5149]), it is provided that 25 per cent. of all money received from each forest reserve shall be paid by the Secretary of the Treasury to the state or territory in which the reserve is situated, "to be expended as the state or territorial Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated." By an act of the Washington Legislature (Laws 1907, c. 185, p. 406), the State Treasurer is directed to turn over to the county treasurers the amounts of money belonging to the respective counties. By section 2 it is provided:

"County commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

For the years 1909 to 1915, inclusive, the county commissioners of King county, Wash., directed the county treasurer to apportion the entire amount of such funds coming into his hands to the road and bridge fund, to the exclusion of the county school fund, and the county treasurer acted accordingly. Of the acts of the commissioners and the county treasurer in this regard the plaintiff complains, and claims that the funds should have been apportioned to the road and county school funds in equal amounts. The sufficiency of the bill of complaint was challenged by a motion to dismiss. This was denied by the court below, resulting in a decree for plaintiff.

[1] It may be premised that there is no apparent controversy touching the authority of the school district to sue and be sued. Indeed, by local statute, school districts in the state are constituted bodies corporate, possessing all the usual powers of a corporation for public purposes, and, among others, in name and style, to sue and be sued. Section 4423, 1 Remington's 1915 Codes and Statutes of Washington. Such school districts are regarded as mere arms of the state for the administration of its school system, and it is said that practically all of their functions are therefore governmental. *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 170, 152 Pac. 1004, Ann. Cas. 1917D, 794. The districts, however, are charged with the administration of the school funds intrusted to them by state authority, or to which they are entitled.

Much controversy has developed in the argument and in the briefs of counsel touching the particular style of trust relations existing between the parties, and out of this spring the questions whether the suit was properly instituted and whether a court of equity, and this, a federal court, have jurisdiction of the subject-matter of the controversy. It would be of little avail to discuss the distinction between private and charitable trusts. The one here involved cannot be strictly classed as either. It is a trust, public in its nature, but to be dealt with on like legal principles as pertain to private trusts.

The general government has, by grant, apportioned certain funds to the several states or territories in which forest reserves are situated, to be expended as the state or territorial Legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. These funds are transmitted to the state or territory entitled to them, and, under the direction of the state Legislature of Washington, are turned over to the treasurers of the respective counties to which they are apportionable. The counties thereby become the trustees of the funds, acting through their treasurers, to be dispensed as directed under the grant. The local public—that is, the inhabitants of the school district—constitute the ultimate beneficiaries; but, in so far as the school districts are concerned, they are the immediate cestuis que trustent for the expenditure of the funds to which they are entitled. Furthermore, they are entitled, under the law, to have the money paid to them for their administration. Now, the school districts being constituted bodies corporate, with power to sue and to be sued, what need is there for the interposition of the Attorney General to enable them to maintain suit to recover the funds from the trustee, so that they may administer them for the public benefit, as the law requires them to do?

[2] In a general sense, if the Attorney General possesses any peculiar province in this country, it is to protect and safeguard the rights of the general public, where there is no one in particular suffering injury more than another. But, as is said by the court in *People v. Ingersoll*, 58 N. Y. 14, 17 Am. Rep. 178:

"Doubtless the prerogatives of the crown, except as affected by constitutional limitations, exist in the people as sovereign, but to what extent the exercise of this prerogative is committed to the public officials, either by the Legislature or by the common law, is a question worthy of grave consideration, and not to be lightly decided, and should only be determined when necessary to a judgment and decision. \* \* \* If there were no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrongdoer and redressing the wrong, the courts would struggle hard to find authority for the Attorney General to intervene in the name of the people."

But another principle is involved, which is that the function of the Attorney General is to represent the public, the entire community, and not a limited portion thereof. An English case of much analogy to the present, and illustrative of the principle, is cited, namely, *Attorney General v. Garner and Another*, [1907] 2 K. B. 480. The suit was one instituted by the Attorney General, on the relation of the Spalding Union rural district council, to restrain defendants from depastur-

ing certain lands. It was found that the parish council was the owner of the right of property as trustee for the parishioners, and not the rural district council, the relator, and the court says:

"The question therefore arises whether in these circumstances the Attorney General can maintain the action, and obtain an injunction in respect of the wrongful acts of the defendants."

Answering the question, the court proceeds:

"The difficulty in the present case is to ascertain whether the Attorney General can interfere in a case where the interests involved are those, not of the whole community, but of a limited portion of it, such as the inhabitants of a parish. \* \* \*. In my opinion it follows from these authorities that in the circumstances of this case the parish council might have maintained the action, and that if the parish council had been plaintiffs it would not have been necessary to join the Attorney General. As to that I have no doubt at all, but it does not decide the whole matter, for there remains the question whether the Attorney General may not be joined as a party to an action in a case in which it is not absolutely necessary that he should be joined. I find an almost complete absence of authority on that point, but, forming the best judgment that I can, it seems to me that the rights, which the Attorney General intervenes in order to protect, as representing the crown, in the capacity, as it is stated in some of the cases, of *parens patriæ*, must be rights of the community in general, and not rights of a limited portion of his majesty's subjects, especially when the limited portion in question, the inhabitants of a parish, have representatives who can bring the action."

Here, as in the English case, we have a body corporate, so constituted by statute, with power and authority to redress the wrong which it is alleged the particular community has suffered. There exists, therefore, in the present situation, no occasion for the Attorney General's interposition for the relief of the general public.

[3] Nor do we think this a matter between two sovereignties—that is, between the general government and the state of Washington, as is illustrated by the cases of *Alabama v. Schmidt*, 232 U. S. 168, 34 Sup. Ct. 301, 58 L. Ed. 555, *Emigrant Co. v. County of Wright*, 97 U. S. 339, 24 L. Ed. 912, and *Emigrant Co. v. County of Adams*, 100 U. S. 61, 25 L. Ed. 563. The funds have passed from the government, not only to the state, but into the hands of the county treasurers charged with the trust which Congress has impressed upon them. It is essentially a matter between the county and the school district, and presents the question whether the county commissioners may dispose of the funds in any other way than that in which Congress has directed that they shall be expended. The state has merely directed that the county commissioners shall expend the money in accordance with the terms of the grant or appropriation of the funds to the state.

[4] The case is clearly one for equitable jurisdiction, as it involves a trust and alleged maladministration of trust funds.

It is further presented that this court has no jurisdiction in the premises, as it is insisted that no federal question is involved. In this we are unable to concur. The very crux of the controversy depends upon a construction of the congressional grant or appropriation; that is, whether shall the funds be expended in equal shares for road and school purposes, or is it a matter discretionary with the state author-

ities? This undoubtedly presents a federal question. Such a question—

"is involved not merely when the construction of a federal statute incidentally arises, but when the case necessarily turns upon the construction of the federal laws, as when the plaintiff would be defeated by one construction, or successful by another." Hughes' Federal Procedure (2d Ed.) 235.

[5] The question which pertains to the proper construction of the grant remains. The funds are to be expended "for the benefit of the public schools and public roads." The use of the conjunctive would seem to indicate that at least not all of such funds should be expended for the one purpose or the other. But we concur with the court below that the language should receive a like construction to that which obtains with respect to wills, gifts, and deeds, where property is bestowed upon or passed to two or more persons, without defining the proportion in which they shall take; the presumption being that they shall take in equal proportions. See *Lee v. Wysong*, 128 Fed. 833, 63 C. C. A. 483; *Markoe v. Wakeman*, 107 Ill. 251, 261; *Keuper v. Mette*, 239 Ill. 586, 88 N. E. 218; *Gerting v. Wells*, 103 Md. 624, 64 Atl. 298, 433; *Campau v. Campau*, 44 Mich. 31, 5 N. W. 1062; *Hill v. Reiner*, 167 Mich. 400, 132 N. W. 1031; *Bennett v. Quinlan*, 47 Mont. 247, 131 Pac. 1067; *Justice v. Stringer*, 160 Ky. 354, 169 S. W. 836; *In re Helling*, 84 Misc. Rep. 684, 147 N. Y. Supp. 799; *In re Conner's Will*, 6 App. Div. 594, 39 N. Y. Supp. 900.

This results in affirmation of the decree appealed from, and such will be the order of the court.

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## INTERSTATE IRON & STEEL CO. v. NORTHWESTERN BRIDGE & IRON CO.\*

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 2988.

1. Contracts  $\S$ 10(4)—Calling for monthly deliveries on specifications to be furnished unenforceable, when providing for automatic cancellation, if tonnages not called for as provided.

A contract for the manufacture and sale of iron and steel bars, to be delivered in monthly installments on specifications to be furnished by the buyer, was unenforceable for want of mutuality, where it provided that, if the tonnages were not specified as called for, the contract should be automatically canceled.

2. Sales  $\S$ 81(5)—Provision requiring buyer to make periodical specifications of requirements is material.

A provision in a contract of sale requiring the buyer to make periodical specifications of his requirements of substantially equal quantities is not a mere formality to be observed or not, but a material provision, and the parties will be held to its observance, especially where the seller is a manufacturer and the articles are of various dimensions, which the manufacturer cannot know until the buyer specifies them.

3. Contracts  $\S$ 153—Every part should be given effect, where possible.

Every part of a written instrument should be given effect, so far as possible.

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$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 258 U. S. — 42 Sup. Ct. 461, 66 L. Ed. —.

**4. Sales ¶58—Written portions prevail over formal printed provisions.**

In a contract for the manufacture and sale of iron and steel bars, to be delivered in monthly installments on specifications to be furnished by the buyer, a written provision that, if the tonnages were not specified as called for, they should be automatically canceled, prevailed over recitals of a sale and purchase in the printed portions of the contract, if inconsistent therewith.

**5. Sales ¶58—Terms "buy" and "sell" not given ordinary signification, when contract shows subject of contract was to be manufactured.**

The employment in a contract of the terms "buy" and "sell" expresses a conclusion which must be controlled by the particular things called for, and if, notwithstanding such terms, it appears that the parties were dealing with reference to something which had no existence, and could therefore not be the subject of a present sale, but had first to be manufactured after the buyer made timely requisition therefor, such terms cannot be given their significance, as applied to things existent and capable of immediate sale and delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Buy; Sell.]

**6. Sales ¶91—Provision of contract for automatic cancellation of tonnages not specified as required held not mere option for protection of seller.**

In a contract for the manufacture and sale of iron and steel bars, to be delivered in monthly installments on specifications to be furnished by the buyer, a provision that, if the tonnages were not specified as called for therein, they should be automatically canceled, was not a mere provision for the protection of the seller, to be exercised by it or not at its option, especially where another part of the contract provided for cancellation by the seller at its option in case of delay in payment,

**7. Sales ¶50—Failure to assert invalidity as reason for not filling orders held not to waive right to set up invalidity.**

Under contracts for the sale of iron and steel bars for delivery in monthly installments on specifications to be furnished, and providing that, if the tonnages were not specified as called for therein, they should be automatically canceled, the seller did not waive its right to set up the invalidity of the contracts because of the provision for automatic cancellation, by disputing the buyer's right under the contract to specify greater widths than six inches, instead of asserting the invalidity of the contract, or by offering to supply the entire tonnage ordered in lesser widths; it having previously called attention to the provision for automatic cancellation.

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by the Northwestern Bridge & Iron Company against the Interstate Iron & Steel Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

The action was for damages for breach of two written contracts to manufacture and deliver iron and steel. Judgment for \$35,259.37 went against plaintiff in error.

Northwestern Bridge & Iron Company, of Milwaukee, defendant in error, was a fabricator and erector of structural iron and steel, and plaintiff in error, Interstate Iron & Steel Company, was a manufacturer of iron and steel, with rolling mills at Marion, Ohio, East Chicago, Ind., and South Chicago, Ill. Under date of March 16, 1917, they entered into two agreements, one respecting iron bars and the other steel bars. Both agreements were on the

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

regular printed sales contract form of the Steel Company. The iron bars contract, so far as here material, is as follows:

*"Sales Contract in Duplicate."*<sup>1</sup>

**"Quality and Description of Goods.**—Interstate Iron & Steel Company, a corporation of the state of Illinois, hereby sells, and *Northwestern Bridge & Iron Company, of Milwaukee, Wis.*, hereby buys, the following described goods (which will be used by the buyer in their business), subject only to the conditions herein expressed, viz: *Two hundred (200) tons iron bars*, all of such sizes and sections as are regularly made by seller at its *East Chicago, Ind.*, works.

**"Specifications.**—Specifications to fulfill this contract shall be given at least thirty days before shipments are to be made, unless otherwise agreed upon. Final specifications to complete contract to be given at least thirty days before expiration of same.

**"Terms of Shipment.**—Shipments shall be made in installments of about equal quantities monthly, between *March 20, 1917*, and *December 31, 1917*, at the rate of about equal tons per month as near as practicable.

**"Prices.**—*\$3.10 base per 100# half extras. Refined iron bars 15c per 100# extra. It is understood that if the tonnages are not specified as called for in this contract they shall be automatically canceled.*

**"Exceptions.**—Each month's shipments to be treated as a separate and independent contract, but if buyer fails to fulfill terms of payment under this or other contracts, seller may defer further shipments until payment is made, or may cancel this contract at his option. \* \* \* This contract becomes binding only when signed or approved by the president or vice president of the Interstate Iron & Steel Company, at Chicago, Illinois.

**"Remarks.**—The specifications on this contract are irrevocable and are not subject to cancellation, suspension of shipment, or to any change in price due to market conditions."

The steel bars contract is in all respects the same, except that in place of iron bars it states "*200 tons steel bars—such sizes as we can roll from our stock of billets.*" The Bridge Company made no specifications whatever until June 29, on which date it specified 43½ tons of steel and 31 tons iron; July 26, 98 tons iron; August 23, 22 tons iron and 22 tons steel; September 5, 130 tons iron and 135 tons steel; total iron 200½ tons, and steel 201 tons. On the first steel order there were shipped, August 6, 29½ tons, and October 11, 16 tons, and on August 6, 4¼ tons of the iron order of July 26. No further shipments were made. The specifications were all of widths more than 6 inches, except such as were shipped, which were 6 inches or less.

On receipt of the first iron order, which was all for over 6 inches, Steel Company wrote (July 2), declining to fill order for such widths, stating such were not bars, but plates, and therefore not within the agreements. Bridge Company wrote July 5 stating that Steel Company's agents who solicited the order told buyer it might specify any material enumerated on page 15 of seller's handbook, whereon such greater widths appeared. Seller (after further exchange of letters) replied July 31, saying handbook was no part of contract, that they were not rolling these wider sizes, that the agreements provided for automatic cancellation of specifications not made as provided in the agreements, and that they could not hold the buyer for failure to specify, and refusing to supply widths of over 6 inches. Upon further specifications of widths greater than 6 inches, seller referred buyer to its letter of July 31.

Jacob Newman, Edward R. Johnston, Conrad H. Poppenhusen, and Henry L. Stern, all of Chicago, Ill., and Joseph V. Quarles, of Milwaukee, Wis. (Henry J. Darby, of Chicago, Ill., of counsel, for plaintiff in error.

Lawrence A. Olwell and Bernard V. Brady, both of Milwaukee, Wis., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

<sup>1</sup> Italics indicate typewritten parts of the instrument.

ALSCHULER, Circuit Judge (after stating the facts as above).  
[1] The judgment is assailed upon various grounds, but the one which goes to the root of action is the contention that the contracts are not enforceable because of the clause:

"It is understood that if the tonnages are not specified as called for in this contract they shall be automatically canceled."

Plaintiff in error insists that this left it entirely optional with defendant in error to take or not to take any or all of the tonnage, and, no consideration appearing for the agreements to sell, neither party became obligated by the contracts. Contracts with provisions more or less similar, but involving substantially the same principle, have been by this court in a number of cases held to be unenforceable. In *American Cotton Oil v. Kirk*, 68 Fed. 791, 15 C. C. A. 540, the memorandum of sale of 10,000 barrels of oil provided "deliveries to be made per week as Kirk & Co. (buyers) desire." Passing on the validity of this contract, the court said:

"Suppose Kirk & Co. had not desired and had not ordered any such quantities as would require 100 years to complete the delivery—is there any way open to the defendant to put plaintiffs in default? We think not, and that there is no mutuality of promises for the sale of a definite or ascertainable quantity of oil."

*Oakland Motor Car Co. v. Indiana Auto Co.*, 201 Fed. 499, 121 C. C. A. 319, dealt with an agreement for sale of automobiles, wherein it was provided that no order shall be binding unless accepted by the manufacturer at least 30 days prior to date of delivery, and for cancellation by either party for just cause. There was no question but that the provision for cancellation alone would have rendered the contract unenforceable. But it was contended that the qualification "for just cause" saved the contract from the operation of the rule. The court held that the addition of these words did not exempt the contract from the application of the rule requiring the mutuality of obligation as a necessary element of a binding contract for future sale and delivery. To like general effect are *Crane v. Crane & Co.*, 105 Fed. 869, 45 C. C. A. 96, *Velie Motor Car Co. v. Köpmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284, and *Tweedie Trading Co. v. Parlin & Orendorff Co.*, 204 Fed. 50, 122 C. C. A. 364, all decided by this court. See, also, *Pocatello v. Fidelity, etc., Co.*, 267 Fed. 181 (9 C. C. A.), and *Cold Blast, etc., Co. v. Kansas City, etc., Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

[2] A provision in a contract requiring a buyer to make periodical specifications of his requirements of substantially equal quantities is not a mere formality, to be at the will of the buyer observed or not. This is particularly true in a case where, as here, the seller is a manufacturer, and the articles to be made for the buyer are of various dimensions, which the manufacturer cannot know until the buyer specifies them: Such a provision in a manufacturing contract is material, and parties will be held to its observance. *Alwart Bros. Coal Co. v. Royal Colliery Co.*, 211 Fed. 313, 127 C. C. A. 599; *Id.*, 234 Fed. 20, 148 C. C. A. 36; *American Steel Foundries Co. v. Indian*

Refining Co., 275 Fed. 800, No. 2854, decided by this court April 26, 1921.

[3-5] But it is urged that, because in the formal part of the contracts there is recited a sale and purchase of the commodity, in order to give effect to this part of the contracts they should be held to be sales rather than only options to purchase. It is elementary that every part of a written instrument should be given effect so far as possible. But where there is irreconcilable difference between formal printed portions of an instrument and other parts of it which are written in, the latter will prevail. *Lipschitz v. Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228. If the effect of this special clause is to make it optional with the buyer whether he will take any of this tonnage, this is inconsistent with the recited sale and purchase, and the special clause would prevail. But, after all, the employment of the terms "buy" and "sell" express a conclusion which must be controlled by the particular things contracted for. If, notwithstanding the employment of these terms, the things actually agreed upon fall short of making a contract of purchase and sale, then no such contract is effected. When from the contract itself it appears that these parties were dealing with reference to something which had no existence, and could therefore not be the subject of a present sale, but that the subject-matter of the contract had first to be manufactured after the buyer made timely requisition therefor as in the contract provided, the terms "buy" and "sell" cannot in any event be given their significance as applied to things existent and capable of immediate sale and delivery.

[6] It is further urged that these contracts fall within the rule announced in *Western Union Tel. Co. v. Brown*, 253 U. S. 101, 40 Sup. Ct. 460, 64 L. Ed. 803, where it was decided that in a contract for purchase and sale of certain shares of mining stock, on which a payment was made, and the stock delivered to a bank for delivery to the purchaser on payment of the full purchase price, and which contained provision that, in case of default in the further payments, whatever had been paid should be forfeited, and the certificates of stock re-delivered, and the rights of the parties forever cease and terminate, this was not to be considered an option terminable at the will of the buyers by their declining to make the further payments, but that the sale was absolute, and that such provision was for the protection of the sellers, to be exercised by them at their option. In our view this case does not fall within that rule. It can scarcely be said that this special provision in the contracts here under consideration was for the protection of the seller only. The buyer may well have desired to protect himself against a situation wherein it would not for a time need the materials. If it had no orders or contracts for bridges and other structures, it might not know what kinds and sizes of materials to specify, and, if it specified in advance of its actual needs, it might have materials which it could not use. Indeed, this was upon both sides a manufacturing contract, the seller being obliged to manufacture the articles as and when specified, and the buyer specifying when its particular requirements were known.

This was evidently so regarded by the parties themselves, since,

under conditions prevailing for over three months after the contracts were executed, the buyer did not see fit to make any specifications whatever, notwithstanding the provision for substantially equal monthly tonnage during the contract period. It does not appear that during this period any communications passed between the parties. The buyer had every reason to believe that the special provision for automatic cancellation operated to cancel each month's tonnage, where no specification was given. As has been seen, it surely could not expect to wait until the end of the contract period, and then, if deemed advantageous, order out the entire 400 tons. Not only does the situation of the parties, as well as the subject-matter of the contracts, forbid the application of the rule in the Western Union Case, but also the nature of the clause itself. If in these contracts, as in that one, there were read in the words "at option of seller," we would have a provision that the tonnage called for should be automatically canceled at option of seller. The two expressions would be quite inconsistent with each other. If the term "automatically," which the parties saw fit to employ, is given any force, it precludes the exercise of an option on the part of anybody as a prerequisite, or any cause or condition, other than the one stated in the clause, viz. the failure to specify the tonnage as called for in the contracts. When, therefore, the parties chose to say that this condition shall automatically cancel such tonnage, they agreed that, upon the occurrence of the condition, the cancellation of such tonnage would be ipso facto effected. The fact that in another part of these same contracts there is provision for cancellation by seller "at his option" would tend further to indicate that the omission of the optional feature from the clause here in question was intentional, and not inadvertent.

[7] This brings us to the claim that there was waiver of the cancellation clause through the subsequent conduct of the parties, largely in that the seller did not in subsequent correspondence state that it would regard the omitted monthly specifications or the contracts themselves as canceled under the clause in question, and that it expressed willingness to supply the tonnage in the material of smaller widths than those which the buyer for most part demanded. Subsequent disputes and negotiations as to what the contracts were intended to cover would not give the contracts validity. If specifications presumably under the contracts are made, and the seller by words or by conduct accepts them, it might be bound thereby, even though of tonnage which under the terms of the contracts might have become canceled. This, however, would not be by reason of waiver of the cancellation, but the effecting of a new contract through the ordering of merchandise and acceptance of the order. It is true that, when the specifications for greater widths than 6 inches were given, the seller did not say, "you are entitled to no material at all, because the contracts are invalid," but it disputed the right of the buyer to specify greater widths than 6 inches.

This was not an acceptance of any of the specifications or orders, and the fact that it disputed the right to supply these widths, rather than to assert the invalidity of the contracts, did not waive or bar its

right thereafter to set up invalidity. Notwithstanding the invalidity, the seller might have been entirely willing to have supplied the full tonnage of the smaller widths. In its letter of July 31, which was long before the specification of the large bulk of the tonnage, it stated to buyer that the contracts provide for automatic cancellations, and its final letter of October 3, referring to the specification of September 5 for the 265 tons, was merely a proposal to supply the entire tonnage in the lesser widths, and it was stated that this was without prejudice to seller's legal rights, if the buyer did not within five days from that date approve the suggestion. This waived nothing, but was merely a proposal to enter into another agreement to supply at the contract prices tonnage which, had the agreements been valid, would at that time have been largely canceled. Even though subsequent transactions might give validity to such contracts, or effect a waiver by the seller of their invalidity, no facts which this record discloses would justify such conclusion here.

There appears here no such situation as was present where contracts seemingly somewhat similar have been upheld, such as contracts to supply a buyer's entire season's requirements, to take a manufacturer's entire output, to sell to the buyer alone all the seller may acquire of a particular article for a definite time. But the contracts here left the buyer with the unqualified right, and with entire impunity, to cancel the contracted tonnage from month to month until at the end of the time fixed none of it remained; both parties being free to buy or sell elsewhere as they saw fit.

These views make it unnecessary to consider the question whether under the contracts widths beyond 6 inches were contemplated, and whether there was error in the admission of seller's handbook, and of conversations of its alleged agents respecting the handbook, and the different dimensions of materials which might be specified under the contracts.

Concluding, as we do, that the contracts are unenforceable, the judgment is reversed, and the cause remanded for further proceedings in consonance herewith.

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### GASAWAY et al. v. BORDERLAND COAL CORPORATION.

(Circuit Court of Appeals, Seventh Circuit. December 15, 1921.)

No. 3059.

1. Appeal and error  $\S$  954(1)—Grant of interlocutory injunction not disturbed, in absence of improvident exercise of discretion.

Where bill seeking an injunction states a good cause of action, the Circuit Court of Appeals, on appeal from decree granting an interlocutory injunction, will not disturb the decree, unless it clearly discloses an improvident exercise of judicial discretion.

2. Appeal and error  $\S$  837(3)—Findings based on complaint conclusive on appeal from decree granting interlocutory injunction.

On appeal from decree granting an interlocutory injunction, the Circuit Court of Appeals accepts as conclusive the District Court's find-

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ings of fact based on the plaintiff's verified bill and affidavits, and ignores the issues of fact which may be tendered in the answer to be filed, and which are forecast to some degree in the affidavits filed on behalf of defendants.

3. Injunction  $\Leftrightarrow$ 152—Considerations in measuring justifiable scope of interlocutory decree stated.

In measuring the justifiable scope of interlocutory decree, the court will consider the nature and object of the bill, the property that requires protection, the interest of parties in that property, and will ascertain what decree is indispensable, in view of the respective rights of the parties in the suit, to afford complete protection.

4. Injunction  $\Leftrightarrow$ 1—Is an extraordinary remedy, limited to protection of property from unlawful invasion.

Injunction is an extraordinary remedy, and is limited to the protection of property from unlawful invasion.

5. Injunction  $\Leftrightarrow$ 135—Great care should be exercised in ascertaining necessity for preliminary injunction.

A preliminary injunction is necessarily so drastic in its nature that great care should be had in exercising the discretion.

6. Injunction  $\Leftrightarrow$ 157, 189—Should forbid only the particular unlawful invasions that would be committed, except for such restraint.

No injunction, preliminary or final, should forbid more than the particular unlawful invasions which the court finds would be committed, except for the restraint imposed.

7. Injunction  $\Leftrightarrow$ 157—Interlocutory decree erroneously applied to unnamed parties, on whose behalf plaintiff alleged to have filed bill.

In action by coal mine operator, who alleged that it filed its bill on behalf of itself and 62 other operators of closed nonunion mines in certain district, to enjoin operators of unionized mines in other district and miners' organization from destroying the property, disturbing the employees, and interfering with the business of the closed nonunion mine operators, in which plaintiff did not name the 62 other operators, and did not allege why it was impracticable to name or to enjoin such other operators, the court, in granting interlocutory injunction, should have made such decree applicable merely to the plaintiff, and not to such other unnamed operators.

8. Injunction  $\Leftrightarrow$ 136(3)—Interlocutory decree granted to restrain destruction of property, interference with employees, and threatened trespasses upon plaintiff's property rights.

In action by operator of nonunion coal mine, doing an interstate business, against operators of unionized mines in other district and mine workers' organization, where the bill and affidavits show such defendants, pursuant to conspiracy, to be engaged in destroying its property, interfering with and intimidating its officers, agents, and employees by armed forces, assaults, threats, and abusive language, and by intrusion on their privacy without invitation or consent, and in inducing plaintiff's employees secretly to change from nonunion to union men, and to remain in plaintiff's employment in violation of their contracts, the District Court will grant a preliminary injunction prohibiting such unlawful acts, and will restrain other specifically threatened trespasses on plaintiff's property rights, if any are shown.

9. Injunction  $\Leftrightarrow$ 101(1)—Employers and employees may bargain collectively for a closed nonunion shop, or for a closed union shop.

Unions of owners of capital may bargain collectively through their officers with laborers, either individually or collectively for a closed nonunion shop, and unions of laborers may bargain collectively through their officers with employers, either individually or collectively, for a closed union shop, and both are entitled to free and equal access to the

pool of unemployed labor, for the purpose of securing recruits by peaceable appeals to reason.

10. Injunction  $\S$  101(1)—Employers may persuade union men to become nonunion, and union laborers may persuade nonunion men to become union.

Employers may persuade a union man, provided they do not violate his right of privacy, nor invade the rights of another, to become nonunion, and union laborers may under the same conditions persuade a nonunion man to become union.

11. Injunction  $\S$  157—Restraining unionization of nonunion man held erroneous, in that it prohibited peaceful persuasion.

Preliminary injunction held erroneous, in that it deprived union laborers of the right to persuade nonunion employees of plaintiff to join the union, instead of limiting the prohibition of unionization or attempted unionization of plaintiff's men to the threatened direct and immediate interfering acts shown by the bill and affidavits.

12. Injunction  $\S$  157—Sending of money into mine district for unionization of miners should not be restrained, except in so far as money is used in protecting unlawful acts.

In action for injunction against operators of unionized mines and organization of union workers, alleged to be destroying plaintiff's property and interfering with its employees by threats, intimidation, etc., an interlocutory injunction restraining the sending of money into the district in which plaintiff's mine was located, to be used in unionizing workers therein, should have limited the prohibition to the use of the money in aiding or promoting the unlawful acts alleged.

13. Injunction  $\S$  157—Interlocutory decree held erroneous, in so far as it restrained performance of check-off contracts between operators of unionized mines and the organization of workers.

Interlocutory injunction held erroneous, in so far as it restrained the performance of check-off contracts between such operators of union mines and union organizations, whereby operators deducted fees of union workers and made payment direct to the organizations.

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Borderland Coal Corporation against Ora Gasaway, W. D. Van Horn, and others. From a decree granting a temporary injunction (275 Fed. 871), the named defendants appeal. Remanded, with directions.

William A. Glasgow, Jr., of Philadelphia, Pa., for appellants.

Z. T. Vinson, of Huntington, W. Va., and A. M. Belcher, of Charleston, W. Va., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. The general nature of the case is stated in the opinion filed by the District Judge:

"The bill avers and the proof shows a combination and working arrangement—a conspiracy—between the United Mine Workers of America and the coal operators in the so-called 'Central competitive field,' to destroy what some of the conspirators call the 'vicious competition' of the West Virginia mines.

"Almost all of the coal produced in West Virginia is shipped out of the state in interstate commerce, and the business of the plaintiff is shown to be interstate. It lifts its coal out of its mines in one state and places it upon cars

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for shipment in another. The evidence shows that the competition complained of, and sought to be destroyed, is competition in the sale of bituminous coal throughout the several states. A conspiracy to destroy such competition is in direct contravention of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830). Section 1 of that act provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

"The bituminous coal fields of the United States are already unionized, except a portion of West Virginia and a small section of the Southwestern part of the country, and an effort to unionize the West Virginia mines is part of an effort to monopolize all the coal industry in the United States until, as one of the conspirators says, the United Mine Workers' organization 'shall cover every coal-producing state in the republic.'"

"The method agreed upon and adopted by the conspirators to thus destroy competition was to organize or unionize the West Virginia field. These West Virginia operators desire to run their mines on a nonunion basis. The effort on the part of the defendants to unionize these mines, and thus compel the operators to unwillingly run upon the union basis, would result either in the suppression of this nonunion mining altogether, or would put such restrictions on it as to accomplish the objects of the conspiracy, namely, raise the price of the West Virginia product, so that it could not compete with the so-called 'Central competitive field.' The attempt to do this was continued for some time by the usual incidents of violence and exhibitions of force, and matters progressed until a state of war existed in West Virginia, which the state government was unable to put down, and upon the call of the state authorities the President of the United States declared martial law, sent federal troops into West Virginia, and restored order."

"The evidence shows that members of the Mine Workers' Union purchased firearms and ammunition and otherwise financed the violent activities in behalf of the unionizing forces in West Virginia, and this state of war continued until the President sent troops into the state, and it is only held in abeyance because of that fact."

"The evidence shows that the revenues of the Mine Workers' Union are produced from dues and assessments laid upon the members; that these fines and assessments are by an arrangement between the Miners' organization and the operators, taken from the wages of the workers in the mines by the operators and paid by them to the organization of Mine Workers. This is the 'check-off' system. The membership is large and the dues and assessments yield an enormous sum."

"Statements made by officers of the United Mine Workers show that the miners' organization has sent into West Virginia to carry on this struggle more than \$2,500,000, and the secretary-treasurer of that organization, in his report to the Convention recently held in this city, stated that during the year ending August 1, 1921, the organization had sent into West Virginia more than \$1,000,000. This money was derived from the 'check-off' system, and was sent to West Virginia to assist in the effort to organize the West Virginia field."

"The evidence without contradiction shows that ammunition and arms were purchased by members of the Mine Workers' Union and used for the purpose of carrying on this struggle. It is claimed on the part of the defendants that the money used to purchase these arms and this ammunition and to mobilize and direct these armies came from the locals, and that no part of the money sent from here was used for that purpose, but that such money was and is used only in such peaceable ways as caring for and feeding and furnishing supplies to those union miners who have been evicted from their homes or deprived of a living, or otherwise put to a disadvantage in carrying on this struggle."

"If this be true, it is quite apparent that there is no difference in the activities of those who furnish the food and supplies for the army and those who furnish it its arms and ammunition. The money sent by the miners' organization derived from the 'check-off' system, as above stated, is sent there to

aid, abet, and assist those on the ground, actively engaged in the unlawful attempt to unionize the nonunion mines in West Virginia and destroy competition, as above stated.

"The evidence clearly shows that the mine operators know—at least they know now—that this money thus contributed by them through the 'check-off' system is used in this unlawful manner. It therefore follows that the use of such money should be enjoined, and the carrying on of the 'check-off' system as a means for raising it should likewise be enjoined.

"At the conclusion of the evidence, counsel for the miners requested time to introduce some evidence explanatory of the large sums of money shown to have been sent by the organization into the West Virginia fields, and also asked for an extension of time for 30 days in which to file their answer to the bill. The court at once conceded that these requests were reasonable, and indicated its willingness to grant such extensions, and stated that, owing to the great importance of the questions involved, and considering that, if the relief prayed for in the bill were granted, it would have such far-reaching consequences, suggested that it would like all the light upon the subject that could be furnished by evidence, and time for investigation, and argument as to the principles of law involved, and stated that the time requested by the Mine Workers' counsel would be granted, upon condition that the status quo be preserved in the meantime. Mr. John L. Lewis, the president of the United Mine Workers of America, being in the courtroom at the time, was asked by the court if he would agree to preserve the status quo—that is, cease efforts to unionize these mines in West Virginia until the court would have time to more thoroughly investigate the matter—the court stating that it would be entirely satisfied with Mr. Lewis' assurance to that effect. Mr. Lewis promptly declined to agree to desist, thus creating the emergency for the issuing of a temporary injunction, and compelling the court to act without further opportunity to investigate the important questions involved.

"This court cannot police West Virginia, nor does it hold that the United Mine Workers' Union is itself an unlawful organization, nor will it in any way attempt to curtail its lawful activities; but it can enjoin the unlawful activities of the parties here in Indiana, who are here now under the jurisdiction of this court, and a temporary injunction to that effect will be issued."

And thereupon the District Court entered the following decree:

"The plaintiff, by counsel, offered in evidence and read to the court, certain affidavits numbered from 1 to 41, and 77 to 79, inclusive, which were filed and made a part of the record, and also asked that the bill of complaint be read as an affidavit, which was done, all in support of its motion for said temporary injunction; and the defendants also offered in evidence, in resisting said motion, certain affidavits, numbered 42 to 75, inclusive, which were read, filed, and made a part of the record.

"Thereupon the defendants, by counsel, moved the court to be allowed 30 days within which to file their answers, and the court stated that, in his opinion, the evidence in the case warranted the granting of a temporary injunction in accordance with the prayer of the bill of complaint and in accordance with the notice given, at least in part, but that the case is of such importance that the request for 30 days within which to file answers would be granted, and the question of granting said temporary injunction would not be passed upon until after the filing of said answers, and after further consideration, provided John L. Lewis, president of the United Mine Workers of America, who was present in court, would state in open court, or promise the court, that his said organization, the United Mine Workers of America, would cease all effort to organize the nonunion coal fields of Mingo county, W. Va., and Pike county, Ky., pending the consideration by the court of the question whether or not said temporary injunction should be awarded; the court further stating to said Lewis, and to counsel for the defendants, that if said Lewis declined to give the assurance suggested, notwithstanding the fact that counsel for the defendant members and officials of said United Mine Workers of America have asked for 30 days' time within which to file their answers, the court

would proceed at this time to award such temporary injunction as the evidence in the case warrants.

"Thereupon said John L. Lewis, president of the United Mine Workers of America, stated in open court that he declined to give the assurance suggested by the court that said United Mine Workers of America should cease all efforts to organize the nonunion coal fields of Mingo county, W. Va., and Pike county, Ky., during said time specified by the court.

"Thereupon the court, upon consideration of the bill of complaint, the affidavits read and filed on behalf of both the plaintiff and the defendants and the circumstances hereinbefore set out, doth adjudge, order, and decree that a temporary injunction, in accordance with the prayer of the bill of complaint filed herein, be and the same is hereby awarded as follows:

"That the defendants, P. H. Penna, J. H. Seifert, and W. J. Snyder, citizens and residents of the state of Indiana, Jackson Coal & Coke Company, Queen Coal & Mining Company, Rowland Power Consolidated Colliers Company, and Lower Vein Coal Company, corporations organized under the state of Indiana and citizens and residents of said state, individually and as representatives of the class of persons made defendants in the original and amended bill of complaint filed herein, be, and they are hereby, and each of them is hereby, enjoined and restrained from collecting over and through their pay rolls, or over and through the pay rolls of either of them, or in any other manner, any and all moneys as dues and assessments levied or charged by the said United Mine Workers of America, its officials or members, upon or against its members, employees of said individuals and of said defendant corporations, or who may hereafter be employed by them, or either of them, under the check-off provisions of the contracts in evidence herein, and heretofore executed by, or on behalf of, said named defendants and the officials or members of said United Mine Workers of America, or under any and all contract or contracts that may hereafter be executed between the said defendants and the officials or members of the said United Mine Workers of America, and from paying the same to the officials, members or representatives of said United Mine Workers of America.

"That the defendants Ora Gasaway and W. D. Van Horn, citizens and residents of the state of Indiana, individually and as members of the International Executive Board of said United Mine Workers of America, and their respective successors in office, and their committees, agents, servants, confederates, and associates, and all the other officials, representatives, members, agents, attorneys, and servants of said United Mine Workers of America and all persons who now are, or hereafter may be, members of said United Mine Workers of America, and all persons combining, confederating, or conspiring with the said designated persons, and all other persons whomsoever, and each and every one of them, be and they are hereby enjoined and restrained:

"From advising, assisting, encouraging, aiding, abetting, or in any way or manner, and by any and all means whatsoever by the use of any funds or moneys howsoever collected by the International Union, United Mine Workers of America, its officers, members, agents, or representatives, to the unionization or the attempted unionization of the nonunion mines in Mingo county, W. Va., and Pike county, Ky.: but this injunction and restraining order is not to be interpreted or understood to prevent the payment by Wm. Green, secretary-treasurer of the United Mine Workers of America, of sufficient funds to the members of said United Mine Workers of America, now living in tents, or out of employment, in Mingo county, W. Va., and Pike county, Ky., for their actual necessities, until the further order of this court, this exception, however, not to include any person or persons not bona fide miners and not now members of said United Mine Workers of America and their dependents."

This is an appeal from an interlocutory decree of injunction. The controversy has its roots in the alleged conspiracy of mine operators in the Central competitive field (Western Pennsylvania, Ohio, Indiana, and Illinois) with their miners, members of the United Mine Workers of America, a voluntary unincorporated labor union, to coerce the mine

operators of the Williamson district (Mingo county, W. Va., and Pike county, Ky.), who are conducting closed nonunion mines, into unionizing their mines, to the injury of their rights in interstate commerce, secured to them by the Constitution and laws of the United States.

Appellee's bill named as defendants the United Mine Workers of America, the president, vice president, and secretary-treasurer thereof, numerous individuals described as members of the executive board, 24 district local unions of the United Mine Workers, and numerous individual and corporate mine operators. On motion the District Court dismissed the bill as to the United Mine Workers, the district locals, and all the individuals described as officers of the United Mine Workers, except appellants Gasaway and Van Horn, who are citizens and residents of Indiana, and who alone were within the jurisdiction of the District Court of Indiana.

This appeal is prosecuted by Gasaway and Van Horn. Inasmuch as the mine operators, defendants below, are not parties to this appeal, the decree is not reviewable as to them, except so far as it may affect the rights of these appellants.

[1] Because the bill states a good cause of action, and because the decree is merely interlocutory, nothing is now involved but the question whether the decree clearly discloses an improvident exercise of judicial discretion.

[2] In examining that question, we accept as conclusive the District Court's findings of fact based on appellee's verified bill and affidavits. and we ignore the issues of fact which may be tendered in the answer hereafter to be filed, and which are now forecast to some degree in the affidavits filed on behalf of appellants.

Respecting the facts a contention is made that appellee's showing did not warrant a finding that the armed insurrection and other unlawful doings in the Williamson district were advised or aided by appellants. We find no direct evidence to that effect; but the evidence of the continuing conspiracy, of the continuous efforts of the executive officers of the United Mine Workers to accomplish the object of the conspiracy, of the employment of similar violent and terrorizing means in the Panhandle and other districts of West Virginia, and of appellants' continuance as executive officers, justified the inference that the unlawful acts in West Virginia met their approval, and therefore, further inferentially, were supported by their advice and assistance. If, when on final hearing all the evidence is presented orally and tested by cross-examination, it shall appear that the wrongdoers in West Virginia were not the agents and representatives of appellants, the complaint will of course be dismissed as to them. *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286.

[3] In order to measure the justifiable scope of this interlocutory decree, it is necessary to have in mind the nature and object of the bill, the property that requires protection, the interest of parties in that property, and what decree is indispensable, in view of the respective rights of the opponents in this suit, to afford complete protection.

[4-6] Injunction is an extraordinary remedy. It is limited to the protection of property from unlawful invasion. Execution in advance of a full hearing and final determination of the issues is a drastic meas-

ure, which may deprive defendants of rights confirmed in them by the final decree. Because the preliminary injunction is necessarily so drastic in its nature, great care should be had in exercising the discretion. What we have already said with respect to the facts indicates our approval of the granting of a preliminary injunction herein of whatever scope is necessary to protect the property before the court. But no injunction, preliminary or final, should forbid more than the particular unlawful invasions which the court finds would be committed except for the restraint imposed. *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

[7] Appellee's property, which was being injured by appellants' trespasses (which, unless enjoined, would be continued), was its business of mining coal and shipping it in interstate commerce. But appellee alleged that it filed its bill on behalf of itself and 62 other operators of closed nonunion mines in the Williamson district. They did not appear as co-complainants. They were not named in the bill. Neither by names of the companies nor by description of their properties (as apparently required by section 20 of the Clayton Act [Comp. St. § 1243d]) were the mines identified which appellants and their agents and representatives in the Williamson district were to let alone. There was no allegation nor affidavit that there were only 63 operators of mines or 63 operators of closed nonunion mines in the district. Affidavits seem to indicate, but somewhat ambiguously, that there were 80 to 90 operators of closed nonunion mines in the district. Appellee averred that it was "impracticable" to name or to join the other operators of closed nonunion mines in the district. Neither averment nor proof tells why the pleader thought it impracticable. If we were to dispose of the matter on judicial notice of other proceedings in equity, we should say that it was not impracticable for appellee to identify the operators of closed nonunion mines in Mingo county, W. Va., and in the adjoining fringe of Pike county, Ky., and to ascertain whether trespasses upon their properties had also been committed by appellants and others, and whether they desired to join in the suit. At all events, the only identified property now before the court is appellee's. We cannot pass in advance upon the right of absent and unidentified operators to join or to be counted as co-complainants; but it may not be inappropriate to say that we are not informed of any departure of the Supreme Court from the limitation upon joinder stated in *Scott v. Donald*, 165 U. S. 107, 116, 17 Sup. Ct. 262, 265, 41 L. Ed. 648:

"The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit."

At this point, on account of the scope of the restraint put upon appellants, it may be well to emphasize what this case is not. It is not an indictment to punish conspirators for their crimes. It is not a bill in the public interest by the government, as *parens patriæ*, to enjoin or dissolve an unlawful conspiracy or combination in restraint of trade. It is not a private bill of the kind where the injury to the complainant's

property was so indirect, as when caused by a secondary boycott in violation of the Sherman Act, that an injunction could not be maintained until specifically authorized by the Clayton Act. *Paine Lumber Co. v. Neal*, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256; *Duplex Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349. Inasmuch as appellee's bill is the oldtime and familiar one to protect property from injury through continuing direct trespasses thereon, proof of the iniquitous conspiracy between the United Mine Workers and the operators of the Central competitive field was useful only in showing that the illegal acts of the tort-feasors in the Williamson district would be continued, unless restrained, and that appellants in Indiana were parties to the threatened invasions. For it was not the conspiracy that was inflicting the damage to appellee's property.

[8] Bill and affidavits show the following trespasses upon appellee's property rights in interstate commerce: Destruction of appellee's property used in operating its mine; interference with and intimidation of appellee's officers, agents, and employees, by armed forces, by assaults, by threatening and abusive language, and by intrusions upon their privacy without invitation or consent; inducing appellee's employees secretly to change from nonunion to union men, and to remain in appellee's employment in violation of their contracts, the terms of which were known to the trespassers; and in using money, sent into West Virginia by the United Mine Workers' general or executive officers, to aid in the commission of the foregoing trespasses. All these unlawful acts (none of which was specified in the decree) should be enjoined by the preliminary injunction, with leave to the District Court to restrain other specifically threatened trespasses upon appellee's property rights, if any is shown.

But appellee was not satisfied with such a decree. It asked that the United Mine Workers be dissolved or enjoined from functioning, on the ground that it is a seditious and otherwise unlawful organization. The District Court declined to find that the union is an unlawful body. But, as we have already indicated, appellee must stand solely on its own private rights; appellee is not the guardian of others; appellee is not the vindicator of the public's rights, criminal or civil; and it was not the conspiracy, but the trespasses of joint tort-feasors, who are liable independently of the conspiracy as a ground of action, that inflicted the injury upon appellee's property.

[9-11] Appellee sought and obtained a decree restraining "the unionization or attempted unionization of the nonunion mines" in the Williamson district. Appellants, and their agents and representatives in West Virginia, are thus enjoined from publishing lawful union arguments and making lawful union speeches in the closed district; from making lawful appeals to those in the pool of unemployed labor to join the union rather than the nonunion ranks; and from using lawful persuasion to induce any one of appellee's employes to join the union and thereupon instantly and openly to sever his relationship with appellee, not in violation of, but in exact accordance with, his contract with appellee. Manifestly the purpose of such publications, public speeches, and personal persuasions would be to enlarge the membership of the union. If completely successful, these means would compel appellee,

if it staid in business, to deal with the union, and thus "unionize" its mine, and use of these means, short of complete success, would be an "attempted unionization." This broad sweep of restraint makes it necessary to refer briefly to the rights of employers and of labor unions. Unions of owners of capital may bargain collectively, through their officers, with laborers either individually or collectively. Unions of laborers may bargain collectively, through their officers, with employers either individually or collectively. Employers may bargain for a closed nonunion shop. Laborers may bargain for a closed union shop. Both are entitled to free and equal access to the pool of unemployed labor, for the purpose of securing recruits by peaceable appeals to reason. Employers may persuade a union man, provided they do not violate his right of privacy nor invade the rights of another, to become nonunion. Union laborers may under the same conditions persuade a nonunion man to become union. If the arguments of the owners of closed nonunion shops should be universally accepted, labor unions would have no ground of complaint, either legal or equitable, for their decline and fall. If the arguments of the advocates of the closed union shop should prevail, then similarly their opponents would have no legal or equitable cause of action. In either case the outcome would be due to the exercise of reason and free will. In this, as in every other instance of antinomy, of conflicting interests and mutually restricting rights, the rule of conduct is that each side shall so exercise its rights as not to injure the rights of the other. *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C. 497, Ann. Cas. 1918B, 461; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. Ed. — (Dec. 5, 1921); *Respective Rights of Capital and Labor in Strikes*, 5 Illinois Law Review, 453. In the present state of the law, and without a constitutional exercise of the legislative power of regulation, appellee had no greater right to a decree suppressing lawful action (such as the publications, speeches and personal persuasions heretofore mentioned in this paragraph) in support of the closed union shop program than appellants had to a similar decree suppressing similar lawful action in support of the closed nonunion shop program. Neither side had any such right.

Appellee sought and obtained a decree enjoining the performance of existing contracts between the operators and their union employees in the Central competitive field with respect to what is called the check-off provision. So far as the contracts themselves and this record disclose, the check-off is the voluntary assignment by the employee of so much of his wages as may be necessary to meet his union dues, and his direction to his employer to pay the amount to the treasurer of his union. In that aspect the contract provision is legal, and quite evidently there are many lawful purposes for which dues may be used. If in truth the bargaining with respect to the contract was not free: if either the employee or the employer put the other under duress, the injured party might have cause to seek cancellation. (But if he had nothing to urge in the way of duress, except "economic necessity," he might not succeed.) If in bargaining one of the parties was not free, by reason of the greatly preponderant power of the other, the Legisla-

tures of these central states and the Congress might consider whether public interest required or justified the limitation of the otherwise existent freedom of contract by abolishing the check-off as a subject-matter of contract, in similitude to the legislative abolition of truck stores, dangerous appliances, unsanitary working places, exhausting hours, etc., as permissible subject-matters of contract. But appellee is not a party to the contract, is not the attorney of either contracting party, and is not the agency to establish the public welfare.

If nothing else should prevent appellee's being given that part of the decree now under consideration, the lack of injury to appellee by the existence of the check-off contracts would suffice. The injury to appellee's property rights in interstate commerce, of which appellee was apprehensive, was that it would be coerced into paying the high costs of production prevalent in the Central competitive field, and thus be unable to meet, or at least to meet so profitably, the existent competition in interstate commerce. As long as appellee is assured, as it now is, that it will have full protection in operating its closed nonunion mine and in marketing its coal in interstate commerce without interference, appellee should rather pray that all the elements causing high cost of production in the Central competitive field should be maintained.

[12, 13] But appellee insists that it is entitled to have the performance of the existent check-off contracts enjoined, because the check-off is the "heart" of the United Mine Workers' organization. Appellee is confusing a series of remote causations with the proximate cause of the injury. The only property that was injured was appellee's freedom in operating its mine and in putting its coal onto cars in West Virginia to be shipped in interstate commerce. The proximate cause of the injury was the described interferences in the Williamson district with appellee's aforesaid right to freedom. Without the direct and immediate interfering acts, the desires and intents of the conspirators in the Central competitive field would have been innocuous. In the series of causations the check-off provision was undoubtedly one of the elements. Manifestly unless money was collected, the union's executive officers could not send it into West Virginia to aid or promote the interfering acts. But in the same contracts that contain the check-off feature were provisions for the payment of wages and the recognition of the miners as human beings with the physical capacity to labor. On a parity with appellee's contention respecting the check-off element, all the other elements in the series of causation leading up to the proximate cause should also be enjoined. Money could not be sent into West Virginia by the executive officers, unless it was collected from the miners' wages; nor unless the miners earned wages; nor unless the miners were human beings having the capacity to labor.

From the record as it now stands we are convinced that the District Court committed substantial errors in exercising its judicial discretion in the following particulars: (1) In not confining the grant of relief to appellee; (2) in not limiting the prohibition of the unionization or attempted unionization of appellee's mine to the threatened direct and immediate interfering acts shown by the bill and affidavits; (3) in not limiting the prohibition of the sending of money into West Virginia to the use thereof in aiding or promoting the interfering acts; and (4)

in enjoining the performance of the existent check-off contracts in the Central competitive field.

The decree should be recast, and for that purpose the cause is remanded, with the direction to the District Court to enter a preliminary injunction decree which shall be in consonance with this opinion.

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**BENCH CANAL DRAINAGE DIST. V. MARYLAND CASUALTY CO.**

(Circuit Court of Appeals, Eighth Circuit. December 14, 1921.)

No. 5862.

1. **Principal and surety** ⇐59—That surety is compensated cannot affect his liability.

The liability of a surety is measured by his contract, which cannot be given one construction where the surety is compensated, and a different construction where he is not.

2. **Principal and surety** ⇐100(3), 117—Material alteration of plans of work after contract and excess payments held to release contractor's surety.

The surety on the bond of a contractor for construction of irrigation canals and ditches, which made the plans and specifications a part of the contract and provided that they should not be changed to exceed 10 per cent. without the consent of the surety, held not liable for failure of the contractor to complete the work, where he was required after the work commenced to excavate an additional two feet throughout the system at a cost approximately double the cost of excavating nearer the surface, and the contract price would probably have paid for the work, if done in accordance with the original plan and specifications, and where also the percentage required by the contract and bond to be withheld from payments on partial estimates was not withheld.

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action at law by the Bench Canal Drainage District against the Maryland Casualty Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. C. Brome, of Basin, Wyo. (Thomas M. Hyde and R. B. West, both of Basin, Wyo., on the brief), for plaintiff in error.

William C. Kinkead, of Cheyenne, Wyo. (George F. Cushwa, of Baltimore, Md., and Kinkead, Ellery & Henderson, of Cheyenne, Wyo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. This was a suit by plaintiff in error against the Maryland Casualty Company as surety on a bond executed by the company, to insure the performance on the part of the contractor of a certain contract entered into between the drainage district and one William P. Bullock for the construction by him of certain ditches or drains. The bond recites that a written contract dated June 16, 1916, was entered into between the contractor and the drainage district. A copy of the contract is attached to the bond and made a part of it,

as if recited at length in the bond. The complaint alleged that Bullock, the contractor, had failed to complete the work stipulated for in his contract. The condition of the bond is:

"That, if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, then this obligation shall be void; otherwise, to remain in full force and effect."

Then follows this provision:

"Provided, however, that this bond is executed upon the following express conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon, anything in the contract to the contrary notwithstanding."

The conditions are five in number. The first relates to the right of the surety in the event of default upon the part of the principal to proceed with the performance of the contract. The second relates to the time within which suit shall be brought upon the bond. The third provides that the surety shall not be liable for damages resulting from strikes or from any act of God causing delay. The fourth condition is as follows:

"That the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed, and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than 10 per centum of such value) until the complete performance by the principal's part to be performed, and until the expiration of the time within which liens or notice of liens may be filed, and until the discharge of such liens, if any; and the obligee shall at all times observe and conform to the laws relating to liens of the state wherein said contract is to be performed. That the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and specifications which shall increase the amount to be paid the principal more than 10 per centum of the penalty of this instrument, without the written consent of the surety."

The fifth condition is as follows:

"That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named, and that the obligation of the surety is and shall be construed strictly, as one of suretyship only, shall be executed by the principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent in writing of the surety over the signature of its president, or one of its vice presidents, attested by its secretary, or one of its assistant secretaries."

The answer sets up five defenses as follows:

(1) "That the contract referred to in said bond was, by plaintiff and said Bullock, and without the knowledge or consent of defendant, materially and substantially altered in its terms and substance, and thereby abrogated, and said bond and the defendant as surety thereon were thereby released and discharged."

(2) "That it is expressly provided in said bond, as an express condition thereof, the performance of which, is also by the terms thereof, made a condition precedent to any right of action on said bond, anything in the con-

tract secured to the contrary notwithstanding, that in the event of any default on the part of the principal a written statement of the particular facts showing such default, and the date thereof, shall be delivered to the surety by registered mail, at its office in the city of Baltimore, Maryland, promptly, and in any event within 10 days after the obligee or its representative, or the architect, if any, shall learn of said default, and defendant further states that it is also provided in said bond that the obligation of said surety is and shall be construed strictly as one of suretyship only, and the defendant now states that plaintiff violated said condition in that it failed, refused, and neglected to so notify the defendant of the default of said Bullock within ten days after discovery of said default by said plaintiff and its representatives, or at any time, or in any manner or form for many days in excess of said 10-day period subsequent to the default of said Bullock; that by reason of the violation of said condition aforesaid this defendant was released from liability thereon and no action can be maintained thereon as against this defendant."

(3) "That besides providing particularly that the obligation of the surety named in said bond shall be construed strictly as one of suretyship only, said bond provides by its terms that the said plaintiff, obligee named herein, shall faithfully perform all the terms, covenants and conditions of said contract on the part of the obligee to be performed, and that said plaintiff shall and will retain that portion, if any, which said contract specifically provides shall or may be retained by it, of the value of all work performed or material furnished in the performance of said contract, and in any event not less than 10 per cent. of such value, until the complete performance by Bullock as principal of all the terms, covenants, and conditions of said contract on said principal's part to be performed; that by the terms of said bond it is likewise expressly provided that the retention of said 10 per cent. aforesaid is one of the express conditions thereof to liability on the part of said defendant, and a condition precedent to the right of plaintiff to maintain an action on said bond.

"In the contract, Exhibit A aforesaid, which is attached to and made a part of plaintiff's petition, it is also provided that, during the progress of the work therein provided for, monthly estimates should be made of the work done and material furnished on the ground by said Bullock, and accepted by the district, and that 10 per cent. of the contract price thereof, based upon said estimates aforesaid, should be reserved by the plaintiff, and not paid to said Bullock until 30 days after the completion and acceptance of the work under said contract by said commissioners and their engineer, and the defendant states that the plaintiff violated the condition of said contract, in that said plaintiff failed, refused, and neglected to reserve or withhold from said Bullock 10 per cent. of the value of said work as it progressed, or 10 per cent. of the aggregate value of said work; but, on the other hand, and contrary to the express terms and conditions of said bond and contract aforesaid, the plaintiff not only failed to reserve said percentage of said work, but it paid to said Bullock from time to time on said contract more than was due him for work performed and material furnished, without regard to, and without any monthly estimates having been made, and this the plaintiff did knowingly and wittingly and in total disregard of the conditions of said bond and contract, and plaintiff states that by reason of said violation of the express provision of said bond, the performance of which is made a condition precedent to the right to institute an action thereon, this defendant and said bond were released and discharged, and no action can be maintained thereon."

(4) "That it is also expressly provided in said bond as an express condition to liability thereunder, the performance of which is thereby made a condition precedent to any right of recovery thereon, anything in the contract secured to the contrary notwithstanding, that the plans and specifications mentioned in said contract, and the plans and specifications for the performance of which work by Bullock are referred to in and made a part of said contract, are not in any respect defective, and are, and at all times will be kept, adequate for the complete performance of such contract, and no change shall be made in said plans and specifications which shall increase the amount to be paid the principal more than 10 per cent. of the penalty of said bond, without

the written consent of the defendant, and the defendant states that defendant [plaintiff] violated said condition knowingly and wittingly and without the consent of said defendant, in that said plans and specifications aforesaid, were in many respects grossly defective, and insufficient for the purpose for which they were made; that said plans were indefinite, uncertain, and misleading to contractors and especially to said Bullock, and, under those circumstances, it was claimed and contended by the plaintiff and the engineer in charge of the work, that said Bullock was required to dig said drainage ditch a foot lower than was shown on the plans and specifications aforesaid, he was not required to dig said drainage ditch said extra foot in depth, said district and the commissioners thereof persisted and were successful in compelling the said Bullock to construct said drainage ditch said extra foot in depth; that said contrary contentions resulted from the defective, uncertain, and indefinite condition of said plans and specifications, and because of the uncertainty thereof; that this defendant had no knowledge of the defective condition of said plans and specifications at the time said bond was signed by it, nor did it learn of the defective condition of said plans and specifications until long after it was claimed by plaintiff that the said Bullock had made default in the performance of the conditions of his construction contract and defendant further states that said plans were not at the time said contract was entered into by said Bullock, nor have they ever been since that time, kept adequate or suitable for the performance of said contract."

(5) "That in the progress of said work the plaintiff and the said Bullock by mutual consent wholly disregarded the terms and conditions of said contract and plans and specifications under which said work was to be performed; that material and substantial parts and portions of the ditch, which was required to be constructed under said contract, were abandoned by mutual consent, and by the mutual obligations of plaintiff and the said Bullock other ditches of substantial length, and of a length greatly in excess of the length of said abandoned ditches, and which said other ditches were not specified in said contract or the plans and specifications made a part thereof, were agreed to be constructed and were constructed by the said Bullock by mutual consent of himself and plaintiff, and instead of said abandoned ditches, all of which was without the knowledge or consent of this defendant."

At the conclusion of plaintiff's testimony the defendant moved the court to direct the jury to return a verdict for the defendant. This motion was denied. Defendant then introduced its testimony, and at the conclusion of all the testimony defendant renewed its motion for a directed verdict. This motion was by the court sustained.

Five assignments of error are relied upon for a reversal. The first four relate to the action of the court in directing the jury to return a verdict for defendant. They are discussed together in the brief. The fifth assignment relates to the action of the court in excluding certain testimony. Counsel for plaintiff in error contend that there was testimony sufficient to go to the jury. That requires an investigation of the testimony.

The plans, specifications, and profiles for the drainage system and ditches were made in 1912. The contract was let to W. P. Bullock on June 17, 1916. The contract bears that date, but it did not become effective until the bond was executed and accepted by the drainage district. The bond bears date of July 20, 1916. It was not accepted by the commissioners of the drainage district until in August or September following. It is stated in the bond that the contract is made a part of the bond "as fully as if recited at length" therein. The nineteenth paragraph of the contract contains the following provision:

"It is understood and agreed that there are no written or verbal agreements outside of this contract."

The engineers who drew the plans, specifications, and profiles did not superintend the work. Mr. G. W. Zorn was the engineer for the drainage district at the time of the letting of the contract, the execution thereof, and the acceptance of the bond. It is admitted by the drainage district that the ditch was required to be dug one foot deeper than was contemplated by the original plans, specifications, and profiles. It is contended by the casualty company that as a matter of fact the ditch was dug at least two feet deeper than originally intended. The first controversy arises with reference to what the profiles showed at the time of the letting of the contract. There is a conflict of testimony on that point. Therefore the testimony on behalf of the plaintiff must be examined. This examination must be made in the light of the stipulation in the bond:

"That the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and specifications which shall increase the amount to be paid the principal more than 10 per centum of the penalty of this instrument without the written consent of the surety."

On direct examination Mr. Zorn, the engineer, testified for the plaintiff as follows:

"These are correct blueprints of the profiles which were submitted to the bidders including Mr. Bullock, prior to the submission of the bids on June 16, 1916. I had a discussion with Mr. Bullock and the other bidders prior to the time they submitted their bids there, with respect to the depth these drains were to be dug. I explained to the bidders that I deemed the—

"Mr. Kinhead: We object to that as incompetent, irrelevant, and immaterial, and an attempt to explain or vary by oral explanation the profile as shown here in evidence and the depth of the ditches as shown by these profiles.

"Overruled. Exception by defendant.

"I explained to the bidders that I deemed the drains of insufficient depth as originally planned and in order to make a change, or to present the plans as I wanted it, I changed the elevations of the grade points of the profiles on the maps or on the profiles. These changes are shown on the profiles as they were changed prior to the letting of this contract.

"By Mr. Brome: Q. What effect did the change that you had made on the profiles, prior to the letting of the contract, have on the depth of the ditches? What I mean is, did they require them to be dug deeper?

"Mr. Kinhead: That is objected to as leading and suggestive as against the bonding company.

"Overruled. Exception by the defendant.

"A. The change I made—that is the established plan of these profiles to submit to the bidders—

"Q. What I want to know is whether the profile before you changed it, and the profile after you changed it, had any effect in the amount of work to be done?

"Mr. Kinhead: We make the same objection.

"Overruled. Exception by defendant.

"A. It made a difference; yes.

"Q. What difference? A. It was a foot deeper than the original profiles were designated.

"Q. You may state whether or not the question of how much the change in elevation sent the ditches deeper into the ground was discussed with Mr. Bullock and other contractors before they bid? A. It was."

From this testimony it appears that the engineer undertook to provide for an increased depth of one foot by changing "the elevations of the grade points of the profiles on the maps or on the profiles." On cross-examination Mr. Zorn testified as follows:

"Q. Now, Mr. Zorn, you say that the altitude has been changed, so as to lower this ditch on these profiles one foot; that is, the height above mean low tide? A. I will say that the distance from the surface line, as shown there, was changed one foot lower than was originally planned on the profile; yes, sir.

"Q. I notice on these exhibits here, from 7 to 13, inclusive, that certain figures below the proposed ditch have been changed, and other figures substituted. What did those figures, before they were scratched out, represent? A. They represented the grade points, and elevation of grade points, at those different stations before the profile was changed.

"Q. What was the basis for those figures? Where did you measure from? A. From sea level datum as used there.

"Q. Will you please state what those three practically horizontal lines on these profiles represent? A. The upper line represents the surface of the ground, and the next line represents the gravel line, and of course it does not in all cases—sometimes it is gravel, and it is sand sometimes, and sometimes there are other lines in there, which indicate there was water on the surface, or where they struck water. The lower line does not represent anything on that profile.

"Q. It does not represent anything, then, in any of the plats and profiles that were submitted to the bidders; is that right? A. What I mean there by that is that the grade points or governing points for that profile, for grade of the tile, is not the line as shown on the profile.

"Q. Then these profiles did not mean what they said; is that what you mean to be understood as saying? A. No, sir; I don't mean that at all.

"Q. Well, now, these profiles were on regular blueprint paper, divided into spaces laterally, of 5 feet weren't they? A. Yes, sir.

"Q. And horizontally of one foot? A. Laterally the scale those are drawn on is 50 feet. These vertical lines are 50 feet apart, as represented on that profile. The horizontal lines are one foot apart.

"Q. The heavy lines are 50 feet apart? A. Yes, sir.

"Q. The lighter lines, running up and down, are 5 feet apart? A. No; they are five stations; that is, 500 feet.

"Q. How many feet between here and there? A. 50 feet. \* \* \*

"Q. Are those exact copies of plats and profiles that were furnished to these bidders on this system as it was then proposed? A. I think they are; I don't see any difference.

"Q. And these have no alterations on them, have they? A. I didn't notice any.

"Q. Or any erasures that were not there at the time the contractors bid? A. No, sir; I don't think so. \* \* \*

"Q. Now, then, Mr. Zorn, the paper on which this profile was drawn is so divided as to show the number of feet, particularly between two points? A. Yes, sir.

"Q. And to look at these plans, these profiles, you could immediately, by counting the lines between the line representing the level of the ground, and the line representing the bottom of the ditch, determine the depth of that ditch? A. Approximately you could; yes, sir.

"Q. Now, as a matter of fact, lowering of the altitude there would not lower the bottom of that ditch, any more than it would lower the sand level or the surface line, would it? A. I don't know as I understand your question exactly.

"Q. (Question read.) A. It would not lower the surface line.

"Q. Isn't it a fact that these three lines, the lines showing the surface of the ground, the level of the gravel, and the bottom of the ditch, are abso-

lutely of the altitude one foot, would lower all three at the same time? A. No, sir.

"Q. Where is there anything on this plat to indicate that those three lines, the relative distance of those three lines, has been changed? A. The elevations at the change of the grade points.

"Q. Now, then, these figures that are marked out here, showing the elevation, were originally made by Bell and Schneidler? A. Yes, sir; I think so.

"Q. Who marked those figures out and substituted others? A. I did.

"Q. You did that yourself? A. Yes, sir.

"Q. On the original plan? A. Yes, sir.

"Q. Now, then, you say that you called in the contractors to explain to them that those figures meant a difference of depth of one foot in that ditch? A. I explained to them that it was to be one foot deeper than originally planned.

"Q. You explained to them that it was to be one foot deeper than as shown on the plans? A. Than as originally planned.

"Q. Why did you find it necessary to do that? A. I made that change in order to get better drainage.

"Q. Why did you find it necessary to make that explanation to contractors and bidders? A. I wanted them to understand just how the profiles were.

"Q. And, without that explanation on your part they would not understand, would they? A. Some might not, and some would.

"Q. So it required your oral explanation there of the purpose of changing the figures to make these plans definite and certain? A. I wanted them to understand fully the profiles and plans.

"Q. (Question read.) A. No, sir.

"Q. You knew that it was the general custom of engineers and contractors bidding on work of this kind, to count these little spaces here laterally between these lines on these profiles to ascertain the depths of that proposed ditch, didn't you? A. Yes, sir.

"Q. That is the custom? A. Yes, sir.

"Q. And that it was necessary for you to make that explanation there to induce them to depart from that custom; that is right, isn't it? A. Well, I would answer it the same as before; I wanted them to perfectly understand these profiles."

It appears from the cross-examination of Mr. Zorn that an oral explanation to the bidders was necessary in order that they might understand that an increased depth of one foot was required. It also appears from such cross-examination that the manner of indicating depth by means of elevation above sea level was not customary. It thus clearly appears that the plans and specifications were defective in that respect.

Mr. Zorn also testified as follows:

"Q. Well, now, as a matter of fact, these ditches here, as appear on Exhibit B and Exhibit C, are greatly in excess of the distance between the top and bottom line on this profile showing stations 230 to 355 of drain B; isn't that a fact, and I present you that profile for examination? Aren't those depths, as shown on Defendant's Exhibit B and C, greatly in excess of the depths as determined by the spaces between the lines on that profile of drain B? A. No, sir; I think not.

"Q. Now, then, where did you take those figures from on Exhibits B and C? A. They were taken from the note books.

"Q. And not from these profiles? A. In constructing the drain we had to establish and run our levels and get out data from which to compute the cut at different points along the line, and they were taken from the note books for that purpose.

"Q. They were not taken from these profiles? A. The grade line of the profile was followed.

"Q. That is, it should have followed the note book? A. It should and did.

"Q. Did you take the figures from the note book and not from the profiles? A. I took the grade points from the profiles.

"Q. I am speaking of these depths, Mr. Zorn, don't you understand? A. Yes, sir.

"Q. I am asking you where you got these depths that are shown on Defendant's Exhibits B and C, whether from the profiles or from the note book? A. It would be out of the question to get them from the profiles; you can't read them.

"Q. Then you did not get them from the profiles? A. No, sir."

Mr. Zorn testified further as follows:

"Q. Then these profiles here represent the field notes of surveys and levels that were made and run by Bell and Schneidler? A. Yes, sir.

"Q. And do not represent the field notes according to the survey made by you? A. No, sir.

"Q. And when you changed these figures here to show a uniform increased depth, as you say, of one foot, that did not even compare with the surveys and the levels and the depths that you have determined upon in your field notes, nor the grades? A. I used the grades of the profiles, but this was another survey.

"Q. Another survey that you made, but no plat or profile was ever made according to that survey? A. No, sir.

"Q. Then Mr. Bullock, at the time he figured on this job, and at the time he started into construction of this work, did not have any plans or profiles according to that survey, did he? A. No, sir."

These extracts from the testimony show that another requirement was violated, in that the plans and specifications in the contract were not at all times kept adequate for the complete performance of the contract. The profile of the ditch showed a surface line and a grade line. It also had on it figures which showed the elevation above sea level at different points along the ditch. The contention of the surety company is that the grade line indicated the bottom of the ditch and therefore a measurement, according to scale, from that line to the surface would give the depth of the proposed ditch.

The drainage district contends that the depth of the ditch should properly be ascertained by subtracting a certain given elevation above sea level from another given elevation. Mr. Zorn himself admitted that the former is the customary method. Upon that point Mr. Bullock, the contractor, testified as follows:

"I followed engineering, but not of this class, for a number of years prior to this. As drainage contractor, I was engaged in that only about 18 months prior to this particular work, but from 1889 to 1893 I was connected with the Coast Geodetic Survey at Washington, and from 1893 to 1905 I followed railroad engineering, and from 1905 to 1914 I followed municipal engineering. During all that period I have had to do with plans and plats such as those introduced in evidence. I have made a great many profiles; at least one-third of my work was sewers for which profile and grades were established, and possibly one-third of it was railroad work. I have also had to do with the submission of jobs or work and the construction thereof. The profile you just handed me of drain D between stations 0 and 79 is a copy of blueprint from the same tracing from which one was made and handed me for my guidance in bidding on this work; it is identical with the ones that were furnished me. The first thing I looked at, after receiving this profile, before observing the line, was the scale. I notice here that the horizontal scale is 1 inch to 200 feet, and that the vertical scale, or the scale up and down, which represents

the depth of the cut vertically, is 1 inch equals 20 feet. After that information was secured, I took a scale divided 20 to the inch, and went over these profiles very carefully.

"The rule that I hold in my hand is the ordinary rule that engineers carry. I always carry one about half as long as this. The divisions were 20 divisions to the inch, represented to follow this scale, and used to determine the depths. In examining these plats, I had nothing else to go by except the scale and drawing. The divisions on the plat correspond perfectly, but were of no consequence. When I had the scale the lines were not necessary, but they did correspond. The scale, as given by the engineers who drew these plats, was for the guidance of the bidders in determining the distance between the lateral lines, representing the depth. I know of no other purpose it could have been provided for. The scale of 1 inch to 200 feet is to determine the length of the ditch, and the vertical scale of 1 inch equals 20 feet is to determine the depth of the trench. Below some of the stations there are certain elevation figures which are obliterated, and others seem to be substituted for them. There is nothing to indicate on this profile what that is; but, knowing the altitude of Germania Bench was something like 4,000 or 5,000 feet, I naturally imagined it meant the elevation above sea level. These figures have no significance and furnish no information as a guide to bidders on a project of that kind. My bid would have been the same whether the altitude of Germania Bench had been 5,000 feet above sea level or 1,000 feet above sea level. It is only important to determine climatic changes which would affect the work. In getting a plan, having a scale before you, and knowing the scale, having it marked on the map, you can measure the height of a building or depth of a cut from that vertical scale and from the drawing. The altitude of the place at which the building would be erected, or the altitude of the place at which the ditch would be excavated, would, in my opinion, have no bearing in making up the cost of making the excavation. It purely represents, from the surface line to the grade line, the depth of cut you are required to dig. The fact that the elevation figures had been changed would not indicate that the depth of the ditch had been increased, unless the drawing was changed and the scale changed. There would be two effective ways to indicate on these plans a change of one foot in the depth of the ditch—either change the scale as indicated on the plat, or else draw a line below increasing the distance between the surface line as indicated and the grade line as indicated. If you change the scale it would appear in fractions. The most effective way would be to make a new profile. I have heard the testimony of Mr. Zorn.

"Q. You may state whether or not, before you made this bid, or before the contract was signed by you for the construction of this work, he ever stated or indicated to you that this ditch was to be a foot deeper than is shown on the profile.

"Objection by Mr. Brome. Overruled. Exception by plaintiff.

"A. No, sir."

Mr. Bullock, continuing:

"I first ascertained that I was required to construct the ditch one foot deeper as shown between the lines on the profile by telegram from my subcontractor on June 18, 1917. I was then in Kansas City. In making my bid and submitting my proposal, I measured the distance between the surface line as indicated, which is the only natural line to guide; the grade line being an absolutely imaginary line fixed at a certain distance below the surface of the ground as indicated, with a scale. After learning what the scale was, I measured between those lines; no one ever told me that I was expected to go a foot deeper than shown on these profiles. After entering into this contract I sublet a part of the work to H. R. Elliott of Montrose, Colo. He began work on the 15th of April, 1917; he wired me that something was wrong with the profiles. I left on the 19th of June for Greybull. Mr. Elliott met me at the train. We telephoned Mr. Zorn, who either came to the hotel or his office

that night. Mr. Elliott had been at work on the ditch, but had discontinued at that time. We went out on the work the next day; the three commissioners were there; I do not know if Mr. Zorn was there or not. We went out to look at the work. Mr. Elliott was then laying tile almost three feet deeper than the cut was indicated, which was the first time I knew that Zorn was claiming the ditch was to go deeper than the profile showed, except the wire I received in Kansas City several days before. The first time I talked with Zorn was the evening before. The members of the board were not present; they considered the matter on Germania Bench the next day. I don't know whether any minutes was made of the meeting; that was June 23, 1917. There seemed to be so much dispute between Zorn and myself that the commissioners did a great deal of considering before they expressed themselves one way or the other. Previous to this time I had sublet this work to Mr. Elliott for the use of a Sargent machine which I have no reason to doubt was of such capacity that it would have constructed this ditch and would have been answerable for that purpose as per the profile. Mr. Elliott threatened to quit the work, and I was required to increase his compensation from 23 cents to 50 cents a foot."

According to the contention of the drainage district the grade line served no useful purpose, so far as the profile in this instance was concerned. Mr. Zorn, however, permitted the grade line to remain on the profile and, according to his statement, undertook to eliminate it by oral instructions. Bullock, the contractor, denied that such instructions were given. The importance, therefore, is clearly seen of that condition of the bond which required that the plans and specifications mentioned in the contract were not in any respect defective, and that they should at all times be kept adequate for the complete performance of the contract. The purpose of these requirements was to avoid what actually occurred; that is, a dispute as to whether or not an oral change was actually made.

Mr. Charles C. Carlisle testified for defendant as follows:

"My business is consulting engineer. I have been in that profession 19 or 20 years; during that time for approximately 5 years I was deputy state engineer of Wyoming and city engineer of Cheyenne. Since that time I have been employed in a consulting capacity on waterworks, sewers, electric light, and irrigation works, principally. My work largely has been the observation of plats and plans and the supervision of work of this kind. I have had to do with the drawing and investigating of profiles, ditches, earth excavations, and drains.

"Q. I will ask you to examine this exhibit containing the profile of drain D from stations 0 to 20, and from stations 20 to 79, and 368, and state what you, if desiring to bid on a construction of this kind, would take into consideration in arriving at the depth of the ditch shown thereon?

"Mr. Brome: That is objected to as incompetent, irrelevant, and immaterial. I am perfectly willing for the witness to state what the paper shows, but I do not think it is competent for him to state what a contractor would take into consideration.

"The Court: He is testifying as an expert, that has been gone over to this jury five or six times.

"A. I would determine the scale on which the profile was made, and determine the distance between the surface line, or profile of the ground, and the grade line, in vertical elevation.

"Q. Where would you look to determine the scale? A. I would look to the legend on the drawing.

"Q. Does that legend appear on that plat? A. It does.

"Q. And after you determined the scale then you would measure, according to that scale, between those lines, is that right? A. Yes; either scaling it or counting it, counting the number of spaces indicating the feet.

"Q. Now, what significance, Mr. Carlisle, would the figures below the station have upon your bid, before they were erased there? A. They would have nothing to do with the relative position of the two lines, the grade line and the surface lines, and they are not usually put on profiles.

"Q. What significance, if any, would the fact have that those figures were erased and others substituted, in determining the depth of the ditch? A. It would not affect the depth of the ditch, except it might displace the whole drawing slightly on the profile paper.

"Q. So the lowering of the depth would take the top and the sand level and all with it, would it? A. Yes; it has more to do with the altitude of the country than anything else.

"Q. Then, so far as those figures are concerned, and so far as a guidance to a determination of the depth of that ditch, those three lines shown there, indicating the depth of the ditch are arbitrary; is that right? A. Yes; they have a relationship to each other.

"Q. Have you examined all of these plats, Mr. Carlisle? A. I have.

"Q. And would your testimony as to each of them be the same as it is of the plat which you hold in your hand? A. It would.

"Q. Now, I will ask you if you have made any calculations, from the depths that have been given in evidence by Mr. Zorn, to determine whether the depths as given by him are the same as given in these plans and plats? A. I have.

"Q. And as to what ditches? A. On drain B the elevations and depths as given in Exhibits B and C. They are the only depths that I had. I compared them with the profiles, and determined the difference between those cuts and what the profile showed.

"Q. And what did you find as to the difference, if any? A. In the 81 stations, or 81 points given, the average depth of the cut shown by the notes was 2.19 feet deeper than the profile showed.

"Q. And how many stations did you say you examined? A. Going by half stations—each 100 feet represents a station—the points were set at each 50 feet distance, or determined as 81 points.

"Q. Where did you get the depths as given by Mr. Zorn? A. From the Exhibits C and B.

"Q. That is, Defendant's Exhibits B and C? A. Yes, sir.

"Q. And you say that these depths, as given by Mr. Zorn, averaged 2.19 feet deeper than the profile showed? A. Yes.

"Q. Now, have you had experience also in the constructing of trenching and ditching, Mr. Carlisle? A. As an engineer and supervisor of construction work.

"Q. And in the relative cost of the movement of the material in such work as might be encountered in this state? A. I have.

"Q. Now, assuming that the contemplated ditch was an average of 7 feet, and that in the execution of the work the ditch ran from 1 to 3 feet deeper than as shown on the profiles, and assuming that in that extra depth a cement gravel was encountered, what would you say that that extra depth and that soil would encrease the cost of the work?

"Mr. Brome: That is objected to as incompetent, irrelevant, and immaterial.

"Overruled. Exception by plaintiff.

"A. It might double the cost of the excavation, depending, of course, on the material encountered, and whether there was ground water."

One of the defenses of the surety company is that the condition of the bond which required that the drainage district should retain not less than 10 per cent. of the value of all work performed, or material furnished in the prosecution of the contract, until the complete performance thereof by the contractor, was violated. That 10 per cent.

was not retained, as required by the bond, clearly appears from the testimony.

Exhibits D, E, F, and G were certain books kept by Mr. Zorn. Those books were taken by Mr. Carlisle, and from the figures contained in them he determined the depth of the ditch, and found it to be in excess of two feet over that indicated by the original profile. Those calculations made from Mr. Zorn's notebooks, and being undisputed by him, must be taken as correct. Therefore the testimony shows: (1) That the depth of the ditch was by verbal order increased by Mr. Zorn one foot over that indicated by the original profile. (2) That it was necessary to explain this change orally to bidders. (3) That the profile did not indicate the change in the customary way. (4) That the profiles were not kept adequate as required by the provisions in the bond. (5) That as a matter of fact the depth of the ditch, as the contractor was required to dig it, was in excess of two feet over that indicated by the original profile. (6) That the 10 per cent. was not reserved as required by the bond.

At the time the motion for a directed verdict was made, the following colloquy occurred between the court and the attorney for the drainage district:

"The Court: Mr. Brome, I want to ask you a question. In your petition in this case you claim a recovery for this additional depth, the estimated cost?

"Mr. Brome: No, sir; we claim recovery only for the depth as we claim the true depth is, but not beyond that.

"The Court: You paid him in your payments for the average depth of 2 feet below the line specified in the contract?

"Mr. Brome: Yes; for whatever yardage—

"The Court: The testimony here is an average of two feet below the line on the profile?

"Mr. Brome: Sometimes below that line, and some places above that line.

"The Court: Mr. Carlisle testified that the average was two feet.

"Mr. Brome: But he testified only over a portion of the line. The entire line he had not computed.

"The Court: That additional two feet is not provided for in this contract?

"Mr. Brome: No, sir; nothing provided in the contract, except the figures that appear there.

"The Court: All the surety company had was the contract?

"Mr. Brome: They had more than that; they had the specifications which provided that changes might be made by the engineer during the progress of the work.

"The Court: That is true; small changes, but not such as would amount to the reconstruction of the ditch. It is a matter of common knowledge, without evidence, that the last two feet of the ditch costs a whole lot more than the first two. Now, then, do you wish to say that it was in contemplation of the parties at that time that the ditch should be 2 feet deeper than the specifications called for?

"Mr. Brome: No, sir; but I do say, with respect to that, that if the ditch was constructed two feet deeper it would not avoid the liability on this bond at all, but if the construction of the ditch cost the contractor more money for the two feet deeper, he would be entitled to credit on the amount due on the extra cost, whatever it was, and if the extra cost exceeded the damage that the district had sustained, because he had not completed his work, the plaintiff could not recover in this action, but it is precisely like the defense and precisely like every other departure in the case of a compensated surety. The departure must have occasioned damage to the surety. If they went deeper than the contract called for, and it cost the contractor more money to dig the

dirt out of the bottom of the ditch, then, if they have proven what that additional cost and damage was, they are entitled to credit on the amount the plaintiff claims, whatever it is, and if that amount exceeds the plaintiff's claim, they would be entitled to a verdict here. \* \* \* If we departed from this contract, that did not void the contract; but if the departure occasioned injury to the surety, we cannot recover to the extent of that injury, whatever it is; but the burden of proof is upon the defendant, the surety company in this case, to show that we did depart from the contract, and what the amount of injury is, if any sustained by them was, and that is an issue of fact to be tried out to the jury. That is my view of it.

"The Court: While that is the rule as to individual sureties, and it is true that the rule has been relaxed as to compensated sureties, surety companies, yet the rule as relaxed must have a reasonable construction, and the company had a certain contract and specifications before it when it made its bond. I think from this evidence we would have pretty hard work to figure out what contract this man was working under. Here is an entirely new contract for two feet deeper; the contract has been changed, the work was changed, and all of that costs money. There is always some slight deviations from the exact terms of a contract which an individual surety would have a right to rely upon, probably, that a compensated surety would not, and which would not avoid the liability; but here there has been such a departure that it seems to me there is absolutely no basis upon which the court could submit to the jury such a question in this case. The testimony of both plaintiff and defendant tends to show that here was certain work secured by a bond, and additional work, not in contemplation of the parties at all, was done, which destroyed the ability of the contractor to perform according to the specifications. Had it not been for the additional two feet, the amount you paid him would probably pay for the construction as outlined by the specifications put before the surety company before they would sign this bond. They did not insure anything of that sort, but your contract was secured, and if they had followed the specifications strictly, with some slight variations, that would not avoid the liability, and the court would not listen for a moment to a question of that kind; but certainly it was not in the contemplation of the parties, when the bond was signed, to go two feet below the grade line as fixed by the specifications, and therefore I do not think there can be any recovery whatever against this surety. All this change took place after the contract was signed, which had nothing to do with it; but I allowed it to go in, in order to get whatever was said about it. The thing that binds the surety company is the contract and specifications, and, while we will give to them a liberal construction, yet I do not think we can go quite so far as to say we can compel a contractor under his contract and these specifications to go two feet deeper than the grade line, and then charge him up, and charge the surety with a failure on his part, when it was brought about and induced by your own engineer. He insisted upon this grade being lowered, and the contractor was obliged to do that. Had he followed the specifications, as I said a moment ago—I have but worked them out roughly in my mind—the compensation you paid him would pay for the whole work originally planned, and therefore there would be no liability here if that had been the case. But the addition of this average of two feet on the entire system additional depth, and the additional expenses over and above every one knows that the last two feet would cost probably, as Mr. Carlisle testified, just about double, at least I so understood it; but there would be at least a very substantial increase in cost. Now, then, here is the proposition: If the contractor had followed the plans and specifications, if there had been a shortage, there would be no question about the liability upon this bond; but the departure from it was so far that, notwithstanding the liberality and relaxation of the surety rule, which the courts now hold is applicable to surety companies—that is, surety for compensations—that I do not think that rule can apply here. I will sustain Mr. Kinkead's motion."

[1] The argument there made by the attorney for the drainage district is repeated in his brief; that is, the defendant in error, being a compensated surety, would not be released from the bond, except to the extent of the damage sustained by reason of the increased cost resulting from the additional requirement made upon the contractor. The bond is a contract between the parties. The enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compensated or not. It cannot be one contract when the surety is compensated, and another contract when the surety is not compensated. The surety had the right to impose such terms as it saw fit before it consented to become liable, and the obligee had the right to accept or reject such terms. The drainage district required that the bond be presented and accepted by it before the contract should become effective.

[2] The surety here has the right to insist that it is released when it shows that the drainage district failed to comply with the terms of the contract which it accepted. We agree with the trial court that the additional depth required of two feet could not be regarded as permissible under the specification allowing changes. The changes contemplated by the contract were minor changes that did not increase materially the cost of construction and the amount of work to be done. The additional depth of one foot, or two feet, greatly increased the cost of the work. *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 142; *Justice v. Empire State Surety Co.*, 218 Fed. 802, 134 C. C. A. 490; *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409; *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 66 Ark. 287, 50 S. W. 508.

With reference to the assignment of error that the court refused to permit the witness Preis to state that Mr. Zorn had told the bidders before the bids were opened that the ditch would be required to be dug one foot deeper than shown by the profile, it appears from the record that this testimony was offered in rebuttal and objection was made on the ground that it was not properly rebuttal testimony. Assuming, without deciding, that the testimony would have been competent, if offered in chief, we think that it was within the discretion of the court to exclude it as rebuttal testimony. Moreover, the plaintiff in error suffered no injury by reason of the exclusion of the testimony.

We think the judgment was right, and should be affirmed. It is so ordered.

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### ELECTRO-DYNAMIC CO. v. UNITED STATES LIGHT & HEAT CORPORATION.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 49.

1. Patents  $\Leftrightarrow$  328—1,019,482, claims 1-4, 7, and 8, for method and means of charging storage batteries, not infringed.

Claims 1-4, 7, and 8 of the Kennedy patent, No. 1,019,482, for a method and means of charging storage batteries in connection with train-lighting systems, when construed consistently with the patentee's actual achieve

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$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ment, consisting of a device for determining the amount of current in the batteries and for cutting down the charging current, when the battery is sufficiently charged, but which shows only the amount of current that ought to be in the batteries, if the precalculated assumptions regarding input and outgo are correct, *held* not infringed by a system embracing a meter responsive to the battery current and indicating at all times the actual or exact charge in the battery.

**2. Patents ¶101—Claim must be fortified by disclosure.**

Even the broadest or most loosely drawn method or combination claim must be fortified by a disclosure of how the method is to be practiced, or of the kind and nature of the elements combined.

**3. Patents ¶243—Combination claim not infringed, except by substantially the same elements functioning co-ordinately in the same way.**

A patented combination, if good for what its elements will really co-ordinately accomplish, is not infringed, unless the infringing combination is of substantially the same elements, functioning co-ordinately in the same way.

**4. Patents ¶46—Not inoperative, though possessing no practical utility.**

A patent cannot be struck down as inoperative, in the sense of the patent law, where the device will operate, at least in a laboratory, though it possesses no practical utility.

Appeal from the District Court of the United States for the Western District of New York.

Suit by the Electro-Dynamic Company against the United States Light & Heat Corporation. From a decree for defendant (Consolidated Ry. Electric Lighting & Equipment Co. v. United States Light & Heat Corporation, 246 Fed. 127), plaintiff appeals. Affirmed.

Suit is on claims 1, 2, 3, 4, 7, and 8 of patent to Kennedy (owned by plaintiff), No. 1,019,482, issued March 5, 1912, upon an application filed March 17, 1908. The patent is for "charging storage batteries." It "relates primarily to an improved method [whereby] \* \* \* the battery shall be automatically recharged to its full capacity, or preferably slightly overcharged, and yet [will not receive] an excessive overcharge."

The specification asserts that "the invention is of peculiar value in connection with train-lighting systems," wherein the generator is driven from the car axle. In point of fact, the invention has no indicated utility, other than in "connection with" car-lighting systems generally known and practiced in and before 1908. For that reason, doubtless the patentee states the systems "which have been most widely used in practice." They were (and are) those based upon (1) the attempted maintenance of a constant current from the generator; and (2) the attempted securing of a constant potential on the main circuit, regardless of the quantity of current flowing therein.

By reference to cases adjudicated and reported in this circuit, it appears that patent to Creveling, 747,686, broadly covers a system of the first class, wherein, when by the constant current the batteries have been charged, so as to develop a predetermined back voltage, a "stop-charge relay" is actuated by said back voltage, and further charging thereby prevented until such time as the back voltage again sinks below the predetermined limit. *Safety, etc., Co. v. United States, etc., Co.* (D. C.) 222 Fed. 310, affirmed 223 Fed. 1023, 138 C. C. A. 651. Of the second class, patent to McElroy, 893,533, furnishes an example. In this system the current need not be constant. The attempt is to maintain constant voltage or potential, which, however, by the use of regulating coils, whereof one acts directly on a rheostat, gradually decreases as the battery charging continues; and this is a system wholly different from the constant current device of Creveling. It illustrates a different plan of operation. *Safety, etc., Co. v. United States, etc., Co.* (D. C.) 233 Fed. 1007, and 237 Fed. 646.

The object of Kennedy was to improve either of these systems in respect

of battery charging or overcharging; he was not concerned with control or regulation of the generator; he asserts in substance that his improvement will benefit either of the above indicated systems. The essence of that improvement is to interpose between generator and battery what has been called at bar an "ampere hour meter," a device calculated to permit the generator to continue charging, regardless of varying conditions of speed or quiet, of lamps lit or darkened, for a predetermined number of ampere hours. The specification shows, by way of illustrating or teaching patentee's discovery, the insertion of this device into a typical constant current system, substantially that of Creveling. For the purposes of this case it is assumed that it functions equally well in a constant potential system; but no such finding is made.

The patentee recognized that in any system of axle-driven generation of current for car lighting, absolute accuracy in rate of delivery was not always attainable; he knew that there never comes out of a storage battery as much as goes in, and that leakage is continuous; and he believed that a slight overcharge with the batteries in that state "floating on the system" was a desideratum. He therefore so constructed his "ampere hour meter" that it only began to register (assuming batteries empty) after current had flowed into batteries for a predetermined time. Thus (as the specification states) the device indicates "less than the actual ampere hours of charge [so as to] make up for this loss." This is called at bar the "corrective factor."

The mechanical detail of Kennedy's meter is unimportant; it is enough to note that current flowing into or out of the storage batteries actuates magnets which draw into operative relation the parts of a registering device, to the end that, assuming a normal or constant generator current of (say) 30 amperes, there will be shown the net number of ampere hours for which the batteries should be charged. If lamps are lit, and by precalculation are consuming 30 amperes, the battery charge shows no change; if more is consumed, then the charge is shown as diminishing; if less than (say) 30 amperes, or if there is no load at all, the charge is indicated as increasing.

But when (say) 30 ampere hours are shown, then mechanically, by the action of a lug or extension of the indicator finger, a switch is closed and a circuit established, in which is a magnet "designed to operate when the voltage has reached a point which indicates full charge." If in point of fact the designer's precalculations are wrong, through (probably) the accidents of rough tracks, change of temperature, or the like, and the back voltage is not as great as expected, charging will continue, but the patentee's register will (if no lamps are lit) stay at its erroneous 30 ampere hours. When, however, the back voltage is strong enough, the "magnet" will "operate," and the battery charging current be cut down to a "maintaining current," calculated to be enough to make up for leakage.

On this disclosure are founded the claims in suit, of which 1 and 2 are for a method, and 3, 4, 7, and 8 for a means (if not *the* means) of applying that method. The most general method claim is as follows:

"1. The method of charging storage batteries which consists in supplying a charging current to the storage battery for a predetermined number of ampere hours, regardless of the electromotive force of the battery, and thereafter causing a predetermined maximum potential difference across the battery terminals to discontinue the charging current, substantially as described."

Of the claims for means, the third substantially defines the device of the disclosure thus:

"In a train-lighting system, a generator driven from the car axle, a storage battery connected to said generator to be charged thereby, and mechanism for regulating the generator to a constant current output, in combination with a controlling device in said circuit which discontinues the charging current when the potential thereof reaches a predetermined limit, and mechanism for rendering the controlling device inoperative until the battery has been charged to a predetermined number of ampere hours, substantially as described."

The seventh avoids reference to the constant current system of the specification and drawings, as follows:

"In a train-lighting system, a generator driven from the car axle, a storage battery connected to said generator to be charged thereby, a traveler mecha-

anism responsive to the current flowing in the battery circuit to move the traveler a distance proportional to the charge in the battery, a circuit-controlling device actuated by said traveler when it reaches a predetermined position, a second circuit-controlling device responsive to the difference of potential across the battery terminals, and mechanism for discontinuing the flow of charging current to the battery when said circuit-controlling devices are both closed, substantially as described."

Defendant makes and sells two constant potential systems, following in substance the teachings of McElroy, but interposes between generator and batteries an ampere hour meter, responsive to the battery current, and indicating (or capable of indicating) at all times the actual or exact charge in the battery in ampere hours. In defendant's so-called "standard system" the meter indicator, on arriving at battery full position, short circuits a resistance normally in circuit with the voltage coil of the system (the coil 13 of 237 Fed. 650), and thus reduces the generator's voltage to a point that permits the batteries to "float," but leaves the generator to continue supplying lamps. Defendant's "double-relay" system it does not seem necessary to describe, in the view taken of this litigation. There are no vital differences between the two; both are alleged to infringe.

Hazel, District Judge, in the District Court, summarized the defenses as "limitation of claims, inoperativeness, and noninfringement." He held there was no infringement, and from decree accordingly plaintiff appealed.

Pennie, Davis, Marvin & Edmonds, of New York City (William H. Davis, of New York City, of counsel), for appellant.

W. Clyde Jones, of New York City, Arthur B. Seibold, of Chicago, Ill., and R. H. Van Nest, of Niagara Falls, N. Y. (Everett N. Curtis, of New York City, of counsel), for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] We pass without discussion or decision the question whether the method claims of this patent are anything more than descriptions of a function of the mechanical device disclosed. In a steadily growing art, the laudatory epithets bestowed in the cases cited above upon the device of using the back voltage of the battery to stop overcharging seem now rather out of place. Systems of lighting substantially along Creveling's suggestions obtained extended use, and this record displays unanimity among practical men, that for reasons arising especially from the rough passage of cars over frogs, switches, and the like, the stop charge relay "went off" too soon.

It is plain that this was the very real problem to which the patentee addressed himself. He solved it, to put the matter most favorably for him, and as it is put by very able counsel, by combining the potential control commonly used in 1908 in train lighting, with the ampere hour meter control already known and used in stationary plants. It is observable that Mr. Kennedy nowhere uses in his specification the term "ampere hour meter"; possibly because "ampere hour" is a term of art, meaning a certain unit of electricity, and a meter for ampere hours must mean something capable of measuring and indicating such units. He speaks only (in the claims quoted) of a "mechanism" or a "traveler."

The language chosen was careful; for as above shown, and admitted by plaintiff's expert witness, the "mechanism" of the patent only registers and reports how many units (called ampere hours) ought

to be in the batteries, assuming that the generator is giving (when it gives anything) a steady volume of 30 amperes, or other precalculated quantum. As a meter, the device (and none other is suggested) somewhat resembles a water meter, which will tell how many gallons there are in a tank, fed by a pipe assumed to give a steady flow, and depleted by turncocks assumed to pass a certain amount of liquid. Such a device is not a meter; it has no means of ascertaining and disclosing whether the assumptions are true.

The basic difference between the mechanism of the disclosure and a true meter or measurer of amperage is that the former has no member responsive to the actual battery current; it never knows what that current is doing or has done; it can only state the result of the assumptions regarding in-put and out-go which are the law of its being. The defendant's meter is a true ampere hour measurer, responsive to the current, and indicating actual and not assumed conditions.

Applying the foregoing to the claims, the patentee's "traveler" does not "move a distance proportional to the charge in the battery"; it only moves a distance determined by the charge that ought to be in the battery, if the generator, etc., have been functioning as expected. But his "mechanism" does render the "controlling device inoperative until the battery has been charged to a predetermined number of ampere hours," in the sense that it delays the operation of what is essentially a "stop charge" until the battery ought to be full, and if it is not (though the indicator says it ought to be) the control will not operate until the predetermined back voltage is reached. The defendant is right in calling this mechanism a "time-delay device."

It is no longer necessary to multiply citations to show that claims are to be construed in the light of the contribution to knowledge actually made by the inventor, or that mere ability to fit to a thing the words of a claim does not prove infringement. Let it be assumed that (e. g.) the first claim, at least, will "read on" defendant's system; it remains to inquire whether that (and other) claims, construed consistently with the patentee's actual achievement, justify the finding that there has been that substantial appropriation which is always the essence of the tort known as infringement.

[2] Even the broadest or most loosely drawn method or combination claim, must be fortified by a disclosure of how the method is to be practiced, or of the kind and nature of the elements combined. The method proposed by this inventor for supplying current to battery "for a predetermined number of ampere hours" leaves the ultimate determination of the proper battery quantum to two circuit-controlling devices"—i. e., relays—both of which are fundamentally dependent for activity on the counter e. m. f. of the charge battery; the sole inventive thought revealed by the disclosure is to delay that action for a time that can be properly expressed in ampere hours only if the generator is working smoothly and delivering its product at a precalculated rate.

[3] The combination disclosed, when not limited to a constant current system (as in claim 3), requires as one element (claim 7) "mechanism responsive to the current flowing in the battery circuit to move

the traveler a distance proportional to the charge in the battery." It has been already shown that in no true sense does the traveler (indicating finger) do the thing claimed; but, assuming that the combination is good for what its elements will really co-ordinately accomplish, there can be no infringement, unless defendant's combination is of substantially the same elements functioning co-ordinately in the same way.

We fully agree with the court below that (to use the phrases of counsel) defendant's ampere hour meter is an element wholly different from plaintiff's time-delay device; consequently there is no appropriation of method or combination, and no infringement. Though in a much less important art there is a singular resemblance between this patent and that to Selden for an automobile. In that well-known instance, the "liquid hydrocarbon gas engine of the compression type," which was an element in Selden's combination, was a phrase as all-embracing as the "mechanism" of this one. Yet, where patentee plainly had only one type of engine (or "mechanism") in mind, varying the combination by employing an entirely different engine type was held to avoid infringement. *Columbia, etc., Co. v. Duerr*, 184 Fed. 893, 107 C. C. A. 215.

[4] The argument has been much pressed that Kennedy's disclosure reveals nothing useful, and is not operative. That it possesses no practical utility is fully proven. The scheme might be called one of hope or aspiration; but the device will operate in a laboratory at least, and we do not think the patent can be struck down as inoperative in the sense of the patent law. We find it true that no practical use has been made of this invention during the 13 years that have elapsed since specification filed. We continue to agree with the doctrine of *Putnam, C. J., in Boston, etc., Co. v. Pennsylvania, etc., Co.*, 164 Fed. 557, 90 C. C. A. 84, as to the narrowness of interpretation to be awarded "paper patents"; but it is not necessary here to invoke that principle.

Appellant has presented objection to certain testimony admitted below. As our decision does not in the least rest upon that evidence, we do not discuss the matter; silence, however, is not to be regarded as decision in favor of admission.

Decree affirmed, with costs.

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LEHIGH VALLEY R. CO. v. MANGAN.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 43.

1. Evidence ¶586(2)—Testimony signals were sounded is contradicted only if witnesses denying them were in position to hear.

Where witnesses for the defendant testified that warning signals were sounded as required by the company's rule, testimony by witnesses for plaintiff that they did not hear such signals raises no conflict for submission to the jury, unless it clearly appears that those testifying they

¶¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

did not hear were in such a position and were giving such attention that they probably would have heard, if the signals had been sounded.

**2. Trial Ⓔ139(1)—Sounding of signals held question for jury.**

Employees of the same train crew as deceased, who were either close to the track where deceased was, or were on an engine just starting on an adjoining track, were so situated that they could have heard signals of the train which struck deceased, if they had been sounded, though the engine on which they were was making considerable noise while starting, since the signals could have been heard at the intervals between the puffs, so that the testimony of such witnesses that they did not hear the signals raised a question for the jury as to whether they were sounded as testified to by other witnesses.

**3. Appeal and error Ⓔ995—Weight of testimony signals were not sounded is for the jury.**

The weight of testimony of witnesses, so situated that they probably would have heard warning signals, that they did not hear such signals, is a question for the jury.

**4. Trial Ⓔ258(1)—Request must give understanding of law applicable to facts.**

A request to charge must be calculated to give the jury an accurate understanding of the law applicable to the circumstances of the particular case.

**5. Master and servant Ⓔ216(6)—Risk of violation of rules by trainmen not assumed.**

A freight train conductor, walking on an adjoining track alongside an engine of his train, which was just starting, to see whether a defect in the engine had been removed, did not assume the risk of a violation by the crew of another train of the rule requiring signals to be sounded while passing a standing train.

**6. Master and servant Ⓔ295(6)—Charge on assumption of risk by conductor held properly refused.**

Where the negligence alleged to have caused the death of a conductor was failure to sound the signals required by the company's rules, a requested charge on assumption of risk by the conductor, which omitted to state that he did not assume the risk of violation of its rules, was properly refused.

Hough, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Beatrice Mangan, as administratrix, etc., of Thomas Mangan, deceased, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error was defendant below, and is hereinafter referred to as defendant. The defendant in error was the plaintiff below, and is hereinafter referred to as plaintiff. The plaintiff brought this action as the administratrix of her deceased husband, suing, on behalf of herself as widow and her three infant children, to recover damages for the negligent killing of Thomas Mangan the husband and father. The action was brought under the federal Employers' Liability Act (Comp. St. §§ 8657-8665).

The defendant is a corporation organized under the laws of the state of Pennsylvania, and operates a railroad within the state of New York. The decedent at the time of his death was in the defendant's employ as a conductor in charge of a freight train. The complaint alleges that on August 24, 1917, the plaintiff's intestate was struck by one of defendant's trains near Gardner's run, in the state of Pennsylvania, and sustained injuries which caused his death. It is also alleged that at the time before mentioned the intestate

Ⓔ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and the defendant were engaged in interstate commerce, and that his death was due to the negligence of the defendant, its agents, officers, and employees, and was not due to any negligence of the decedent. The defendant in its answer set up, among other defenses, those of contributory negligence and assumption of risk.

It appears that Mangan had been in the employ of the railroad for 20 years before his death, during 14 years of which he had been a conductor. His death occurred under the following circumstances:

On August 24, 1917, he was the conductor in charge of a freight train which was at a place called Gardner's Run, in Pennsylvania. At that place the railroad maintained two separate tracks running parallel and about four feet apart. One of these tracks was devoted to west-bound and the other to east-bound traffic. Mangan's train was bound east up the mountain. It consisted of about 45 cars, a "leader engine pulling the train" and a "pusher engine" pushing it at its extreme rear. While the train was working its way up the mountain, it stopped because a piece of brick of the arch got in between the two sections of the grate of the rear or "pusher" engine, tipping one grate. This was about 7:30 in the evening and it was getting dark. Mangan was assisting in getting the engine ready to start. The trouble with the engine was all on the side of it next to the west-bound track, and in making the repairs, adjustments, or observations in relation to the trouble with it, it is claimed that it was necessary to do so from the side of the engine abutting on that track.

Mangan's train was stopped to permit an adjustment of the fire grate, a clinker having become lodged in it, thus preventing its closing, and thereby permitting burning coals to fall through. The adjustment of the grate was made by one of the crew operating a wrench or shaker bar from the cab of the engine, thereby opening and closing the grate in the familiar manner of "shaking" a stove or furnace. One or two other members of the crew, including the decedent, stood on the ground between the east-bound track and the west-bound track, watching to see if and when the obstruction should be dislodged. The train was delayed about half an hour while the adjustment was being made. When the adjustment was completed and they were ready to proceed, the engineer upon a signal from a brakeman, who was over on the right-hand side of the engine, moved his engine forward up to the rear end of the standing freight train, blew two long blasts of his whistle as a signal to the head engineer that he was ready to proceed, and started pushing up the slack of the standing train. Meanwhile "the blower" on the engine was being used to raise the pressure of steam, and the engine was making a great deal of noise in the effort to push forward the 45 standing freight cars, thereby taking up the slack, as the cars had been standing without the brakes being set. As the pusher engine moved forward, the decedent and one of the other employees, who had been on the ground beside the engine, watching the attempts to shake out the obstruction in the grate, moved forward with the engine: the decedent stepping over and walking between the rails of the west-bound track. As the pusher engine was in the act of pushing forward the slack of the standing freight train, a train consisting of an engine and 10 empty Pullman cars came from the east on the west-bound track at a speed of about 30 miles an hour and struck decedent, causing his death.

The accident occurred on a line of the defendant's road known as "the mountain cut-off." This cut-off was a much-used line at the time, there being upwards of 20 trains a day each way. These included three scheduled trains and about 20 so-called "extras," all freight trains being styled "extras"; and in addition at times unscheduled trains of passenger cars were run over the line. The negligence claimed on the trial was that no warning was given of the approach of the train on the west-bound track, either by the blowing of a whistle or the ringing of a bell, although a rule of the defendant required the bell on the engine to be rung while passing a standing train.

Three railroad employees, who it was claimed, were all in a position to hear the bell if it had been rung, and whose hearing was good, testified that they neither heard any bell rung, nor any whistle blown, nor any signal or warning given of the approach of the train, but that it was run upon Mangan without any notice whatever of its approach. Three witnesses called by the

defendant, and who were in the employ of the defendant and were on the west-bound train, testified that the bell of the engine drawing the west-bound train was ringing constantly as it passed the freight train; and two other witnesses, employees of the defendant, testified that as the train passed they heard two long and two short blasts of the whistle blown.

The jury found a verdict for the plaintiff in the sum of \$16,000.

Allen McCulloh, of New York City (Clifton P. Williamson, of New York City, of counsel), for plaintiff in error.

Austin Flint Gibbons, of New York City (John C. Robinson, of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The defendant claims that an error was committed in leaving it to the jury to find whether the engine on the west-bound track in passing the freight train blew its whistle or rang its bell. It is said that there was no such conflict of testimony as warranted the submission of any question to the jury. In calling attention to the testimony as to the blowing of the whistle, the District Judge told the jury that, putting himself in their place, he thought he should conclude that the whistle was in fact blown. He added:

"I can see no reason to discredit the testimony of the crew of the leader engine, but it seems to me that it might well have been owing to the noise of the exhaust that the whistle was not heard by the others who were very close to the whistle itself. But that is a question which I do not take from you. It is a question of fact for your decision. It is perhaps conceivable that between the ruffs of the engine the sound of the whistle would be heard if it had been blown."

As to the ringing of the bell he said:

"The question on which most emphasis was made by the plaintiff is the question of the bell itself, and on that the testimony of the leader crew is silent. Apparently they did not hear the bell as it passed. The crew of the passenger engine, as you will remember, did testify that the bell was ringing, and was ringing from the mountain top down. The question of fact as to whether that was done or not I leave entirely to you, without any indication as to my judgment of mind upon the subject."

[1] If the witnesses who testified that the bell was not rung or the whistle sounded were so located that they would probably have heard either the one or the other, it was proper to submit their testimony to the jury. *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 70, 64 C. C. A. 399. It is, of course, conceded to be an established principle of law that, where witnesses who were in a position to hear testify affirmatively and positively that they did hear a bell or whistle, the testimony of other witnesses that they did not hear it raises no conflict of testimony for submission to a jury unless it clearly appears that those who say they did not hear were in such a position, and were giving such attention that they most probably would have heard the sound had it occurred. *Northern Pacific R. R. Co. v. Freeman*, 174 U. S. 384, 394, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Stitt v. Huidekoper*, 17 Wall. 384, 394, 21 L. Ed. 644; *Foley v. N. Y. Central & H. R. R. R.*, 197 N. Y. 430, 432, 90 N. E. 1116, 18 Ann. Cas. 631.

[2] The witness Thomas, who saw the accident, was standing close to the track as the west-bound train passed, and who said his hearing was excellent, testified as follows:

"Q. What was the first you knew of the approach of this train, the very first that you knew of the approach of this train which ran Mangan down? A. Just while it was on me, that is all. Q. Did you hear any bells sounded on that train? A. No, sir.

"Q. Did you hear any signal of any kind given of its approach? A. No, sir."

The witness Earley, who at the time of the accident and at the time of the trial was in defendant's employ, and had been for 14 years, and was the engineer of the pusher engine on Mangan's train, testified as follows:

"Q. Do you remember a train passing you there at that time? A. There was a train that passed us there, yes, sir.

"Q. While you were standing there? A. Just as we were starting our train.

"Q. Did you hear any sound from that train, any bell, or whistle, or warning, or signal of any kind? A. No, sir.

"Q. Did you see it pass you? A. I just heard the noise of a passing train, and took no particular attention to it, and paid no attention to it."

The witness Dougherty, a trainman on Mangan's train, who was at the window in the caboose at the rear of the train on the side on which the west-bound train passed, and who saw it pass, testified as follows:

"Q. Did you hear any bells sounded on that train? A. No, sir.

"Q. Any whistle blown on it? A. No, sir.

"Q. No signal of any kind of its approach? A. No, sir."

It is impossible for the court to say that these men were not so situated that they could not have heard the blowing of the whistle or the ringing of the bell, if either had occurred. Counsel laboriously argued that the noises around the spot where Mangan was killed at the time he was killed would have precluded Earley, Dougherty, Thomas, and Mangan from hearing any bell, even if it had been rung. The noises which would have so precluded them, he argued, were the blower on the pusher engine, and the intermittent puffing sounds of the engine, ordinarily made when an engine is started up. The argument has not convinced us. The clanging of a bell continuously rung for a distance of more than 1,700 feet, as the rule required, should have been distinguished, if not above the puffing of the engine of Mangan's train, certainly between the puffs which the testimony shows were intermittent with intervals between them.

[3] It may be that these witnesses were mistaken, and that the bell was in fact rung; but that we think was, as the court below held, a question for the jury. The question for us is whether these witnesses were so situated that they would probably have heard the sound if the bell had been rung, and we think they were, and therefore that their testimony was entitled to be submitted to the jury, and its weight was to be determined by them. The weight of the testimony was exclusively for the jury, and this court has no right to pass upon it.

But it is said that the decedent assumed the risk. At the instant he was struck he was in the line of his duty giving his attention to the disabled engine of his own train, in order to make it safe for him

to proceed with it. He was in charge of the train, and at the time he was struck was watching the grate to see if it was functioning, and was not sure that the defect had been remedied. It seems to have been necessary, in order to make his observations, that he be on the side of his engine that abutted upon the other track. The space between the side of his engine and the side of the passing engine, at the time it struck him, was not more than  $2\frac{1}{2}$  feet, owing to the overhang of both engines, due to the curving of the track at that point. The grate he was observing was under his engine on its left side, so that, in order to observe its action, he was necessarily obliged to stand off from the left side of the engine a little distance. He knew that the entire length of his standing train, consisting of its locomotive and 45 cars stretching out on the east-bound track for a distance of about 1,700 feet, was between him and any train that might approach on the west-bound track, and he had the right to assume that the rule promulgated for his protection in just such a situation would be complied with by those operating an approaching train. That rule directed that "the engine bell must be rung \* \* \* while passing trains on adjacent tracks." If the rule had been obeyed, the bell on the engine which struck him would have been clanging continuously from the time that engine was nearly one-third of a mile away up to the instant that it struck him. At the rate it traveled—30 miles an hour—its clanging would have gone on continuously for 40 seconds before he was struck, bringing its warning nearer to him every moment, and giving him ample time to step out of the path of the approaching engine, which would have required not more than the fraction of a second. Whatever noises were made by his own engine were intermittent, and the bell, if it could not be heard above the puffing, ought to have been heard in the intervals between the puffs.

In going upon the west-bound track under the circumstances, did Mangan assume the risk of being struck by a train running over that track? The court below was of the opinion that the doctrine of assumption of risk was not applicable to the case, and, so stating, declined to give a request on that subject made by the counsel for the defendant. The court then said that he would give any of the defendant's requests on that subject which the counsel of the plaintiff assented to. As the plaintiff's counsel stated that he had no objection to the following portion of the requests they were given:

"II. If the noise, at the place where Mangan was, was such that the danger of the approach of a train moving at the rate of 30 miles an hour and sounding its bell, without being heard by him, was so obvious that an ordinarily prudent person would have known and appreciated that danger, Mangan must be held to have known and appreciated it, and to have assumed it.

"III. If you believe that the immediate or proximate cause of the decedent's death was his own failure to exercise reasonable care for his own safety, the verdict must be for the defendant. 'Reasonable care,' in this connection, means doing or omitting to do what an ordinarily prudent and cautious man of the age, knowledge, and experience of the man in question would have done or omitted to do under the circumstances."

But counsel did not assent to the following, and they were not given:

"I. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers

as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not. When a employee knows and appreciates the risk and danger incident to his voluntarily placing himself in a certain position in the course of his employment, he is deemed to assume the risk of injury.

"Therefore, if you find that the decedent, Thomas Mangan, knowing the use which was commonly made of the west-bound track at the point in question, placed himself upon that track under conditions where he probably could not hear a bell and approaching engine, then you may find that he assumed the risk of being struck without warning by an approaching engine, and if his death came about through the conditions, the dangers of which he assumed, the verdict must be for the defendant."

The failure to give the omitted portion of the request is assigned for error.

[4] A request to charge must be calculated to give the jury an accurate understanding of the law applicable to the circumstances of the particular case. *Erie Railroad v. Purucker*, Adm'x, 244 U. S. 320, 324, 37 Sup. Ct. 629, 61 L. Ed. 1166. What was said by the court in the *Purucker* Case shows very clearly that an instruction that a man who goes for his own convenience and voluntarily upon the tracks of a railroad at the time of its being used as a highway of interstate commerce thereby assumes the risk of so using the tracks is too broad, and omits elements which are essential to make the assumption of risk doctrine applicable to the case.

[5, 6] The only negligence charge against the defendant was that it failed to give any warning of the approach of the train which killed the defendant, and especially that it violated its own positive rule requiring that the engine bell should be rung while the engine was passing a train on an adjacent track. Mangan did not assume the risk of any injury arising from the failure to obey that rule; and any instruction as to assumption of risk should have made that fact clear. Neither do we think that under the circumstances it could properly be said that Mangan was on the track voluntarily and for his own convenience. It seems to us that he was there in the discharge of his duty and because it was necessary for him to be there.

The charge as to the assumption of risk which was given, assuming that the doctrine of assumption of risk was involved, was as favorable a charge as the defendant was entitled to. The court was justified in declining to charge in the exact language of the appellant's request, which would have confused and misled the jury.

Judgment affirmed.

HOUGH, Circuit Judge (dissenting). Not only did the learned trial judge refuse the request copied in the opinion of the court, but added, apparently within the hearing of the jury, "I think there is no question here of the assumption of risk, so I will decline any charge on assumption of risk." After this ruling he did charge such of defendant's requests as plaintiff had no objection to.

To hold with the plaintiff that there was no question of assumption in the case, and then charge only what the plaintiff did not object to, cannot in my judgment be called a ruling conformable to *Anzolotti v. McAdoo* (D. C.) 262 Fed. 568.

The rulings on negligence, contributory and otherwise, are consistent with the more recent decisions of this court; wherefore I dissent only in respect of the treatment of assumption of risk.

### SALSEDO v. PALMER et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 59.

**1. Death ⚡11—Recovery unauthorized at common law.**

No action lies at common law to recover damages for causing the death of a human being by the wrongful or negligent act of another.

**2. Death ⚡17—Wrongful act must be proximate cause.**

To sustain an action for death, under Code Civ. Proc. N. Y. § 1902, giving a right of action for death from wrongful act, neglect, or default, the wrongful act, neglect, or default must have been the proximate cause of the death.

**3. Negligence ⚡60—"Proximate cause" and "remote cause" distinguished.**

The "proximate cause" is one in which is involved the idea of necessity, and one from which the effect must follow, while the "remote cause," although necessary for the existence of the effect, is one the existence of which does not necessarily imply the existence of the effect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proximate Cause; Remote Cause.]

**4. Negligence ⚡58—Proximate cause of injury defined.**

In determining whether an act was the proximate cause of an injury, the question always is whether there was an unbroken connection between the wrongful act and the injury, and to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

**5. Death ⚡17—Wrongful treatment of prisoner held not proximate cause or death from suicide.**

If, as alleged, defendants held plaintiff in confinement, assaulted him, and subjected him to mental torture, and thereby he was caused to lose control of his mind, and to become suicidally despondent and mentally irresponsible, with the result that he threw himself from a window causing his death, the wrongful acts were not the proximate cause of the death, as the suicide was an intervening act, if the killing was deliberate, while, if it was the result of suicidal mania, such mania was not a natural or reasonable result of the mental or physical torture.

Mayer, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Maria Salsedo, as administratrix of Andrea Salsedo, deceased, against A. Mitchell Palmer and others. From a judgment for defendants on demurrer, plaintiff brings error. Affirmed.

Hale, Nelles & Shorr, of New York City (Walter Nelles, of New York City, of counsel), for plaintiff in error.

William Hayward, U. S. Atty., of New York City (Keith Lorenz, Asst. U. S. Atty., of New York City, of counsel), for defendants in error.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. This action was commenced on January 4, 1921, in the Supreme Court of the state of New York for the county of New York, by the plaintiff as administratrix of her deceased husband. The action is brought to recover damages for causing the death of the plaintiff's intestate. The complaint alleges that the defendants and each of them caused the death of the decedent by the acts set forth therein and which may be found in the margin.<sup>1</sup>

The plaintiff is an alien being a subject of the kingdom of Italy. The defendant A. Mitchell Palmer was, during the period of the acts herein involved, the Attorney General of the United States. He filed a petition in the United States District Court for the Southern District of New York, in which among other things he averred that the plaintiff was an alien and that he himself was a resident of the state of Pennsylvania, and asked that the case might be removed to the District Court in pursuance of the act of Congress in such case made and provided. This petition was granted, and on February 18, 1921, the cause was removed from the state court into the District Court.

Thereafter, and on February 24, 1921, the defendant Palmer demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The other defendants joined in a similar demurrer. On the same day an order was entered requiring defendants to show cause why the demurrers should not be forthwith determined and judgment entered for the plaintiff upon the pleadings; and on February 28, 1921, an order sustaining the demurrers was entered, the complaint was dismissed upon the merits, and judgment was entered for the defendants against the plaintiff upon the merits and for their costs.

[1] This is an action brought by an administratrix to recover damages for causing the death of her decedent husband by alleged wrongful acts. Although there are some cases which maintain a contrary view,<sup>2</sup>

<sup>1</sup> The complaint alleges that the defendants caused the death of the decedent by the following acts and conduct: "They lawlessly and wrongfully arrested and seized his body and held him in confinement and captivity without process of law and against his will. They assaulted him. They inflicted upon him blows and grievous bodily injuries. They subjected him against his will to repeated interrogations and inquisitions. In, during, and throughout said period the defendants and each of them tortured the said Andrea Salsedo mentally by the following acts and conduct: They threatened to inflict upon him grievous physical injury and death, and to cause his prosecution, conviction and imprisonment for a crime of which he was innocent; and they made and broke repeated promises to set him free. They caused him to believe, and he did believe, that they had present power and ability to inflict upon him said wrongs with which they threatened him and they caused him to be and live in constant fear. In and by said tortures the defendants and each of them caused said Andrea Salsedo to lose control of his mind and will, and to become suicidally despondent and mentally irresponsible for his own conduct, with the result that on or about May 3, 1920, he projected his body from a window of his chamber of confinement in the premises occupied by the so-called Department of Justice on the fourteenth story of the building at Park Row, New York City, to the pavement of the street below, and died."

<sup>2</sup> *Cross v. Guthery*, 2 Root (Conn.) 90, 1 Am. Dec. 61; *Shields v. Yonge*, 15 Ga. 849, 30 Am. Dec. 698.

it is now well established that no action lies at common law to recover damages for causing the death of a human being by the wrongful or negligent act of another. *St. Louis, etc., R. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. It is a maxim of the law that "*actio personalis moritur cum persona*." The rule was most justly criticized as extremely technical and unsound in principle. It was changed by statute in England, but not until 1848, when Lord Campbell's Act was passed. The Congress by the act of June 11, 1906, made common carriers engaged in commerce between the states and between the states and foreign nations, as well as in the District of Columbia and the territories, liable for death caused to their employees resulting from negligence of such carriers. 34 U. S. St. at L. part 1, p. 232, c. 3073. See, also, 35 U. S. St. at L. 65, c. 149 (Comp. St. §§ 8657-8665); 36 U. S. St. at L. 291, c. 143 (Comp. St. §§ 1010, 8662, 8665). And in most of the states statutes similar to Lord Campbell's Act have been passed, and it is interesting to observe that the year before Lord Campbell's Act was passed the state of New York enacted a statute giving a right of action whenever the death was caused by wrongful act, neglect, or default, and the act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. Laws of New York 1847, vol. 2, c. 450, p. 575. And see Laws of 1849, c. 256, p. 388; Laws of 1870, vol. 1, c. 78, p. 215; Laws of 1909, vol. 1, c. 221, p. 346.

[2] The present action is brought under section 1902 of the New York Code of Civil Procedure, the material part of which is as follows:

"The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued."

To sustain an action for death, the wrongful act, neglect, or default must have been the proximate cause of the death. *Scheffer v. Washington City Midland, etc., R. Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Mella v. Northern S. S. Co.*, 162 Fed. 499; *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254, 62 N. E. 349.

The maxim "*In jure non remota causa sed proxima spectatur*" applies in such a case as the one now before the court. That maxim is thus paraphrased by Lord Bacon in his constantly cited gloss:

"It were infinite for the law to consider the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." *Bac. Max. reg. 1.*

This is the first of Lord Bacon's maxims. Its meaning is that in ascertaining the cause of an injury in order to fix liability therefor one cannot go behind the last cause. The final cause and its immediate effect alone concern the court. Liability for result and responsibility

for final cause are regarded as inseparable. If one is responsible for the proximate cause one must be responsible for the result. And it has been pointed out that the general grounds of liability for a tort are not different from those which determine criminal liability. 9 Harvard Law Review, p. 84.

Addison on Torts (8th Ed.) p. 51, declares the rule of law to be that the immediate cause, the *causa proxima*, of the damage, and not the remote cause, is to be looked at. "If the wrong and the legal damage," the writer says, "are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined, as cause and effect, to support an action, unless it is shown that the wrongdoer knew, or had reasonable means of knowing, that the consequences not usually resulting from his act were, by reason of some existing cause, likely to intervene so as to cause damage to another."

In Pollock on Torts (11th Ed.) p. 29, that distinguished authority declares that in such cases liability must be founded on an act which is the immediate cause of harm or of injury to a right. He asserts that for the purpose of civil liability, those consequences, and those only, are deemed "immediate," "proximate," or "natural and probable," which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.

And Judge Cooley in his great work on Torts (3d Ed.) 99, treating of the right to recover in such cases declares that it is not only necessary that damage should be suffered but the damage must be "the legitimate sequence of the things amiss." He states that the maxim of the law here applicable is, that in law "the immediate and not the remote cause of any event is regarded, and that the law always refers the injury to the proximate and not to the remote cause."

The same eminent authority also declares that if the original act was wrongful and in the ordinary course of events would prove injurious to some other person, and does in fact result in injury through the intervention of other causes which are not wrongful, the injury is to be attributed to the wrongful cause passing by those which are innocent. But, if the original wrongful act became injurious only because of the intervention of some distinct wrongful act by another, the injury is imputed to the last wrong as the proximate cause and not to the one which was more remote. See Cooley on Torts (3d Ed.) pp. 101, 104.

The defendants claim that the intervening and wrongful act of suicide was the proximate cause of the death, and that their own acts, assuming them, as we must upon demurrer, to have been committed as alleged, are not sufficient to make them responsible for the injury which resulted, but must be regarded as too remote.

[3] So that the question this court must determine is whether the wrongful acts which it is alleged the defendants committed, and which the demurrer admits they committed, can be regarded as the proximate cause of the death of the decedent. In determining that question it may be well to have in mind the rule laid down by the New York Court

of Appeals in *Laidlaw v. Sage*, 158 N. Y. 73, 99, 52 N. E. 679, 688 (44 L. R. A. 216), where it is said:

"A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague or indeterminate. \* \* \* The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow."

And see *Seifter v. Brooklyn Heights R. R. Co.*, 169 N. Y. 254, 258, 259, 62 N. E. 349.

[4] It is also desirable to keep in mind what was said in *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 475 (24 L. Ed. 256), that—

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, 't must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

[5] It seems to this court that a new and independent cause intervened between the wrong and the injury, and that the suicide was not the natural and probable consequence of the wrongful acts of the defendants, and was not one which the defendants ought to have foreseen in the light of the attending circumstances. And in *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 315 (49 Am. Rep. 580), the court used the following language:

"In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

It was laid down by Lord Ellenborough in 1807 in *Vicars v. Wilcocks*, 8 East, 1, that a man is answerable only for "the legal and natural consequence," not for "an illegal consequence;" that is, a wrongful act of a third person. But this opinion is now disapproved. See *Lynch v. Knight* (1861) 9 H. L. C. 577; *Clark v. Chambers* (1878) 3 Q. B. D. 327; *Pollock on Torts* (11th Ed.) 334. In reaching our conclusion as to the liability of the defendants in the case at bar, it is hardly necessary to say that we attach no importance to the fact of the illegality of the decedent's own act of suicide.

In the leading and well-known case of *Scott v. Shepherd*, 2 W. Bl. 892, the defendant threw a lighted squib into a building full of people, intending no doubt to do mischief of some kind. It fell near a person

who, by a natural act of self-protection, cast it from him. A third person did the same, and in its third flight the squib struck another in the face and exploded, destroying the sight of one eye. Shepherd intended no such grave harm to any one, but he was held none the less liable. His act was wrongful, and the result was the natural and probable consequence. The intervening act of casting off the squib was not the act of a free agent, but was done under compulsive necessity and for self-protection, and was an inevitable consequence, and one the probability of which might have been foreseen. But in the instant case, while the original acts of the defendants were wrongful, it is claimed that the result was not the natural and probable consequence thereof.

The doctrine announced in *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070, is applicable to the case now under consideration. In that case a passenger was injured in a railway collision being injured about his head, back, and spine. Because of his injuries it was alleged that he became disordered in mind and in his brain and spine, and his reasoning powers became prostrated and he took his life. The action was brought under the statute of Virginia giving a right of recovery when death is caused by default or neglect, the statute being similar to the New York Statute herein involved. The question came up in that case, as in this, upon a demurrer to the complaint. The Circuit Court had sustained the demurrer on the ground that the negligence of the railroad company was too remote, and that the proximate cause was the suicide of the defendant; that his death was due to his own immediate act. In that opinion the Supreme Court unanimously concurred and the judgment was affirmed. The court said:

"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."

We think the case decisive of this, and that no just ground of distinction exists between the two cases.

In *Stevens v. Steadman*, 140 Ga. 680, 79 S. E. 564, 47 L. R. A. (N. S.) 1009, the action was under a death statute of the state of Georgia similar to that existing in New York. The complaint alleged that the defendants, in pursuance of a conspiracy to bring about the death of the plaintiff's husband, had written a letter to the decedent calling upon him to resign his official position as vice president of a corporation, and advising him not to inquire into the reasons for the admonition; that, owing to the nervous condition of the decedent and his impaired mental and physical state, this letter had the effect of causing him to take a drug which caused his death; and that the defendants intended

and knew that the letter would produce this effect and bring about the death of decedent.

In the above case the lower court overruled a demurrer to the complaint, and that action was reversed by the Supreme Court, which held that the writing of the letter could not be regarded as the proximate cause of the suicide; the court not being warranted in finding that the writer of the letter intended the suicide of the party to whom it was addressed, and this notwithstanding the allegations of the complaint. As to those allegations the court said that—

"When it is charged that the letter alleged to have been written by the defendants would, when read by the decedent, naturally result in a certain state of mind upon the part of the decedent, and that this 'was known' by the defendants, we are prepared to hold that this was not such a statement of fact as will withstand a demurrer. What is termed fact is, after all, in such cases merely a conclusion of the pleader, though it is set forth as fact and put in the place of a fact among other facts joined together in laying the foundation of the plaintiff's case. \* \* \* Mere positiveness of the terms alleging the psychological results which we have set forth above would not prevent the court from holding, upon demurrer, that the results charged could not have been the known and natural results of the acts charged against the accused."

In the case now to be decided by us there are no allegations that the defendants intended to cause the death of the decedent.

In *Daniels v. New York, New Haven & Hartford Railway Co.*, 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, the action was brought under the Massachusetts statute to recover from the railroad company for negligently causing the death of one Daniels, who was injured in a collision at a railroad crossing. It appears that he had received a blow on the head and other injuries in the collision, and that these injuries caused mental disease, with the result that he committed suicide. It was held the railroad company was not liable. The court declared that the liability of a defendant for a death by suicide—

"exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues."

It declared its opinion to be:

"That the voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death."

We think it unnecessary to examine into the cases further. In our opinion the allegations of the complaint are insufficient to sustain a cause of action against the defendants for causing the death of the unfortunate decedent. His death was not the natural or probable consequence of what the defendants are alleged to have done, and the connection between the defendants' original acts and the final result was too remote.

If the deceased, his mind having become unbalanced because of the treatment to which the defendants subjected him, had escaped from his confinement, and, being unable to appreciate the wrongfulness of his act, had killed the first man he met, could it be said that the death was due to the acts of the defendants? We feel certain that no liability would attach to them under such circumstances. And we feel equally certain that in taking his own life, instead of that of another, the responsibility of defendants is no different.

We may say in conclusion that we concede that a course of either mental or physical torture, or of both combined, may cause a death. And we also concede that the same course or courses of torture may produce a frame of mind that desires death as a means of relief. It is conceivable, therefore, that a tortured man may kill himself. But, if he so kills himself deliberately, we hold that there is an intervening act of his own will for which the New York act affords no remedy. If, on the other hand, it is contended that his self-killing is not his own act, but is the result of suicidal mania, we hold that suicidal mania is not a natural or reasonable result of either mental or physical torture. It is a most unreasonable inference, it seems to us, to say that suicidal mania can be regarded as the natural and probable consequence of either mental or physical torture. So that, if the man does not kill himself deliberately, but his death is due to suicidal mania, which results from torture, we hold that the act of suicide cannot be regarded as the natural and reasonable result of the torture or misconduct alleged, and that the New York act affords no remedy.

We may add in conclusion that we are content to base our decision in this case solely on the authority of *Scheffer v. Railroad Company*, supra. If we may repeat what has been already pointed out in effect, in this case as in that, the suicide was not a result naturally and reasonably to be expected from the acts of misconduct alleged to have been committed by the defendants. It was not the natural and probable consequence. His insanity as a cause of his final destruction was as little the natural or probable result of the conduct of these defendants as his suicide, and each of these are casual or unexpected causes intervening between the acts which injured him and his death.

Judgment affirmed.

MAYER, Circuit Judge (dissenting). The complaint might, perhaps, have been more aptly drawn. It does contain some conclusions. Eliminating various allegations which either are conclusions or might not be provable as matter of law, and reducing the complaint to its narrowest limits, it is alleged that defendants "during and throughout the period from March 1, 1920, to May 3, 1920, caused the death of the said Andrea Salsedo by the following acts and conduct: \* \* \* They inflicted upon him blows and grievous bodily injuries. \* \* \* They threatened to inflict upon him grievous physical injury and death." It further appears that these acts were alleged to have been done while decedent was held in confinement and that during the period mentioned—i. e., on May 3, 1920—he killed himself. In other words, the complaint is drawn upon the theory that there was a continuous course of infliction of physical and mental injury, which directly caused dece-

dent "to lose control of his mind and will" and "to become \* \* \* mentally irresponsible."

Upon this theory, when defendant killed himself, he had no mind, and hence was incapable of understanding the nature of the act of self-destruction. If, then, he had no mind, in the sense of complete inability or disability to understand what he was doing, his suicide was not a knowing act, and, so far as he was concerned, was no act at all, and hence was not an independent intervening cause of death. It surely cannot be said that in every case suicide is an independent intervening cause of the death complained of. Whether or not suicide is an intervening independent cause, which breaks the chain of causation, is a question of fact; and, on this complaint, the wrongs of continuous physical and mental injury alleged to have been committed were, as matter of law, on this pleading the direct cause of the death of decedent.

It is, of course, fundamental that the death of decedent must be the natural result and probable consequence of the alleged wrongful acts. With the general propositions of law in that regard, and the illustrative cases cited in the court's opinion, I agree as matter of course. My view, however, is that it cannot be said, as a matter of law, that the alleged wrongs were not the proximate cause of decedent's death. The course of cause and effect is (1) injuries; (2) loss of mind; (3) death. Eliminating (2) on the ground, *supra*, that it was not an intervening cause, there remains nothing between (1) and (3).

It is said that the suicide was not the natural and probable consequence of the wrongful acts, and not one which defendants ought to have foreseen in the light of attending circumstances. Why not? If a man is confined against his will for over two months (March 1 to May 3), and continuously and grievously injured, and, at the same time, continuously threatened with death, can it be said, as matter of law, that the wrongdoer should not have foreseen that the infliction of such wrongs continuously over a long period of time might naturally and probably lead to loss of mind and that self destruction might follow?

In *Stevens v. Steadman*, 140 Ga. 680, 79 S. E. 564, 47 L. R. A. (N. S.) 1009, I think the court was right. No one can reasonably foresee that to write a letter of the kind there described will, as a natural consequence, cause suicide. In *Daniels v. N. Y. N. H. & H. R. R. Co.*, 183 Mass. 393, 67 N. E. 424, 62 L. R. A. 751, it will be noted that the court regarded the suicide as "resulting from a moderately intelligent power of choice." Again, the court considered that the decedent knew "the purpose and physical effect of his act." It will be noted, however, in that case that the court said that liability of the defendant for a death by suicide—

"exists only when the death is the result of an uncontrollable impulse, or is accomplished by delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act."

In the case at bar, the allegations as to loss of control of mind and will and mental irresponsibility are fully equivalent to "uncontrolled impulse \* \* \* without conscious volition to produce death." The

foregoing, however, are, as is so often the case, expressions to explain the reason for the decision on the facts. In the Daniels Case, *supra*, the court was considering the charge of the trial judge, and, referring to the expression "rational volition," the court said:

"We are of opinion that the term 'rational volition,' used in the charge, was understood by the jury to mean volition attended by the powers of reason, to consider and judge of the act in all its relations, moral as well as physical, and that the charge was in this respect too favorable to the plaintiff. The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life, that he closed the door and locked it with a view to exclude others and prevent interruption, and that he then took the napkin and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a willful and intelligent purpose to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant."

Indeed, the Daniels Case is, I think, authority in favor of the sufficiency of the complaint in the case at bar. The Daniels Case, in effect, recognizes liability when a decedent is wholly incapable of knowing what he is doing and when he acts "without volition." In *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070 (decided in 1881), the death by suicide occurred eight months after the railroad accident. The original injury was sustained, according to the declaration, by reason of the negligent operation of the railroad train upon which the decedent was traveling. The court said:

"The argument is not sound which seeks to trace this immediate cause of death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad."

The conclusion is based upon the proposition that the court construed the suicide as being too remote in point of fact and of time from the original accident, and also as not a result naturally and reasonably to be expected from an injury which was caused not by deliberate acts, but by a negligent act; i. e., careless operation of a train. In the case at bar, however, the acts are alleged in such manner as to be deliberate and the suicide occurred, not at a period long after the injuries were inflicted, but during the very period when they were in process of infliction.

It will not be serviceable to attempt to analyze the decisions of the courts in insurance cases, where the question of suicide has been involved. The point in this case is that on demurrer, when all doubts must be resolved in favor of the pleader, this complaint shows a state of facts from which it may fairly follow that the death was not the result of an independent intervening act, but the proximate result of acts whose consequence could reasonably have been foreseen.

On a trial the allegations may turn out to be unfounded, but we are

now dealing not with their merits, but solely with their effect as matter of pleading. I think, therefore, that the complaint states a cause of action, and that the judgment should be reversed.

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**HARPER et al. v. HOCHSTIM et al.**

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 55.

1. Sales  $\S$ 162—C. i. f. sale to be executed by delivery of title documents, and not physical delivery of goods.

A contract of sale c. i. f. is to be accomplished or executed by the delivery of a bill of lading and policy of insurance, and usually additional papers, and not by physical delivery of the actual goods, and the buyer cannot refuse the documents and demand the goods, or the seller withhold the documents and tender the goods.

2. Courts  $\S$ 372(4)—Construction dependent on whether contract was one of sale c. i. f., not governed by state statutes.

The construction of a contract of sale, dependent on whether it was a sale c. i. f., is one of general law, if not of general commercial law, and unaffected by any statute of the state of New York, in which the contract was made, including the Sales of Goods Act, even assuming that the place of execution furnished the law of the contract.

3. Sales  $\S$ 162—Contract held a c. i. f. sale, and not performed by tender of property, notwithstanding provision as to insurance.

Under a contract of sale for a specified price c. i. f. New York, shipment to be made from China, the sale was a c. i. f. sale, and the seller did not tender performance by purchasing goods in New York and tendering them to the buyer, though the contract further provided that, if the goods were damaged in transit, the buyer would accept the same percentage of allowance secured by the seller from the insurers, as the seller might act as the buyer's agent in procuring the insurance.

4. Contracts  $\S$ 161—No part disregarded, unless no rational interpretation will render it effective.

It is only when parts of a written agreement are so radically repugnant, that there is no rational interpretation that will render them effective and accordant, that any part must perish.

5. Contracts  $\S$ 163—Written portions prevail over printed parts.

In case of inconsistency, the written portions of a document, in the absence of proof to the contrary, will prevail over the printed parts.

6. Contracts  $\S$ 147(1)—Rules of construction only resorted to to effect intent.

The intent of the parties to a contract is the fundamental guide in construction, and rules of construction are only resorted to to effect such intent.

In Error to the District Court of the United States for the Southern District of New York.

Action by J. Ralph Harper and another, copartners doing business as Ralph Harper & Co., against Adolph Hochstim and another, copartners doing business as Hochstim & Bossak. Judgment for defendants on demurrer, and plaintiffs bring error. Affirmed.

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$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The parties hereto entered into a contract evidenced by a document, whereof the material parts are as follows (the italicized portion being written, and the rest a printed form):

"New York, *February 16, 1920.* According to this convention, written and signed in duplicate, the seller, *Ralph Harper & Co., of Tientsin, in China,* sells to Hochstim & Bossak the quantity of about 30,000 *Shantung weasels with tails.* Shipments from China per steamer direct or indirect to New York during March and/or April. Price: \$2.45 each C. I. F. New York. Import duty, if any, to be paid by the buyer. Payment: Four m/s confirmed banker's letter of credit \$73,500 to be opened by the buyer in favor of and to be approved by the seller. Letter of credit to be telegraphed within two days after confirmation. \* \* \* In case of a c. i. f. sale and the goods are damaged while in transit, the buyer agrees to accept in settlement thereof the same percentage of allowance as the seller may secure from the insurers by way of settlement of recovery."

The sellers were in China; the above contract was signed on their behalf by an agent, and the printed form used was the agent's form.

Plaintiffs (the sellers) never shipped any weasel skins under this contract, but on June 25, 1920, they obtained in New York 10,000 weasel skins of the kind contracted for and tendered them to the buyers, who refused the same. The sellers then brought this action, alleging that the weasel skins tendered had been shipped from China (though not by them) to New York, via Seattle, and further asserting that they "would and could have obtained and delivered to defendants" the remaining weasel skins "within the reasonable time for delivery in New York of March or April shipments by steamer from China."

The complaint further asserted that the weasel skins actually tendered "were insured in the amount and against the risks usual in an ordinary c. i. f. contract under a policy payable to the plaintiffs," and finally alleged a "general custom and usage among the dealers in furs in New York City" to the effect that shipments such as above contracted for permitted "shipments from China by steamer to San Francisco and Seattle and thence overland by freight to New York." This custom is said in the pleadings to have been "well understood by both parties" to the above contract.

The breach alleged is the refusal of the buyers to accept the weasel skins tendered, and their refusal to accept any skins so obtained in New York and tendered as were the 10,000 above mentioned.

To this complaint defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer prevailed, and to judgment accordingly plaintiffs brought this writ.

Stockton & Stockton, of New York City (Kenneth E. Stockton, of New York City, of counsel), for plaintiffs in error.

Jacob Newhouse, of New York City (Sidney Rosenbaum, of New York City, of counsel), for defendants in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The allegation of custom, or, properly speaking, of usage (*Eames v. Claffin*, 239 Fed. 631, 152 C. C. A. 465), need not be considered; for, if plaintiff did not tender what he agreed to sell, the manner of his shipment is of no importance. The only question in the case is as to the nature of the contract admittedly made.

[1] If that contract is for what is now widely known as a "sale c. i. f.," such sale was by specific agreement to be accomplished or executed by the delivery of documents by vendor to vendee, and not by the physical delivery of the actual goods for which the documents are the evidence of title. The bargain must be kept as made; the buyer can no more refuse the documents and ask for the goods than can the seller

withhold the documents and tender the goods; and the documents necessary are a bill of lading and policy of insurance, although additional papers, especially an invoice, are usual. The foregoing is now too well settled to need more than reference to *Thames, etc., Co. v. United States*, 237 U. S. 19, 26, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087, and cases there cited; *Landauer v. Craven*, 2 K. B. 94 (1912); *Manbree Co. v. Corn Products*, 1 K. B. 198 (1919); *Setton v. Eberle Co.*, 258 Fed. 905, 169 C. C. A. 625; *Klipstein v. Dilsizian (C. C. A.)* 273 Fed. 473; *Smith Co. v. Moscahlades*, 193 App. Div. 128, 183 N. Y. Supp. 500, and cases there cited.

[2] This question of construction is one of general law, if not general commercial law, and unaffected by any statute of New York, especially the Sales of Goods Act (Consol. Laws, c. 41, §§ 82-158), even assuming that the place of execution of agreement furnishes the law of the contract. That the Sales Act left c. i. f. contracts "as before" was specifically held in *Smith v. Moscahlades*, *supra*.

[3] We are thus required to construe or interpret a commercial or mercantile agreement partly written and partly printed, wherein at the very beginning it is written that the price is to be "c. i. f. New York," and the shipment from China; but later follow printed words plainly implying that the seller is not only to procure insurance, but collect from the insurers, and therefore suggesting that such insurance would naturally be in the seller's name. It is urged that this latter proviso is so repugnant to the nature of a c. i. f. contract as to transform it into something else, and justify a tender of goods in New York, instead of a delivery of documents by mailing in China.

[4] It cannot be doubted that it is only when parts of a written agreement are so radically repugnant that "there is no rational interpretation that will render them effective and accordant that any part must perish." *Rushing v. Manhattan, etc., Co.*, 224 Fed. 74, 139 C. C. A. 520. Applying this rule, it must be admitted that for the seller under a c. i. f. contract to insure in his own name is an apparent departure from the theory of such a sale; for the goods are the buyer's from and after delivery of documents, yet it is perfectly possible for the seller or any one else to act as buyer's agent and validly insure for his principal's benefit (*Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219), and the whole of this agreement may be consistently regarded as containing an authorization from buyer to seller to get the insurance and in case of loss settle for the buyer with the underwriters. As the case cited shows, and it is matter of common knowledge, insurance for "account of whom it may concern" was known to be procurable, and it might run to seller, yet inure to buyer. There is no radical repugnancy here presented, and the reconciliation above suggested is far less difficult than in many reported cases, of which *Harding v. 4698 Tons of Coal (D. C.)* 147 Fed. 971, is a fair example.

[5] But, if inconsistency be still insisted upon, the equally settled rule that the written portions of a document, in the absence of proof to the contrary, will prevail over the printed parts, may be appealed to. *Lipschitz v. Napa, etc., Co.*, 223 Fed. 698, 704, 139 C. C. A. 228; *Thomas v. Taggart*, 209 U. S. 385, 389, 28 Sup. Ct. 519, 52 L. Ed. 845. The reason for this rule has never been better stated than by Lord Halsbury

in *Glynn v. Margetson*, App. Cas. (1893), at page 357, quoting largely from Lord Ellenborough's rulings of 1803. This rule plainly gives decision as it was given below.

A still older rule in the construction of instruments inter vivos is that the earlier of two supposedly inconsistent clauses prevails over the later; and this canon of interpretation has lately been insisted on by high authority. *Vickers v. Electrozone, etc., Co.*, 67 N. J. Law, 665, 675, 52 Atl. 467. It also supports defendant's demurrer.

[6] But a dependence upon rules, which, detached from the circumstances surrounding and justifying their formulation, often seem arbitrary, is unsatisfactory; every rule should be one of reason. Here the first and reasonable inquiry is: What is the dominant or leading thought revealed by this writing, read with the eye of experience? Plainly that seller was to ship the furs and send the documents ahead by mail, so that buyer could, if he wanted, sell the goods again "to arrive." That is a c. i. f. contract. Therefore the parties intended to make that sort of agreement, and the "rules" are resorted to to effect their intent. This is the fundamental guide in construction; it is well put (with an extreme application thereof) in *Morrill Co. v. Boston*, 186 Mass. 217, 71 N. E. 550, by saying that, where—

"a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract itself, is entitled to greater consideration than the other which tends to defeat a full performance; and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument."

-The evident purpose of this agreement was to give buyer substantially what a c. i. f. sale would have given him; the seller never even attempted to put buyer in that desired and agreed upon position, and the decision below was right, because the contract was of the kind known as c. i. f.

Judgment affirmed, with costs.

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IN RE NAGEL.

NAGEL v. KRAUS.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 185.

1. Bankruptcy  $\S$  440—Order reversing order expunging claim reviewable by petition to revise.

An order of the District Court, reversing an order of the referee, expunging a claim against a bankrupt, is reviewable on petition to revise, under Bankruptcy Act,  $\S$  24b (Comp. St.  $\S$  9608), as a proceeding in bankruptcy, and not by appeal, under section 24a, as a controversy arising in a bankruptcy proceeding.

2. Bankruptcy  $\S$  446—Only questions of law reviewable on petition to revise.

Bankruptcy Act,  $\S$  24a (Comp. St.  $\S$  9608), authorizing the Circuit Courts of Appeals to superintend and revise in matters of law proceedings of inferior courts of bankruptcy, does not contemplate any review of

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the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision.

**3. Master and servant ¶30(1)—Motive for discharge immaterial.**

The motives which actuate an employer in discharging an employee are wholly immaterial, if a legal ground exists for the discharge.

**4. Master and servant ¶32—Cause for discharge need not be assigned.**

It is not necessary that an employer should assign a reason for the discharge of an employee, and if at the time of the discharge he assigns a reason, he is not thereby precluded from afterwards relying on a different reason, whether known to him at the time of the discharge or not.

**5. Master and servant ¶30(1)—Arbitrary discharge unauthorized.**

Unless a contract of employment is subject to termination at will, the employer cannot arbitrarily discharge the employee.

**6. Master and servant ¶30(4)—Misconduct ground for discharge.**

Any misconduct inconsistent with the relation of employer and employee, or which is prejudicial or likely to be prejudicial to the interests of the employer, is good ground for an employee's discharge.

**7. Master and servant ¶30(4)—Inducing coemployee to leave ground for discharge.**

For an employee to attempt to induce a coemployee to leave the employer's service to set up a rival business was such a violation of his duty as warranted his immediate discharge.

**8. Master and servant ¶30(7)—Misconduct condoned by delay in discharge.**

The failure of an employer to discharge an employee for about three weeks after learning of his attempt to entice a coemployee to leave the service to set up a rival business was prima facie a condonation of such misconduct, and in the absence of any explanation of the delay was conclusive evidence that the misconduct had been condoned.

**9. Master and servant ¶30(7)—Misconduct condoned not ground for discharge.**

An employer, having once condoned an employee's misconduct, could not thereafter rely on it as ground for discharge; the offense not having been repeated.

**10. Bankruptcy ¶446—Statements of District Judge held findings of fact, that could not be disregarded on petition to revise.**

Statements of the District Judge in his opinion that there was no evidence that an employee's tardiness continued after the employer complained of it, and that none of the other alleged defaults continued after that time, must be regarded as findings of fact, which the Circuit Court of Appeals cannot disregard on a petition to revise, though it might not be able to agree with the finding, if at liberty to examine the facts.

**11. Bankruptcy ¶446—Finding that tardiness was not ground of employee's discharge not reviewable on petition to revise.**

A finding of the bankruptcy court that an employee's tardiness was not the ground for his discharge is a finding of fact, which the Circuit Court of Appeals is not at liberty to review on a petition to revise.

Appeal from the District Court of the United States for the Southern District of New York.

Proceeding on objections filed by Isidor Nagel, alleged bankrupt, to the claim of Walter Kraus. An order expunging the claim was reversed by the District Court, and the bankrupt appeals. Affirmed.

Archibald Palmer, of New York City (C. Deward Benoit, of New York City, of counsel), for appellant.

Arthur C. Kahn, of New York City, for appellee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. [1, 2] The question involved arises in a "proceeding in bankruptcy," within section 24b (Comp. St. § 9608), and so is to be disposed of upon a petition to revise, not being a "controversy arising in a bankruptcy proceeding," under section 24a (section 9608), which could be brought here only upon an appeal; and it is of course well settled that in the case of a petition for revision, as the statute confers jurisdiction "to superintend and revise in matters of law," it does not contemplate any review of the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision in this mode. It will be necessary, however, to set forth the facts, in order to ascertain whether the District Court fell into any error of law in the rule of law which it applied to the facts which were found to exist.

The following facts found by the referee are herein incorporated:

"On May 28, 1920, the claimant Kraus made a written contract with the alleged bankrupt. This contract, among other things, provided that the claimant was to receive a weekly salary of \$100 and 15 per cent. of the net profits of the business, and that 'irrespective of the profits earned by the said manufacturer' (the alleged bankrupt), 'the manufacturer guarantees to the salesman' (the claimant) 'that in no event will the salesman's share of the said profits be less than thirty-five hundred (\$3,500) dollars,' the contract running for the period of one year from June 1, 1920.

"The second paragraph of the agreement is as follows: 'Second. The salesman will assist Nagel in the purchase and sale of such goods, wares, and merchandise which the manufacturer shall require in connection with the cloak and suit department to be operated by the said manufacturer, and the salesman will render any service which may be required of him in connection therewith, which service shall be under the direction, supervision, and control of the said manufacturer. The duties of said salesman shall likewise consist in the selling of goods, wares, and merchandise of the manufacturer in the showroom, not only of the cloak and suit department, but also other departments of the said manufacturer, and the salesman will in addition thereto travel as salesman for the manufacturer at such times and at such places as he may be directed by the manufacturer from time to time. The expenses for such traveling on the road to be paid, however, by the said manufacturer.'

"The fourth paragraph of said agreement provides as follows: 'Fourth: The salesman agrees to devote his entire time and attention for, on behalf, and in the interest of the manufacturer, and will not represent any other person, firm, or corporation during the term of this agreement, directly or indirectly, and will give to the manufacturer his sole and exclusive service.'

"The claimant entered into and continued in the employment of the alleged bankrupt under this agreement until November 20, 1920, when Nagel paid the \$100 salary for the week ending November 20, 1920, when the claimant was discharged by Nagel. Upon the occasion of his discharge, Nagel told the claimant, 'I know that you have been doing things that undermine my business.'

"The claim filed is as follows: 'Weekly salary at \$100 a week from November 20, 1920, to May 28, 1921, 27 weeks, \$2,700; weekly salary at the rate of \$100 a week from May 28, 1921, to May 31, 1921, three days, \$42.84; profits guaranteed, \$3,500; whole amount of claim, \$6,242.84.'

"The evidence shows that, some three or four weeks before his discharge, Kraus asked Knoll, another employee of Mr. Nagel, whether he would like to go in business with him (Kraus). This employee told Kraus, 'Yes, but he hadn't any money; that his money was with Mr. Nagel, \$2,500 as a deposit' Mr. Kraus then said, 'That's nothing, the money I can get you out.'

Kraus proposed to this employee that he should put this money into a partnership with him. Kraus said he would 'put in money and the profits would be divided fifty-fifty.' About two or three days after this, and before the discharge, this employee told Mr. Nagel what Kraus had proposed to him.

"The evidence shows that Kraus, on the Monday following the Saturday when he was discharged, reported at Nagel's place of business, and Nagel asked him 'What are you doing here?' and Kraus said he came to work. 'I said, you know I discharged you, and I had good cause to discharge you; you tried to undermine my business, and you wanted to go in business with Knoll, and even promised to get his money.' Nagel further said that Kraus 'went out and bought a lot of goods that you wanted me to take in from Weinstein, that I gave you no authority to buy.' Kraus then said, 'I am the manager here; I can go out and buy goods whenever I like, and we need goods next month, and I need a lot of goods to sell; I can't stand around here and not sell any goods.'

"In view of the agreement made by Kraus that he would assist Nagel in the purchase and the sale of such goods, wares, and merchandise as Nagel should require, and would 'render any service which may be required of him in connection therewith, which service shall be under the direction, supervision, and control of the said manufacturer,' and that Kraus further covenanted that he would 'devote his entire time and attention for, on behalf, and in the interest of the manufacturer' (that is, Nagel), 'and will not represent any other person, firm, or corporation during the term of this agreement, directly or indirectly, and will give to the manufacturer his sole and exclusive service,' I have come to the conclusion that there was sufficient cause in the conduct of Kraus to justify his discharge.

"I therefore find that he was discharged for cause, and, as he was paid up to the date of his discharge in full for his salary, I think he has no further claim against Nagel. An order expunging the claim of Walter Kraus may be entered accordingly."

An order was thereupon entered, directing that the claim of Kraus against the bankrupt in the sum of \$6,242.82 be in all respects expunged and stricken from the records; and the creditor, feeling aggrieved by the order and believing it erroneous, filed his petition praying that the order might be reviewed. In his petition he set forth that (a) the findings of conclusion of the referee, as stated in his opinion, are contrary to and against the evidence and against the weight of evidence; (b) that the evidence of the alleged bankrupt, if true, was insufficient in law to justify a discharge; (c) that the evidence of the alleged bankrupt, claimed to justify the discharge, did not disclose such a systematic course of conduct for a definite period of time prior to the discharge as would justify petitioner's discharge.

The District Judge states in his opinion that he agrees with all the findings of the referee except one. That one is the statement made by the referee that Knoll told Nagel of Kraus' talk with him two or three weeks after it occurred. "In fact," says the District Judge, "he told him about three weeks before November 20th, the day of the discharge." He continues:

"I agree that Kraus' approaches to Knoll were certainly intended for action before their contracts expired, and were a just ground for discharge. Therefore the only question is whether Nagel's inaction for three weeks was conduct from which condonation should be inferred. \* \* \* Therefore the question is whether an employer, knowing that his employee has tried to wrest away other employees and to set up a rival business, in breach of his own contract of service, may wait for three weeks before discharging him."

Then the District Judge held that, as there was no explanation given for the delay, Nagel—

“was not entitled to wait so long and the discharge was not justified. It is possible that Nagel seized upon these faults, because he found himself drifting into financial embarrassment and wished to retrench; but, whatever his motive, the fact is that by his conduct he has condoned the fault, and also the earlier faults.”

[3, 4] We may observe that the remark as to the possible motive of Nagel is quite immaterial and irrelevant. The motives which actuate the employer in discharging his employee are wholly immaterial, if a legal ground exists for the discharge. *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935. It is not necessary that he should assign a reason for the discharge. *Mercer v. Whall*, 5 A. B. 447; *Ridgway v. Hungerford*, 3 A. & E. 171; *Strauss v. Meertieff*, 64 Ala. 229, 38 Am. Rep. 8; *Orr v. Ward*, 73 Ill. 318. And if at the time of the discharge he assigns a reason, he is not thereby precluded from afterwards relying upon a different reason, whether known to him at the time of the discharge or not. The real question is whether a good and sufficient reason existed at the time. *Carpenter Steel Co. v. Norcross*, 204 Fed. 537, 123 C. C. A. 63, Ann. Cas. 1916A, 1035; *Park v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138; *Allen v. Aylesworth*, 58 N. J. Eq. 349, 44 Atl. 178; *Abendpost Co. v. Hertel*, 67 Ill. App. 501; *Arkush v. Hanan*, 60 Hun, 518, 15 N. Y. Supp. 219; *Insurance Co. v. Williamson*, 152 Ky. 818, 154 S. W. 409; *Getty v. Silver Co.*, 162 App. Div. 513, 516, 147 N. Y. Supp. 1083; *Macauley v. Publishing Co.*, 170 App. Div. 640, 155 N. Y. Supp. 1044; *Thomas v. Manufacturing Co.*, 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020.

[5-7] Unless the contract of employment is one which can be terminated at will, the employer cannot arbitrarily discharge his employee. *New York Insulated Wire Co. v. Broadnax*, 107 Fed. 634, 46 C. C. A. 518. Any misconduct, however, which is inconsistent with the relation of employer and employee, will justify the former in terminating the relationship. *Darst v. Matthieson Alkali Works (C. C.)* 81 Fed. 284; *Singer v. McCormick*, 4 Watts & S. (Pa.) 265; *Frederich v. Ralli*, 11 La. Ann. 425; *Darden v. Nolan*, 4 La. Ann. 374; *Beckman v. Garrett*, 66 Ohio St. 136, 64 N. E. 62. And dismissal is warranted by any act of the employee which is prejudicial, or likely to be prejudicial, to the interests of the employer. *Pearce v. Foster*, 17 Q. B. D. 542; *Newman v. Reagan*, 65 Ga. 512; *Vinson v. Kelly*, 99 Ga. 270, 25 S. E. 630; *Adams Express Co. v. Trego*, 35 Md. 47. If the employee does any act which is inconsistent with the duties and obligations arising out of and incident to the relation, it is good ground for his discharge. *Singer v. McCormick*, supra. The nature of the relation imports trust and confidence, and its evident purpose is the advancement of the master's interests, and if the trust is violated, and the employee intentionally does anything detrimental to the employer's interests, it is such a breach of the contract as justifies his immediate discharge. *Mercer v. Whall*, 5 Q. B. 447; *Amor v. Fearon*, 9

Ad. & El. 548. That an employee attempts to induce a coemployee to leave his employer's service to set up a rival business is certainly such a violation of his duty as warrants his immediate discharge.

[8, 9] This brings us to inquire whether a delay of, "about three weeks" in discharging Kraus, after learning of his conversation with Knoll, there being no explanation for the delay, amounted in law to a condonation of that particular misconduct. As we understand the rule, it is that, if an employer retains the employee in his service after he has knowledge of misconduct warranting his discharge, such retention is *prima facie* a waiver, and condonation is presumed, unless circumstances are shown that tend to establish a reasonable and proper reason for the delay. *Batchelder v. Elevator Co.*, 227 Pa. 201, 207, 75 Atl. 1090, 19 Ann. Cas. 875. In *Wood on Master and Servant* (2d Ed.) § 123, the rule is laid down as follows:

"The question as to whether the master has waived a breach of contract by the servant, by retaining him in service after knowledge of such breach, is a question of fact for the jury. *Prima facie* it is a waiver, and condonation is presumed; but, if there are circumstances shown that tend to establish a reasonable or proper excuse for delay, it is for the jury to say whether in fact the breach was condoned."

In 20 Am. & Eng. Encyc. of Law, 33, the rule is stated in similar terms. It is as follows:

"The mere fact that the servant is not dismissed immediately after knowledge of the ground for discharge does not necessarily amount to a waiver of the right to discharge, but his retention under such circumstances is *prima facie* evidence of waiver."

We must conclude, therefore, that the District Judge correctly held that the failure of Nagel to discharge Kraus for about three weeks after learning of the attempt of Kraus to entice Knoll to leave the service of Nagel was *prima facie* a condonation of his misconduct in that particular, and that, as no explanation was made for this delay, we must regard the omission as conclusive evidence that Nagel had condoned that particular misconduct. Having once condoned it, he could not thereafter rely upon it. *Ridgway v. Hungerford Market Company*, 3 Ad. & El. 171; *Jones v. Trinity Parish (C. C.)* 19 Fed. 59; *Daniell v. Boston, etc., Co.*, 184 Mass. 337, 68 N. E. 337; *Leatherberry v. Odell (C. C.)* 7 Fed. 641; *Tickler v. Andrae Mfg. Co.*, 95 Wis. 352, 70 N. W. 292; *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524; *Jonas v. Field*, 83 Ala. 445, 3 South. 893. Although, if the offense had been repeated, the principle stated would not have applied. *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 359, 57 N. E. 485. As respects the particular misconduct we have been considering, it was not claimed that there was any repetition of it.

[10, 11] The bankrupt relied, however, upon two other grounds of alleged misconduct. One of them was the tardiness of Kraus in reporting for business at the office. The referee, however, has made no findings of law or fact upon that phase of the subject. The District Judge in his opinion alludes to the matter as follows:

"Kraus' tardiness may indeed have continued, but there is no evidence that it did, and it is pretty clear that this was not in fact the ground of the discharge."

This is the only reference he has made concerning it. The statement that there is no evidence in the record that the tardiness continued after Nagel complained of it to Kraus we must regard as a finding of fact, and as such, on a petition to revise, we cannot disregard it, although we might not be able to agree with it, were we at liberty to examine into the facts, which we are not. We are also concluded by his finding that the tardiness was not the ground for the discharge. That also is a finding of fact, which we are not at liberty to review.

The third ground upon which Nagel relied was that Kraus went out and bought a lot of goods from one Weinstein without authority, and when he was remonstrated with said, "I am the manager here; I can go out and buy goods whenever I like," etc. The referee considered this matter, and concluded that it warranted the discharge of Kraus; but he made no finding as to the time when this misconduct occurred. The District Judge makes no reference to the subject in his opinion, except that, after saying that Nagel learned "about three weeks" before his discharge of Kraus of the conversation between Kraus and Knoll, he states that none of the alleged defaults continued after that. We must accept that as a finding of fact which we are not at liberty to review, and if it is to be so treated then it follows that that particular misconduct was also condoned.

For the reasons stated, the order of the District Judge is affirmed.

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MOORE, County Assessor, et al. v. GAS SECURITIES CO.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1921.)

No. 5719.

1. Waters and water courses ⇐231—Under Colorado statute, irrigation district taxes must be collected with general taxes.

Under Colorado Irrigation District Act 1905, § 21, as amended in 1907 (Rev. St. Colo. 1908, § 3460), which provides that "it shall be the duty of the county treasurer of each county in which any irrigation district is located in whole or in part, to collect and receipt for all taxes levied as herein provided in the same manner and at the same time and on the same receipt as is required in the collection of taxes upon real estate for county purposes," a county assessor is without authority to discriminate against taxes levied for district purposes by segregating them and refusing to include them in the totals against the lands as shown on the assessment roll, but placing them on a separate roll, and a county treasurer may not lawfully demand, receive, and receipt for all other taxes against the lands, leaving district taxes uncollected.

2. Taxation ⇐319 (1)—Forms prescribed by state tax commission must conform to statutory requirements.

Under Laws Colo. 1911, p. 612, creating a state tax commission and (section 18, subd. 3) giving it power to prescribe a uniform system of procedure in the assessor's office, and all forms, blanks, books and records used

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

therein and providing that "no other system, forms or blanks," etc., "shall be used in such offices excepting those prescribed by the commission," the forms prescribed must conform to the statutes, and the commission cannot insist that the operation of a statute be suspended that its idea of forms may be carried into effect.

**3. Constitutional law**  $\S$  143—State statute held unconstitutional, as impairing obligation of contracts with bondholders.

At the time of issuance and sale of bonds by a Colorado irrigation district, the statute under which they were issued provided (Rev. St. Colo. 1908,  $\S$  3461) that "the revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes," the revenue laws provided that all taxes on land should be payable one half on or before the last day of February each year, and the other half on or before the last day of July; that on default there should be a sale for all taxes delinquent, and if there was no bidder the land should be struck off to the county, and could be redeemed only by payment of all taxes due, with interest and penalties. By Laws Colo. 1915, p. 317, said section 3461 was amended by providing for a separate sale for delinquent district taxes, and that if there was no bidder the land should be struck off to the district, which should be entitled to a deed on payment of such sum as the county commissioners might fix. *Held*, that such amendment gave the bondholders a different and less effective remedy for the collection of their bonds, and was void, as impairing the obligation of their contract, in violation of Const. U. S. art. 1,  $\S$  10.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Petition for mandamus by the Gas Securities Company against E. B. Moore, Assessor of Adams County, Colo., and others. Writ granted, and defendants bring error. Affirmed.

Bert Martin and Samuel H. Morrow, both of Denver, Colo., for plaintiffs in error.

Platt Rogers, of Denver, Colo. (Edmund Rogers and Robert G. Strong, both of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS and JOHNSON, District Judges.

YOUMANS, District Judge. This cause was submitted to the court below on the petition for mandamus and the response thereto. There was no dispute as to the essential facts, either in the court below or in this court.

The East Denver municipal irrigation district was a corporation organized on the 22d day of November, 1909, under an act of the General Assembly of Colorado entitled "An act in relation to irrigation districts," approved May 3, 1905 (Laws 1905, p. 246), and all acts amendatory thereof. On the 8th of October, 1910, the landowners and taxpayers of the irrigation district, at an election duly held, authorized an issue of bonds to the amount of \$3,000,000 for the purpose of constructing an irrigation system for the lands of the district. On the 10th of October, 1910, the board of directors of the district, pursuant to such election, directed the issuance of bonds in the amount author-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ized by the voters. During the year 1914 the defendant in error, a corporation of the state of New York, purchased bonds of the district to the amount of \$628,500. On the 8th of May, 1919, the defendant in error obtained judgment in the court below on interest coupons on said bonds to the amount of \$226,170.95, which judgment was and is unpaid.

In December, 1919, the court below issued a writ of peremptory mandamus, commanding the board of county commissioners of Adams county, Colo., to fix the rate and make the levy to pay the judgment. Levies for each of the years 1919 and 1920 were to be at such rate as to be equivalent to \$2 upon each acre in the district, and for the year 1921 at such rate as would be necessary to complete the payment of the judgment. The defendant in error demanded of E. B. Martin, one of the plaintiffs in error, that he, as assessor, extend the levy for the payment of the judgment in the proper column of the tax list opposite each piece of real property assessed, and that he total said taxes with the state, county, and other taxes, and at the end of the tax list prorate the total of said taxes to the several funds. The assessor proceeded to comply with such demand, but on the 22d of January, 1920, the Colorado state tax commission ordered him not to incorporate irrigation district taxes in the total of general property taxes. The said assessor then refused to comply with the demand of defendant in error. The order of the state tax commission was by letter, which reads as follows:

"State of Colorado, Colorado Tax Commission.

"January 22, 1920.

"Forms.

"Mr. E. B. Moore, Assessor, Adams County, Brighton, Colorado—Dear Sir:

"It has recently come to our attention that you have proposed a change in form of your tax roll, in order to include in the total of general property taxes special taxes levied for irrigation districts. Your attention is called to the fact that, under the statutes creating the tax commission, all authority for establishing or changing forms is vested in this body. We have heretofore approved the form which your county has used and the manner of recording the various tax levies thereon, and we do not approve any change from that method. In other words, we do not consider it advisable to incorporate irrigation taxes in the total of general property taxes. There are numerous reasons for keeping these taxes separate, which need not be gone into at this time.

"Very truly yours,

Colorado Tax Commission,

"E. B. Morgan, Chairman."

After stating the foregoing facts and setting out the order of the Colorado tax commission, the petition of the defendant in error contains the following allegations:

"Your petitioner alleges that the object and purpose of said order, and of the observance of the same by the said assessor, was and is to deny to your petitioner, and the other holders of the bonds of said irrigation district, the benefit of the revenue laws of the state of Colorado in the assessment, levying, and collection of the special tax provided for by the Irrigation District Law for the payment of the bonds of the said irrigation district and the interest thereon, and to discriminate said special tax from the state, county, school, and other taxes, in the collection of said taxes, and by not demanding the payment of the total of all taxes, including said special tax, to cause said

special tax to remain unpaid, and to otherwise encourage a refusal to pay said special tax.

"12. Your petitioner further shows to the court that the only levy heretofore made by the county commissioners of Adams county for the payment of interest on the bonds of your petitioner, and other bonds of said district then outstanding, was in the year 1913; but the assessor of said county then failed and neglected to include said levy in a proper column in the tax roll, or to include the same in the total of taxes assessed against the real property in said irrigation district, but, on the contrary, made a separate and different roll for the levies made on account of said district, and thereafter said James W. Campbell, the treasurer of said county, in notifying each person in said irrigation district from whom a tax was due on real estate in said district, failed and refused to include the levy for interest on bonds of said district in the amount stated to be due from such person, and never required or demanded the payment of the levy for such interest at the times of collecting taxes for other purposes, but, on the contrary, deliberately and intentionally, and for the purpose of aiding in the avoidance of the payment of said tax, has offered to give receipts for all other taxes other than those levied for the payment of said bonds, and has aided and abetted those desirous of avoiding the payment of said taxes for interest.

"13. Your petitioner also shows to the court that said James W. Campbell, as treasurer of said county, has treated the levy of taxes for the payment of interest as made in 1913, and the levies of taxes as made in subsequent years for the general expenses of said district, as separate and distinct from levies made for state, county, school, and other purposes, and has refused to include said tax for the payment of interest in the total tax of the owners of lands in said district, and has not demanded payment of said tax for interest as part of the tax due from said owners of lands, but, on the contrary, has allowed and encouraged the payment of all taxes other than those for bond interest and other district taxes whereby the taxes for state, county, and school purposes have been generally paid, and said interest tax has not been paid, and said James W. Campbell, as treasurer, threatens to continue the same practice with respect to the levies heretofore by the court commanded to be made.

"14. And your petitioner further shows that said treasurer has heretofore distinguished the levy made in 1913 for interest on the bonds of said district from the levies made for other purposes, and in making sales of lands in said district for delinquent taxes has refused to include as part of said delinquent taxes the taxes which then remained unpaid on account of interest on said bonds, and has, by separate advertisement, with separate and additional penalties and costs, offered for sale the lands in said district on which said levy for interest on said bonds had not been paid, and has executed and delivered separate and different certificates of purchase for said separate and distinct sales, and said treasurer has for the unpaid taxes for the general expenses of said district made separate and distinct sales, with separate and additional penalties and costs, all of said sales for delinquent taxes being made in the year 1919 for the taxes of 1913 and subsequent years, and although all of the taxes of said years were delinquent at the times of said sales the said treasurer refused to include all of said delinquent taxes in one sale, but made advertisement and sale for each of said previous years, with penalties and costs in each of said sales, and the said James W. Campbell threatens to continue to discriminate all levies made on account of bond interest from those for state, county, school, and other purposes, and in case of failure to pay taxes on the land in said district to make separate and distinct sales, and to give separate and distinct certificates of purchase.

"15. By reason of the acts and doings of said treasurer, as above set forth, the undertaking of the state of Colorado to levy and collect taxes for the payment of the bonds issued by the said irrigation district and the interest thereon in the same manner, at the same time, and with the like effect as in case of all other taxes, is wholly nullified and set at naught, and your petitioner and other holders of the bonds of said district are denied the taxing

power of the state in the collection of said bonds and the interest thereon, and they are wholly without remedy, except by the interposition of this court.

"16. By reason of the acts and doings of said treasurer, as above set forth, none of the sales of lands in said district for delinquent taxes either for state, county, school, or other purposes, or for interest on bonds, or the general expenses of said district, have been in accordance with the statutes of Colorado, and no legal tax deeds on account of said sales can be made, and said practice, if continued as threatened, will defeat and render invalid all such tax sales, and thereby prevent sales being made, and render impossible the collection by proper legal methods of the moneys due and to become due to your petitioner on account of interest and principal of said bonds.

"17. The respondent James W. Campbell, as treasurer of Adams county, fails, neglects, and refuses, and threatens to continue to refuse, proper demand by your petitioner having been made therefor, to collect and receipt for the tax levied to pay the said judgment of your petitioner, and all other irrigation district taxes, in the same manner, at the same time, and on the same receipt as is required in the collection of taxes for state, county, and other purposes, and to apply the general revenue laws of the state to the collection of and receipt for said taxes.

"18. By reason of the failure and refusal of the said respondent E. B. Moore, as county assessor of Adams county, induced thereto by reason of said erroneous order of the Colorado state tax commission, to extend the said levy to pay the judgment of this court in the proper column of the tax list for the year 1919, and to total said tax with the state, county, and other taxes for said year, and by reason of the failure, neglect, and refusal of the said assessor to extend in the appropriate column, as bond fund levy to be accounted for separately and solely applicable upon the judgment heretofore rendered in this court, the levy made and adopted by the board of county commissioners of Adams county to pay said judgment, and by reason of the failure of the respondent James W. Campbell, as treasurer of Adams county, to collect and receipt for the tax levy to pay the judgment of your petitioner, and all other irrigation district taxes, in the same manner, at the same time, and on the same receipt as required in the collection of taxes for state, county, and other purposes, and to apply the general revenue laws of the state to the collection and receipt of said taxes, your petitioner is without remedy to obtain satisfaction and payment of said judgment or of the coupons due or to become due to it, as the owners of the bonds hereinbefore described, because the methods provided by said statutes of the state of Colorado for the payment of the obligations of said district is the only method by which said judgment or said coupons can be paid."

Mandamus was granted in accordance with the prayer of the petition. After appropriate recitals, the order of the court reads as follows:

"Wherefore, by reason of the premises, you, the said E. B. Moore, as assessor of said Adams county, are commanded each and every year, until the judgment rendered in favor of said Gas Securities Company, and against the said East Denver municipal irrigation district, shall have been fully satisfied and discharged, to extend on the tax list of said Adams county the tax levied each year by the board of county commissioners of said county, on the lands in said East Denver municipal irrigation district, to pay the judgment of said court in manner as provided in the writ of mandamus heretofore issued by our said court against said board of county commissioners, the same to be in tabular form, and in separate columns, in the same manner, and in the same form as state, county, and other taxes are extended on said tax list, and at the end of each item of land in said district, assessed and taxed in said tax list, to total the amount of said tax with the state, county, and other taxes, and to deliver said tax list to the county treasurer of said county, in the form and manner and with the total of taxes on lands in said district, as above set forth, to the end that the said treasurer shall be commanded to collect the said total tax on the lands in said district, at the times provided by statute,

and shall not receive or receipt for payments made for less than said total tax.

"And you, the said E. B. Moore, as assessor, are further commanded, each and every year, and until said judgment shall be satisfied, to make known to our said District Court, immediately upon the completion of the tax list and assessment roll of said county of Adams, and prior to the delivery thereof to the county treasurer of said county, how you shall have executed this writ, and upon the making of each of said returns you will then and there have this writ.

"And you, the said James W. Campbell, as treasurer of said county, are hereby commanded, during the year 1920 and each and every year until said judgment rendered in favor of said Gas Securities Company, and against the East Denver municipal irrigation district, shall have been fully satisfied, to demand of each owner of land in said irrigation district the payment of the total of all taxes levied against said land, including the taxes levied for the payment of said judgment, and to collect the total of said taxes, at the times and in the manner provided by statute, and to issue a single receipt therefor, or for each installment thereof, which shall include the tax levied for the payment of said judgment; and this you shall do, notwithstanding said taxes may appear on different tax lists. And you are also commanded, in case of delinquency in the payment of said taxes on any of the lands in said district, to make sale of the same from time to time, and in the manner provided by statute, for the said total amount due, including taxes for the payment of said judgment; that is to say, to make but one sale for the total of all taxes levied on lands in said district, and giving but one certificate of sale, and not to make separate sales for taxes levied against lands for the payment of irrigation district expenses, or for the payment of the judgment. If there are no bidders for any of said lands at said sales, the same shall be struck off to the county of Adams, and a certificate of purchase issued to said county as provided by statute.

"And you, the said James W. Campbell, as treasurer of said county, are further commanded, on the 5th day of March and the 5th day of August each year, until said judgment has been satisfied, to make known to our District Court how you shall have executed this our writ in respect to the collection of taxes, and in the event of making sales of lands in said district for delinquent taxes, you are commanded, immediately upon making sales of lands for taxes, to make known to our said District Court how you shall have executed this our writ in respect to making such sales and of striking off said lands in the event there are no bidders."

[1] The correctness of these orders is challenged here. The contention of the defendant in error is that under the law of Colorado special taxes levied for irrigation districts should be included in the total of general taxes and collected at the same time. The plaintiffs in error, as assessor and treasurer of Adams county, contend that the law is otherwise, and that they are bound by the orders of the state tax commission. The controversy involves the construction of a sentence of section 21 in the act of May 3, 1905, of the General Assembly of Colorado entitled "An act in relation to irrigation districts." As passed in 1905, the sentence in section 21 read as follows:

"It shall be the duty of the county treasurer of each county in which any irrigation district is located, in whole or in part, to collect and receipt for all taxes levied as herein provided, in the same manner and at the same time as is required in the receipt for and collection of taxes upon real estate for county purposes."

On April 3, 1907 (Laws 1907, p. 490, § 3), that sentence was amended to read as follows:

"It shall be the duty of the county treasurer of each county in which any irrigation district is located, in whole or in part, to collect and receipt for all

taxes levied as herein provided in the same manner and at the same time, and on the same receipt as is required in the collection of taxes upon real estate for county purposes."

The amendment of 1907 is a part of section 3460 of the Revised Statutes of Colorado of 1908. The General Assembly of Colorado on April 4, 1919 (Laws 1919, p. 483, § 1), again amended section 21, but left unchanged the sentence above quoted in the amendment of 1907.

Counsel for plaintiffs in error contend for the application of the rule that the courts of the United States will follow the decisions of the Supreme Court of a state upon the construction of a statute of that state. Counsel argue that section 21 as amended, as above quoted, has been construed by the Supreme Court of Colorado in the case of Interstate Trust Co. v. Smith, 66 Colo. 525, 181 Pac. 126, decided May 5, 1919. The opinion in that case is short, and we will quote the whole of it.

"Plaintiff in error, plaintiff below, the Interstate Trust Company, brought this action to restrain defendant, as county treasurer of Montezuma county, from accepting and giving receipts for the general county, state and school taxes levied against lands in the Montezuma Valley Irrigation district, without at the same time requiring the payment of the Montezuma Valley Irrigation district taxes. The defendant interposed a demurrer to the complaint, which was sustained. Plaintiff elected to stand upon its complaint, and a judgment of dismissal followed. Plaintiff brings the cause here for review.

"The case of Interstate Trust Co. v. Montezuma Valley Irr. Dist., et al. (decided by this court at this term) 181 Pac. 123, determines that irrigation district assessments are special taxes levied for local improvements only. A refusal, therefore, of the county treasurer to accept general state, county, and school taxes unless and until the taxpayer had also paid his irrigation district assessments, in our opinion finds no support either in reason or law, statutory or otherwise. The judgment of the trial court is right, and should be affirmed."

In its opinion the Supreme Court of Colorado made no reference to any part of section 21 as above quoted, nor to the act approved April 4, 1919. The court in its opinion refers to the case of Interstate Trust Co. v. Montezuma Valley Irr. Dist. et al. (decided on the same day) 66 Colo. 219, 181 Pac. 123. In its opinion in the last-named case the Supreme Court of Colorado did not undertake to construe section 21, above referred to. The following quotation from the opinion in that case will show that the question involved there was the power of a board of directors of an irrigation district to levy a cumulative tax:

"In these proceedings, plaintiff below, the Interstate Trust Company, sought by writ of mandamus to compel the board of directors of the Montezuma Valley Irrigation district to certify an additional tax by cumulative levy to the county commissioners of that county, for the purpose of paying off some \$25,000 in warrants of that district and held by it, amounting, with interest, to approximately \$38,000. There was a demurrer to the writ on the ground that it did not state sufficient facts to constitute a cause of action. The demurrer was sustained, and, plaintiff electing to stand by its case as made, a judgment of dismissal was entered. The trust company brings the cause here for review.

"It is admitted that sufficient levies have been made to pay the warrants in question in full, and that such levies are also sufficient to cover in addition a margin of 15 per cent. for deficiencies. It appears, however, that many taxpayers are delinquent, and that for this reason the warrants have not been discharged. Therefore plaintiff claims that it is the clear legal duty of the

defendant officers to levy and collect an additional tax to pay and discharge these warrants. It is urged that the words, 'such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred,' found in the statute (Laws 1905, p. 259, § 18), confer the power upon, and make it the duty of, the district officials to levy a cumulative tax for this purpose. The outcome of this suit, therefore, depends wholly upon the construction to be given the Irrigation District Act.

"It is clear that the claim of plaintiff can be upheld only upon the theory that the clause above quoted gives the board of directors of the district general taxing powers, and that the taxes levied under the act are in the nature of general taxes, and are not local or special in character. The question is whether irrigation districts are organized for the purpose of making local improvements, with the power to levy local improvement taxes only, or whether they are so closely akin to municipal corporations in their nature and objects as to give them general taxing powers."

The conclusion of the court is stated in the opinion as follows:

"It is manifest that to command the defendants to make the proposed levy would be to enjoin upon them the doing of a thing which they are not only not required by law to do, but which they in fact have no legal right to do. The judgment of the trial court is sound and should be affirmed."

The Supreme Court of Colorado in that case was construing section 18 of the act of 1905 (section 3457 of the Revised Statutes of Colorado of 1908), which section reads as follows:

"It shall be the duty of the board of directors, on or before September first of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred."

In neither of the two cases above referred to does the Supreme Court of Colorado construe the provision in section 21 which requires irrigation taxes to be collected and receipted for "in the same manner and at the same time and on the same receipt as is required in the collection of taxes upon real estate for county purposes." In our opinion the plain wording of the statute leaves nothing for construction, and, there being no construction of a state court to the contrary, we adopt, that construction which the plain wording of the statute indicates. It is true that there is a distinction in law between special taxes levied on real estate for making an improvement, and general taxes for county and state purposes; but there is no such inherent difference between the two classes of taxes as prevents the collection of both classes in the manner that the statute directs.

[2] The state tax commission of Colorado is given power by the statute (Laws 1911, p. 616, § 13, subd. 3.):

"To prescribe a uniform system of procedure in the assessor's office and the form and size of all tax schedules, tax rolls and warrants, field books, plat and block books and maps, and all other notices and forms furnished to taxpayers, and all blanks, books and records used in the offices of county assessors, and no other system, forms or blanks, etc., shall be used in such offices excepting those prescribed by the commission."

The commission must accommodate and adapt its forms to the statute. It cannot insist that the operation of the statute be suspended in

order that its idea of forms may be carried into effect. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 512, 514, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

[3] Another question was raised in the court below, and passed upon; that is, that any law of the state, which gave to the holders of bonds a method for their collection less effective than the one they had at the time the bonds were issued, impaired the obligation of a contract. In the case of *Crew Levick Co. v. Commonwealth of Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 127 (62 L. Ed. 295), the Supreme Court of the United States said:

"We accept the decision of the state court of last resort, respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."

Section 22 of the Irrigation Act of 1905, carried into the Revised Statutes of Colorado of 1908 as section 3461, reads as follows:

"The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes."

This section was unchanged at the time of the issuance of the bonds by the East Denver municipal irrigation district and at the time of the purchase of a portion of these bonds by the defendant in error. It contends that these revenue laws are a part of its contract. That section was amended by an act of the Legislature of Colorado approved April 12, 1915 (Laws 1915, p. 315). That act reads as follows:

"Section 1. That section 22 of an act entitled 'An act in relation to irrigation districts,' approved May 3, 1905, the same being general section 3461 of the Revised Statutes of 1908, be, and the same hereby is, amended to read as follows:

"Section 22. The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes; Provided, that in case of sale of any lot or parcel of land, or any interest therein, for delinquent irrigation district taxes or delinquent irrigation district and general taxes, and there are no bids therefor on any of the days of such tax sale, the same shall be struck off to the irrigation district in which such land is located for the amount of the taxes, interest and costs, thereon, and a certificate of sale shall be made out to said district therefor and delivered to its secretary, who shall file the same in the office of its board of directors and record the same in a book of public record to be kept by said board for such purpose, but no charge shall be made by the county treasurer for making such certificate, and in such case he shall make an entry on his records "struck off to ——— irrigation district" as well as an entry showing the amount of the general irrigation district taxes and interest thereon, respectively for which said lands were offered for sale, together with the cost attending such sale; and no taxes assessed against any land so struck off to said district under the provisions of this section shall be payable until the same shall have been derived by the district from the sale or redemption of such lands; And provided further, that such irrigation district or its assignee shall be entitled to a tax deed for said lands in the same manner and subject to the same equities as if a private purchaser at said tax sale, upon the payment to the county treasurer at the time of demanding said deed of such sum as the board of county commission-

ers of such county at any regular or special meeting may decide; And provided further, that in case the owner of said lot or parcel of land, or interest therein, shall desire to redeem the same at any time before said tax deed shall be issued, the same may be done in the same manner as now or hereafter provided by law to be done, in case said lot or parcel of land, or interest therein, had been purchased by a bidder at said tax sale or had been struck off to the county, and in such case the county treasurer shall forthwith issue a certificate of redemption therefor and notify the district secretary of said fact; who shall thereupon make a suitable transfer entry upon his record aforesaid, and return the certificate of sale to the county treasurer for cancellation; And provided further, that in case any person shall desire to obtain such certificate of purchase so issued to said irrigation district, the same may be done in the same manner as now or hereafter provided by law to be done in case said lot or parcel of land, or interest therein, had been purchased by a bidder at said tax sale or had been struck off to the county, upon payment to the county treasurer of the required amount in cash, or in cash together with warrants not in excess of the district general fund tax, or in cash and interest coupons or bonds not in excess of the irrigation district and redemption fund tax, or in cash and in warrants and bonds, respectively, not in excess of said respective funds. Provided, further, that no action for possession of or to quiet the title to land sold for taxes shall lie on behalf of the owner or claimant of the fee title as against the holder of the tax deed or his grantee, claiming title or color of title thereunder, in any case wherein the taxes or any part thereof for which said land was sold were levied for the maintenance, operating and current expenses of an irrigation district or to pay the interest or principal of the bonds of such district, unless such action be brought within five years after the execution and delivery of the deed by the treasurer and the record thereof, any law to the contrary notwithstanding; Provided, further, that as a condition precedent to the right of such owner or claimant of the fee title to maintain his said suit for possession or to quiet title as against the person in possession under color of title, or as against the claimant of title to vacant and unoccupied land under a tax deed giving color of title to lands in an irrigation district, plaintiff, at the time of filing his complaint, shall pay to the clerk of the court in which such proceedings shall be instituted, for the benefit of, and to be paid to, the person or persons entitled thereto in case the plaintiff prevail in such suit, the amount of all taxes, interest, expenses and penalties, including the amount of subsequent taxes paid on account of such sale which may have been paid thereunder, with interest on the whole of such sum or sums at eight per cent. per annum. In any case in which the claimant has title or color of title to land in an irrigation district under a tax deed duly recorded, and shall bring his suit for possession of or to quiet title to such lands, the invalidity or alleged invalidity or insufficiency of the tax deed shall not be a sufficient defense after the expiration of five years from and after the execution, delivery and record of said tax deed, nor, if such defense is pleaded prior to the expiration of said five years, shall the invalidity or insufficiency of the tax deed be considered by the court as a defense, unless defendant shall first deposit with the clerk of the court in which said suit is brought, a sufficient amount to pay the taxes, interest, expenses and penalties, including the amount of subsequent taxes, and interest at eight per cent. per annum, paid on account of such tax sale, for the benefit of and to be paid to the person or persons entitled thereto, when ascertained by the judgment in said suit."

"Sec. 2. All acts and parts of acts inconsistent herewith are hereby repealed."

"Sec. 3. In the opinion of the General Assembly an emergency exists in regard to the matters provided for in this bill, and therefore this act shall take effect and be in force from and after its passage."

Defendant in error contends that the act of 1915 materially changes its contract with the district to its injury. We agree with the following statement and conclusions in the opinion of Judge Lewis, who tried the case:

"The revenue laws of the state pertinent to the present inquiry made it the duty of the county assessor to deliver annually to the county treasurer the tax list and warrant under his hand and official seal, setting forth the assessment roll with the taxes extended, containing in tabular form and alphabetical order the names of the persons and bodies in whose names the property had been listed in his county, with the several species of property and the value, and the total amount of taxes, and with the column of numbers and value footed, and commanding the treasurer to collect the said taxes (Rev. Stat. Colo. 1908, § 5666); it was the duty of the treasurer, on receiving the tax list and warrant, to collect the taxes levied, the list and warrant being his authority and justification, and he was required, upon the last day of each month, to pro rate the total amount of the taxes during the month to the several funds (section 5672); no personal demand of taxes was necessary but it was the duty of every person subject to taxation to attend at the office of the treasurer and pay the first half of the taxes assessed against his property on or before the last day of February, and the remaining one-half part on or before the last day of July of the year following the one in which they were assessed (section 5675); the county treasurer was required to make public sale of those lands on which taxes should become delinquent, and if there were no bidders for any of the tracts offered it was his duty to strike the same off to the county and to issue to the county a certificate of purchase therefor (section 5713); he was required to keep a correct record of all sales of real estate for taxes in a book kept by him for that purpose, and in it put down the total amount of taxes, interest, penalties and costs at the time of sale, with other data, and to file a copy thereof with the county clerk (section 5719); if there were a bidder at the tax sale to the amount of the taxes and costs against the tract the same was to be struck off to him and a certificate of purchase issued to the bidder (section 5723), and on the expiration of three years from the date of the sale of the person holding the certificate of purchase would be entitled to a deed to the particular tract from the treasurer. The certificates of sale issued to the county were assignable by the treasurer to any one who would pay to the treasurer the taxes, with interest and penalties against the land bid in by the county, and the subsequent taxes assessed against that particular tract, but the amount of taxes subsequently assessed might be adjusted by the board of county commissioners for a less sum (section 5726). The owner of any real property sold for taxes was given the right to redeem the same at any time before the expiration of three years from the date of sale, or before the execution of the treasurer's deed to the purchaser, by payment to the county treasurer of the amount for which the same was sold, with interest thereon from the date of sale at a specified rate, together with the amount of all taxes accruing on the real estate after the sale, paid by the purchaser, with interest thereon, and the county treasurer was thereupon required to issue a certificate of redemption and hold the fund so paid in for the purchaser (sections 5734 and 5736).

"From these statutory provisions it is clear that when the district issued its bonds the principal and accruing interest were to be paid by annual tax levies on the lands in the district, that the levy for that purpose was to be made by the county commissioners, that the county assessor was required to include that levy against each tract on the roll which he made up, with state and county taxes assessed against the same, and to turn over that roll, with his certificate to the same, to the treasurer, which would be the treasurer's warrant for the collection of all taxes against the tract, that it was the duty of the taxpayer owning the tract to pay, and of the treasurer to receive, one-half of the total tax so assessed against the tract upon the roll, on or before the last of February, and the other half on or before the last of July succeeding the levy, that it was the duty of the treasurer, on the last day of each month, to apportion to the several funds the taxes so collected during that month, that in event the taxes so assessed against any one tract became delinquent it was the duty of the treasurer to make sale of the tract for all of the delinquent taxes so appearing upon the assessment roll against the tract and to issue a certificate of purchase to any one who bid the amount of

taxes and costs; and on which a deed might later issue under the conditions named. The statute thus clearly set forth the remedy which the law gave to the holder of the bonds for their collection and became a part of the contract between him and the district. The taxes which were to be levied and paid for his benefit were coupled with and put on the same footing as county taxes. *Nile District v. English*, 60 Colo. 406, 409 [153 Pac. 760]. The assurance was held out that the taxpayer could not pay one and let the other become delinquent. All of the taxes appearing upon the assessment roll were made a demand and charge against his property en masse. He was required to pay all of it without distinction, half at one time and half at another, and his failure to do so rendered the entire assessment delinquent and subjected his property to the one sale for all taxes assessed against it.

"A levy has been made by the county commissioners to pay in part the petitioner's judgment; but the county assessor and county treasurer have refused to make the assessment and collection of the tax so levied in the way and in the manner above set out. The assessor proposes to make up, if he has not already made up, a separate roll and assessment for the taxes levied to pay the judgment, and certify that separate roll to the treasurer as his warrant. And the treasurer proposes to receive and accept that roll as his proper warrant, and to make a separate collection of county and all other taxes from the taxes so levied to pay the judgment, and in event the taxpayers fail to pay the district taxes so levied, to make separate sales of lands for those taxes from sales that he may make for other unpaid taxes against the same tract. Indeed, this has been the practice of those two officers for the past several years in the levy and collection of taxes to pay interest coupons not in judgment.

"This is a proceeding in mandamus to compel the assessor and treasurer to make assessment and collection in accordance with the revenue laws above set out. Their attempted justification is two-fold. By Legislative Act of 1911 the state tax commission, composed of three members, was created. It gave the commission power (section 13), among other things, 'to prescribe a uniform system of procedure in the assessors' office and the form and size of all tax schedules, tax rolls and warrants, field books, plat and block books and maps, and all other notices and forms furnished to taxpayers, and all blanks, books and records used in the offices of the county assessors, and no other system, forms or blanks, etc., shall be used in such offices excepting those prescribed by the commission.' The state tax commission has heretofore directed the assessor to make up a separate assessment roll for district irrigation taxes, and has furnished the assessor blanks for that purpose, and has ordered the assessor to use those blanks for the purpose of assessment to be made under the levy for the payment of petitioner's judgment. And the state Legislature, at the 1915 session, passed an act amendatory of the District Irrigation Act of 1905, providing for sale for delinquent irrigation district taxes only, and in event of no bid at the sale the act provides that the land is to be struck off to the irrigation district instead of to the county, without the district being a bidder at the tax sale, and that the certificate of sale is to be issued by the county treasurer to the district. It also gives the district or its assignee of the certificate of purchase the right to a tax deed for the land so sold for irrigation district taxes on the expiration of three years, 'upon the payment to the county treasurer at the time of demanding such deed of such sum as the board of county commissioners of such county at any regular or special meeting may decide.'

"These legislative acts and the practice under them give the holders of bonds a different remedy for their collection from the one which they had at the time the bonds were issued. The material difference is this, formerly all taxes, state, county, school and district, had to be paid or none, now the taxpayer may let the district taxes become delinquent but pay all other taxes; formerly there was one tax sale for all delinquent taxes, now there may be two, one for district and one for all other taxes; formerly one tax sale certificate of purchase was issued for all delinquent taxes, now there may be two, and if to different persons, each is entitled to a deed on failure to redeem,—and if each gets a deed, which has the title? These changes, it seems to

me, affect substantial rights of the bondholders. Their present remedy is not as adequate and efficient as was their prior remedy. The mode of procedure now adopted is a discrimination against district taxes by which they are put on a lower level than other taxes. Under the prior remedy there was compulsion on the taxpayer to pay all or none, and with it the patriotic impulse to promptly meet all just obligations to sustain schools, and state and county governments. Of course, the Legislature was not without power to change the remedy, but in doing so it was obliged to give the bondholder some other equally adequate remedy, otherwise it would impair the obligation of his contract with the district. *Von Hoffman v. Quincy*, 4 Wall. 535 [18 L. Ed. 403]; *Walker v. Whitehead*, 16 Wall. 314 [21 L. Ed. 357]; *Tennessee v. Sneed*, 96 U. S. 69 [24 L. Ed. 610]; *Railroad v. New Orleans*, 157 U. S. 219 [15 Sup. Ct. 581, 39 L. Ed. 679]; *Selbert v. Lewis*, 122 U. S. 284 [7 Sup. Ct. 1190, 30 L. Ed. 1161]."

We think that the orders complained of were right and that the judgment should be affirmed.

It is so ordered.

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ELROD v. MOSS et al.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1921.)

No. 1907.

1. False imprisonment ⇐30—Intoxicating liquors ⇐257—Evidence of information as to illegal sale of liquor held admissible on question of damages.

In an action for damages for illegal arrest and imprisonment and illegal search of plaintiff's automobile, where plaintiff sought to recover punitive damages, on the charge that the tort alleged was maliciously committed, it was competent for witnesses to testify that plaintiff had been selling contraband liquor and that they had communicated that fact to defendants.

2. False imprisonment ⇐24—Intoxicating liquors ⇐257—Source of informer's knowledge of crime inadmissible.

In action for illegal arrest and imprisonment and illegal search of plaintiff's automobile, where plaintiff sought punitive damages on charge that tort was maliciously committed, and witness testified that he communicated to defendants information that plaintiff was transporting liquor, court properly refused to require witness to disclose the source of his information.

3. False imprisonment ⇐24—Intoxicating liquors ⇐257—Invalid search warrant held admissible to refute charge of malice.

In action for illegal arrest and imprisonment and illegal search of plaintiff's automobile, where plaintiff sought punitive damages on charge that tort was maliciously committed, a so-called John Doe search warrant, though invalid, was admissible to refute the charge of malice and wantonness; and such was true as to another search warrant, under which one of the defendants acted, though its period of validity had expired.

4. False imprisonment ⇐7(3)—Intoxicating liquors ⇐257—Search warrant held in possession of officer.

In action for false imprisonment and illegal search of plaintiff's automobile, there was no merit in a contention that a search warrant in defendant's coat pocket, 10 or 12 feet away at the time of the search, was not in possession of the officer.

5. False imprisonment ⇐39—Intoxicating liquors ⇐257—Reasonable time for execution of search warrant held for jury.

In action for illegal arrest and imprisonment and illegal search of plaintiff's automobile in South Carolina, whether a search of the auto-

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

mobile, made more than a month after date of search warrant, was made within a reasonable time, *held* for the jury, though the search warrant described the contraband liquor as "now unlawfully in possession, storage, and keeping"; defendant not being bound as a matter of law to know that all liquor placed in the car before the date of the search warrant had been taken out.

**6. Constitutional law ⚡18—Statutes ⚡224—Every provision construed with purpose of giving effect to other provisions.**

Every constitutional or statutory provision must be construed with the purpose of giving effect, if possible, to every other constitutional or statutory provision, in view of new conditions and circumstances in the progress of the nation and the state.

**7. Intoxicating liquors ⚡249—Searches and seizures ⚡7—Provisions as to unreasonable searches construed in light of provisions against sale, manufacture, and transportation of liquors; less particularity of description required in liquor search warrants.**

The provisions of federal and state Constitutions forbidding unreasonable searches must be construed in the light of the constitutional provisions against the sale, manufacture, and transportation of intoxicating liquor, as no man can have any rights of property in contraband liquor, or any right to transport it, being forfeited as soon as it comes into existence, and the degree of particularity of description in search warrants for contraband liquors is not the same as that required for other property.

**8. False imprisonment ⚡7(3)—Intoxicating liquors ⚡257—Citizens summoned to assist officer bound to respond.**

When plaintiff, while resisting arrest, knocked a state officer from his automobile and fled, in defiance of a search warrant, such officer had the right to summon any citizen to his aid in the execution of the warrant, and one so summoned was bound to respond, and such right and obligation to respond was not weakened by the fact that he was a federal prohibition officer.

**9. Arrest ⚡63(3)—Warrant unnecessary for arrest for violation of prohibition law in South Carolina in presence of officer.**

Under Cr. Code S. C. 1912, §§ 828, 831, 840, concerning alcoholic liquors, an arrest can be made without a warrant by an officer detecting one in the act of violating the law, but such officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused.

**10. Arrest ⚡63(3)—Statute permitting arrest without warrant not repealed.**

The provisions of Cr. Code S. C. 1912, §§ 828, 831, 840, permitting arrest without warrant for violation of the Prohibition Law, were not repealed by changes in the law, under Act S. C. Feb. 16, 1915 (28 St. at Large, p. 90), and Act Feb. 24, 1917 (30 St. at Large, p. 75).

**11. Arrest ⚡63(3)—Provisions for arrest without warrant held valid.**

The provisions of Cr. Code S. C. 1912, §§ 828, 831, 840, permitting arrests without warrant where one is detected in the act of violating the liquor laws, are subject to no constitutional objection.

**12. Arrest ⚡63(2)—Intoxicating liquors ⚡249—Search and seizure and arrest by federal officer for violation of Prohibition Law permissible.**

Under National Prohibition Act, tit. 2, § 26, a federal prohibition officer may make a search and seizure or arrest without warrant, where he has direct personal knowledge, through his hearing, sight, or other sense of a violation of the law.

**13. False imprisonment ⚡39—Intoxicating liquors ⚡257—Justification for arrest without warrant for violation of federal prohibition law held for jury.**

In action for illegal arrest and imprisonment and illegal search of plaintiff's automobile by a federal prohibition officer, where plaintiff had

resisted a warrant of state officer to search his car for contraband liquor, and had knocked him from his car to prevent the search, and in flight had thrown a package from his car, whether a federal prohibition officer near by had such direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime of transporting contraband liquor, as to warrant his making a search and arrest without a warrant, under title 2, § 28, of the National Prohibition Act, *held* for the jury.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry H. Watkins, Judge.

Action by B. O. Elrod against B. R. Moss and another. Judgment for defendants, and plaintiff brings error. Affirmed.

A. H. Dagnall and H. C. Miller, both of Anderson, S. C. (Dickson & Miller, of Anderson, S. C., on the brief), for plaintiff in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (J. E. Marshall, Asst. U. S. Atty., of Greenville, S. C., on the brief), for defendants in error.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. In this action for illegal arrest and imprisonment and illegal search of plaintiff's automobile, the verdict was for the defendant. The importance of the questions made as to arrest and search in the enforcement of national and state prohibition laws requires a detailed statement of the evidence. There is no conflict, except as to the reputation of the plaintiff.

The record contains the statement that "plaintiff, together with four other witnesses, testified in support of all the allegations of the complaint." The following is plaintiff's entire testimony:

"Mr. B. O. Elrod, plaintiff, testified that he was coming down Stump House Mountain at the time in question, when Mr. Moss jumped on his car and commanded him to stop; that he undertook to push him off the car, and Mr. Moss fell to the ground. I kept on down the road towards Walhalla, and on looking back through the glass in the back of my car I saw Mr. Gosnell on the running board of Mr. Parker's car. I was running 10 or 15 miles per hour around those sharp curves. The Parker car caught up with me. Then Mr. Gosnell commanded me to stop, and I did so. I would not permit Gosnell to search my car with a John Doe search warrant; and he proceeded to ride with me to Walhalla. I have made several trips up to Tunnel Hill. About one year and a half or two years ago, I was constable of Anderson county. I get my liquor from blind tigers around home. I was an officer of the law, and purchased a pint or so of liquor at different times. The last liquor I bought from blind tigers was six months ago, about a pint. I purchased whisky from a blind tiger about last Christmas, may have had a quart, but do not remember what it cost me."

The undisputed testimony on behalf of the defendants was as follows:

J. G. Mitchell, a rural policeman of Oconee county, having "information that plaintiff was hauling whisky," on May 18, 1920, saw him "going towards the mountain." Thereupon he made an affidavit before Magistrate W. M. Dillard that he was—

"informed by W. S. Bearden, and verily believes from such information and his own observations, that in one Ford roadster car driven by Constable Elrod, wherever met in the public highway in Oconee county, there is now deposited, stored and kept contraband liquors, in violation of law, to wit, jugs,

kegs, bottles, etc., and that said intoxicating and contraband liquors are kept, stored, and deposited by Constable Elrod car, his aiders and abettors, without a permit, in violation of the laws of the state."

The magistrate issued a warrant, directed to the sheriff of Oconee county or any constable in these words:

"Whereas, it appears to me, W. M. Dillard, a magistrate in and for the county and state above named, by the information of J. G. Mitchell, that the following contraband intoxicating liquors *are now unlawfully in the possession, storage, and keeping of, and on the premises occupied by Constable Elrod Ford car, in the state and county above named, the said place being Constable Elrod roadster car driven by him, to search car wherever met in Oconee county, in or near the town or city of Westminster, and that the said J. G. Mitchell has probable cause to believe, and is informed and doth believe, that the said contraband liquors so illegally kept are in the house (or other place appurtenant thereof) of the said Constable Elrod aforesaid, and there diligently, by day, search for the said contraband liquors, and if the same or any part thereof shall be found upon such search, that you bring the said liquors so found, and also seize and bring all vessels, bar fixtures, screens, bottles, glasses, and appurtenances apparently used, or suitable for use, in and about such liquors, take a complete inventory of the same, and deposit the same with the sheriff, which said articles are there to remain, to be disposed of as required by the provisions of the dispensary laws.*"

On the same day Mitchell and the defendant Moss, a state constable, waited about two hours on the road for plaintiff, but he failed to return. Mitchell left the warrant with Moss. Moss was on the lookout to execute the warrant from that time, but did not find plaintiff in Oconee county until June 25, 1920. On that day, having information that plaintiff had again gone to the mountain, Moss and the defendant Gosnell, a federal prohibition officer whose assistance Moss had requested, waited on the mountain for plaintiff's return. Moss thus describes what followed:

"Mr. Elrod, he drove around to where I was in the road, in his Ford roadster, going about 7 or 8 miles an hour. As Elrod pulled up in the road, then I said to him that I have a search warrant for you and to stop that car, but he kept going faster. The search warrant was in my coat pocket in my car 10 or 12 feet away from me. I then jumped on the running board of his car and after I told him again to stop the car, he speeded up, and I reached over to switch his engine off. When I did that he struck me right here in the stomach like, and knocked me off on the left side of the car, and pretty nearly knocked the life out of me. I then hollered to Mr. Gosnell, who was down the road a piece, that this man had liquor in his car, and had knocked me off and nearly killed me, and to catch him. Mr. Gosnell pursued Mr. Elrod. I sat there 10 or 15 minutes and got sicker and sicker, finally vomited, then lay down on the ground on the side of the road, and rode to Walhalla in a passing automobile with a young lady and young man, leaving my car and coat and search warrant for Elrod's car on the mountain side, because I was unable to operate my car. Upon reaching Walhalla, I first went to the doctor and had him fix me up, and then went on down to the jail, and found Mr. Gosnell and Mr. Elrod. When Elrod knocked me off his car, he had speeded up to 15 miles an hour, and the distance from where I was knocked off his car to the point where I boarded it 112 steps. I never had the paper in my pocket on the running board, when I called to plaintiff to stop his car and bent over to switch off his engine. When we searched plaintiff's car at Walhalla we found no whiskey."

Gosnell gives this account:

"He drove by Mr. Parker's car, and right at that time Mr. Moss jumped on the car, and he drove right on by Mr. Parker's car, and Mr. Moss reached

over as if to turn off the switch of the engine, and Mr. Elrod knocked him off. After Mr. Elrod knocked Mr. Moss off the moving automobile, Mr. Moss hollered to me to catch that man; he has got liquor in his car and nearly killed me. I called to Mr. Parker to bring his car and drive me down the mountain, and I jumped in the car with Mr. Parker. We went on down the road after the Elrod car. I could see it in front of us. Finally we got close to the Elrod car, and Elrod, and Elrod looked back, saw that we had him, and he then threw a package out of his car on the left-hand side of the road. I had my gun in my hand, and I finally caught up with the Elrod car, and told Mr. Elrod that we had a warrant to search his car; that Mr. Moss had the warrant. He said I could not search his car. I informed Mr. Elrod that I had a John Doe warrant, but he said I could not search under the John Doe warrant, and I did not search his car under it. I did not arrest him for assault and battery on Mr. Moss. I held Mr. Elrod to see how Mr. Moss was getting along, and because Mr. Moss told me Mr. Elrod had liquor in his car. I held him, to see if Mr. Moss wanted to make any charges against him. At that time he started to move out of the car on the left-hand side, and I told him to sit still, and grabbed him on his arm, 'I will hold you, to see how Mr. Moss is.' I put my hands on him, and told him to sit in that car and to consider himself under arrest."

Some witnesses testified that plaintiff's reputation as to dealing in whisky was good; others, that it was bad. Evidence as to the reputation of the plaintiff for peace and good order was not responsive to any issue made by the testimony, and was properly excluded.

[1] Since the plaintiff sought to recover punitive damages on the charge that the tort alleged was maliciously committed, it was competent for witnesses to testify that plaintiff had been selling contraband liquor and that they had communicated that fact to the defendants.

[2] Alexander, sheriff, testified he communicated to defendants information he had that plaintiff was transporting liquor. The District Judge properly refused to require him to disclose the source of this information. *Vogel v. Gruaz*, 110 U. S. 311, 316, 4 Sup. Ct. 12, 28 L. Ed. 158; *In re Quarles*, 158 U. S. 532, 536, 15 Sup. Ct. 959, 39 L. Ed. 1080.

[3] The so-called John Doe search warrant in the possession of the defendant Gosnell as a federal officer, although properly held invalid by the court, was clearly admissible to refute the charge of malice and wantonness. The search warrant under which Moss acted, even if its period of validity had expired, was admissible for the same purpose.

[4] We think there is nothing in the position that the warrant was not in the possession of the constable. It was in his coat pocket, 10 or 12 feet away, and was therefore substantially in his possession. *State v. Shaw*, 104 S. C. 359, 89 S. E. 322.

The vital question is whether the District Judge erred in refusing to charge that the search warrant dated May 18, 1920, had expired by its own terms on June 25, 1920, when the state constable, Moss, on its authority undertook to search plaintiff's automobile, and, on the contrary, charged that it was for the jury to decide whether it was executed within a reasonable time.

[5] The argument is, first, that the search warrant and the affidavit on which it was based describe the contraband liquor, in the language we have italicized, as "now unlawfully in possession, storage, and keeping," etc., and that the liquor in the car on May 18 must have been

taken from the car and disposed of before June 20, 1920; and, second, that the search was illegal because of unreasonable delay.

It is to be observed that the time "now" does not refer to the time when the warrant was to be executed, but to the time when the contraband liquor was alleged to be in the car. True, the warrant in terms directed search of the car for contraband liquor which was in it on May 18, 1920. But can the court hold, as a matter of law, that one who conveys contraband liquor disposes of all liquor obtained on one trip before he starts on another? Such a holding would mean that the execution of a search warrant even the day after the trip would be unreasonable, because the liquor in the car at the time of the issuance of the warrant could not be there at the time of the search.

In view of the ingenuity of criminals in storing in automobiles intoxicating liquors for transportation and sale, the court should not adjudge as a matter of law that on June 25, 1920, the constable was bound to know that all liquor placed there on or before May 18 had been taken out. The probability that it had been disposed of, and the question whether the constable should have known that none of it was in the car, were for the jury to consider on the issue of unreasonable delay in the execution of the warrant.

The statement of the constables that the warrant was procured with the view of making search in May is not conclusive that the search was illegal in June. Nor would the opinion of the officer that the liquor in the car on May 18th had been disposed of in itself justify his failure to obey the mandate of the warrant. The evidence is that in all the intervening time Constable Moss had been trying to catch up with the plaintiff and serve the warrant. The jury might well infer that the plaintiff had made no trip in the intervening time, and that the constable was duly diligent in executing the warrant in search of the liquor referred to therein.

In *State v. Guthrie*, 90 Me. 448, 38 Atl. 368, it was held as a conclusion of law that a delay of three days in executing a search warrant was unreasonable; the Maine statute requiring that the warrant should be returned immediately. There is no such statute in South Carolina, and the Supreme Court of that state, in *Farmer v. Sellers*, 89 S. C. 492, 72 S. E. 224, has held it to be the province of the jury to decide what is reasonable promptness in the execution of a search warrant, unless the delay is so great that reasonable men could draw only one conclusion. In that case the court said:

"A warrant cannot be legally enforced by an officer so long after its issuance that the search could not be reasonably referred to a bona fide effort for the recovery of the particular property therein mentioned. It cannot be held back by an executive officer as a menace to the citizen. But manifestly, there can be no hard and fast limitation of time fixed by judicial authority as unreasonable in all cases and under all circumstances. Every case must depend on its own facts. The character of the person charged with having the stolen or contraband goods in possession, the nature of the crime, and other circumstances are to be taken into account. It is obvious to all men that a sporadic and untrained criminal and a professional criminal would stand on a different footing. In the case of an ordinary man, suspected of being in possession of stolen goods or contraband liquor, it might well be held beyond all doubt reasonable that a search warrant should be enforced within a few days. On the other hand, when the officer has the task of recovering

stolen goods or taking contraband liquor from a trained and disciplined criminal, the enemy of society, it may take weeks of patient observation to ascertain the moment when a search would be of any avail. In such a case the enforcement of the law might be rendered impossible by a judicial holding that a reasonable time for the execution and return of a warrant is the same as in the case of an ordinary criminal."

[8, 7] Furthermore, every constitutional or statutory provision must be construed with the purpose of giving effect, if possible, to every other constitutional or statutory provision, and in view of new conditions and circumstances in the progress of the nation and the state. *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. Hence, the provisions of federal and state Constitutions forbidding unreasonable searches must be construed in the light of the constitutional provision against the sale, manufacture, and transportation of intoxicating liquors. No man can have any right of property in contraband liquor, or any right to transport it. As soon as it comes into existence, it is forfeited.

Intoxicating liquors are made in so many forms and transported in so many different sorts of packages that, if the same particularity of descriptive identification were required as in the case of stolen goods, professional criminals who engage in the traffic would have practical immunity. Such a distinction between private papers and goods forfeited to the government is pointed out in *Boyd v. United States*, 116 U. S. 616, 623, 6 Sup. Ct. 524, 29 L. Ed. 746. In warrants for search and seizure of stolen goods particularity of description is necessary to the protection of the citizen from the seizure of other goods of the same general character, his lawful property. The protection of the rights of the accused does not require that the Constitution be construed to exact the same degree of particularity of description in search warrants for contraband liquors, because there is no right of property in contraband liquor, and hence there can be no danger to the citizen of being deprived of property which he is lawfully entitled to hold against the state.

The finding of the jury that the execution of the search warrant was not unreasonably delayed, and was therefore lawful, seems to be conclusive of the other points made.

[8] When the plaintiff resisted arrest, knocked the officer from the car, and fled, in defiance of the search warrant, the state constable, Moss, whose duty it was to enforce the warrant, had the right to summon any citizen to his aid in the execution of the warrant. Gosnell was summoned, and he was bound to respond to the summons. 6 C. J. 428; 2 R. C. L. 491; *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; 35 Cyc. 1526. The fact that he was a federal prohibition officer did not weaken his right and obligation to respond.

[9-11] The verdict in favor of both defendants as to the arrest was justified, even if Gosnell had not been a federal prohibition officer. After Moss had summoned Gosnell to his assistance, both were clothed with the authority of officers under the laws of South Carolina relating to intoxicating liquors, with full authority to execute the search warrant and to arrest the plaintiff, if necessary, in the performance

of that duty. 5 C. J. 408; *Braddy v. Hodges*, 99 N. C. 319, 5 S. E. 17. Section 831, chapter 29, Criminal Code of South Carolina, concerning alcoholic liquors, provides that any person detected in the act of violating any of the provisions of this chapter shall be liable to arrest without warrant. Section 828 requires that all contraband liquor in possession of any person shall be seized without warrant. Section 840 imposes upon constables and other officers mentioned the duty to enforce the provisions of the statute. Subsequent changes in the law left these provisions for the enforcement of the liquor law unrepealed. 28 Stat. 90; 30 Stat. 75; *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 3 A. L. R. 1500. These provisions of law for arrest without warrant are subject to no constitutional objection. *State v. Byrd*, 72 S. C. 104, 51 S. E. 542. Under them, however, the constable may arrest without warrant only when he detects one in the act of violating the law. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 3 A. L. R. 1500; *Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441, L. R. A. 1916E, 714.

But Gosnell, who actually made the arrest, was not only a citizen summoned to aid Moss in the execution of the search warrant, but he was a prohibition officer, whose duty it was to enforce the federal prohibition statute. 41 Stat. 305. Section 26 of title 2 of the statute provides:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

[12, 13] Under the federal as well as the state statutes, to justify search and seizure or arrest without warrant, the officer must have direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused. But it is not necessary that he should actually see the contraband liquor. Here the plaintiff had resisted the warrant to search his car for contraband liquor; he had struck the officer from his car to prevent the search, and in flight had thrown a package from his car. We think the jury might well conclude that all this constituted a discovery by Gosnell of the plaintiff in the act of transporting contraband liquor in his automobile, and that Gosnell was justified in making the arrest for interference by plaintiff with the performance of his official duty.

We find no error.

Affirmed.

THE ISLE OF MULL.

ISLES STEAMSHIPPING CO., Limited, v. GANS STEAMSHIP LINE et al.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1921.)

No. 1868.

1. **International law** ¶10—**Courts cannot question requisition of foreign vessel by its government in foreign port.**

The sanction of a foreign government, evidenced by its use of a vessel of its nationality requisitioned in a foreign port, is conclusive in the courts of this country as to the legality of the notice of requisition and the right of the government to take over the vessel.

2. **Admiralty** ¶12—**Has jurisdiction to adjust equities between owner and charterer of requisitioned vessel.**

A court of admiralty has jurisdiction to determine whether the charterer of a foreign vessel, which was requisitioned by its own government during the term of the charter, has an equitable right against the owner to the portion of the amount paid by the government for the use of the vessel which exceeded the amount due under the charter, on the theory that the owner had been unjustly enriched to that extent.

3. **Shipping** ¶51—**Owner not liable for surplus hire under requisition which frustrates charter.**

If the charter of a vessel is frustrated by the requisition of the vessel by its government during the term of the charter, the charterer is not entitled under the British law to recover from the owner the difference between the amount paid the owner by the government for the use of the vessel and the charter price; any more than the charterer would be liable to pay the owner the difference, if the payments under the charter exceeded those from the government.

4. **Shipping** ¶51—**Government requisition, probably extending beyond term, frustrates charter.**

The requisition of a chartered vessel by its government frustrates the charter, if the requisition is for a definite period extending beyond the term of the charter, or if it is indefinite, but the circumstances indicate it will probably extend beyond the term of the charter, though a requisition for a period less than the term of the charter merely suspends the charter during the period of the requisition.

5. **Shipping** ¶51—**Requisition of vessel by British government in 1915 held to frustrate charter expiring in 1918.**

Where a British vessel, under charter to an American corporation which would expire in 1918, was requisitioned by the British government in 1915, at a time when it was obvious the war would continue until the military exhaustion of one side, and that Great Britain would need to mobilize her entire shipping to meet the losses occasioned by submarines, the circumstances indicated that the use of the vessel would probably continue, as it did, until after the term of the charter had expired, so that the charter was frustrated, and the charterer cannot recover from the owner the amount received from the British government in excess of the charter hire.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Libel in admiralty by the Gans Steamship Line against the Isles Steamshipping Company, Limited, as owner of the steamer Isle of

Mull. Decree for libelant (257 Fed. 798), and respondent appeals. Reversed and remanded, with instructions to dismiss the libel.

John M. Woolsey, of New York City (Stuart S. Janney, of Baltimore, Md., on the brief), for appellant.

John W. Griffin, of New York City (Wharton Poor and Haight, Sandford, Smith & Griffin, all of New York City, on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. On May 19, 1913, Gans Steamship Line, a New York corporation, made a charter contract in England with Isles Steamshipping Company, Limited, a British corporation, owner of the steamship Belle of Ireland, afterwards called Isle of Mull, for the hire of the vessel for "about five years" from time of delivery, at the price of £1,370. a month. The charter contained the usual restraint of princes clause. The ship began service under the charter January 7, 1914. On June 10, 1915, while the vessel was on a voyage to Lisbon, notice from Mathwin & Co., purporting to be issued on behalf of the British Admiralty, was given to the owner that the vessel was requisitioned for government service. Under this notice the British Admiralty assumed control of the vessel on June 12, 1915, at Bilbao, Spain, and retained it beyond the period of the charter. The price fixed by the government was £2,361. 15s. a month, £991. 15s. more than the charter hire.

The charterer insisted from the first, in correspondence with the owner, that its contract remained in force, and tendered the monthly payments therein stipulated for the entire period. In its libel, filed July 25, 1915, the charterer alleged breach of the charter contract by the owner, and claimed as damages the difference between the market value of the use of the ship for the unexpired time, set down as £5,110. a month, and the price it had agreed to pay. The owner denied breach of the contract, and set up as a defense complete frustration of the contract by the requisition.

The District Court held that the charter had not been frustrated, and that the charterer was entitled to recover from the owner the difference between the price fixed by the charter and the greater price paid the owner by the British government for the use of the vessel. The question made by the appeal of the owner is whether the charter was frustrated and all rights and obligations of the owner and the charterer terminated by the requisition.

[1] We need not pause to discuss the legal authority of the source of the notice of requisition, or the right of the British Admiralty to take over a British vessel in a foreign port. The sanction of the British government, evidenced by its use of the ship for the entire period of the charter, is conclusive in the courts of this country. *Texas Co. v. Hogarth Shipping Corp.*, 256 U. S. 619, 41 Sup. Ct. 612, 65 L. Ed. —, filed June 6, 1921.

[2] The contention is made, on the authority of *The Claveresk* (C. C. A.) 264 Fed. 276, that the court of admiralty has no jurisdiction.

This cannot be sound, unless courts of admiralty are to admit, in analogy to the admission once unfortunately made by the common-law courts, that they have no form of action expansive enough to meet a new condition arising out of a strictly maritime contract. Nothing less than the plainest controlling authority would justify such an admission. The reasons would, indeed, be much stronger for a court of equity than for a court of admiralty to refuse jurisdiction of the case.

The true view of the libel on the question of jurisdiction, as it seems to us, is that the charterer sues for breach of the owner's contract to give it the use of the vessel for the time specified. The owner answers, admitting that it did not keep the vessel in the service of the charterer, and setting up the affirmative defense that performance of its contract was made impossible by government interference. The issue as thus presented to the court then is: Does the defense of requisition altogether defeat the libel? or is the defense allowable in justice and good conscience only on condition and to the extent that the owner shall not appropriate to itself benefits derived from the use of the vessel by the government for the time that, as between itself and the charterer, the latter was entitled to them—that the owner shall not be enriched from the government's use of the vessel at the expense of the charterer?

True, this is an inquiry into the equity of the matter, in the sense of inquiry into the justice of the controversy. But it is in no sense an inquiry belonging exclusively to a court of equity. Even common-law courts constantly decide causes on grounds of fraud, mistake, unjust enrichment, and other grounds sometimes thought of as peculiar to courts of equity. Courts of admiralty have often decided cases on the equities which arise incidentally in the exercise of their jurisdiction. *The Port Adelaide* (D. C.) 59 Fed. 174; *The Emma B.* (D. C.) 140 Fed. 771; *The Seguranca*, 250 Fed. 19, 162 C. C. A. 191.

The main question on the merits is difficult. The strong reasons in favor of the charterer's claim may be thus stated: The charter confers upon it the right to the use of the vessel for the specified period. This right, although not a demise, is a property right. There is the strongest presumption against the intention of the British government to appropriate this property of the charterer without compensation. Yet the government, in the stress of a war involving its highest interest, if not its existence, cannot take time to adjust the rights of the charterer and the owner. The government needs the vessel, and takes it from the owner, because the owner is in actual possession by its master and crew, and pays the owner with whom it deals a lump sum, leaving it to meet other claimants. But it pays the owner for the use, not for the vessel itself. Therefore, since the charterer had legal right to the use of the vessel, the owner, after paying itself the amount due under the contract and compensation for any losses sustained, holds the remainder for the charterer. To allow the owner to retain the excess paid by the government would be to allow it to avail itself of the act of the government, a third party, to enrich itself at the expense of the charterer by the practical appropriation of the charterer's property right.

The opposing argument that, if this be true, by parity of reasoning the charterer should pay the contract hire, when the government pays nothing or less than the contract price, is not convincing. When the government breaks into the charter by seizing the vessel, the charterer is deprived of its use, and if the government pays nothing, neither party has any claim against the other, because neither is enriched at the expense of the other. If the government pays the same as the contract price, the owner gets no more than it is entitled to under the contract, and, although the charterer may lose commitments for freight, the owner owes it nothing. If the government pays less than the contract price, both the owner and the charterer lose, the owner a part of its hire and the charterer the use of the vessel; but the charterer has not been enriched at the expense of the owner, and therefore the owner has no claim against it. It has nothing in its pocket that ought to be in the pocket of the owner.

The restraint of princes clause is intended for the protection of the party whose ability to carry out his contract is destroyed or impaired by the enumerated causes. The other party cannot avail himself of it to escape his obligations. Detention of the ship in quarantine or requisition for public service for the entire period of the charter does not entitle the owner to set up the claim that the charter is annulled, if the charterer chooses to pay the hire. It would be turning the restraint of princes clause backward to allow the party claiming the benefit of it to enrich himself at the expense of the other.

It is true that regard for the interests of the parties, as for the public interests, requires that both parties should know at the time of the requisition how their rights have been affected by it, and hence those rights and obligations must not be left in uncertainty to be determined by future events. But in this case that consideration has no application for the reason that, at the moment of requisition and since, the charterer has assured the owner of all its rights under the original contract, by notice that it will remain bound, and by tender every month of the charter hire.

Finally, even if it be admitted that the contract has been frustrated and destroyed, the courts should not award all the benefit of the salvage from the wreck to the party who happens to be in possession of it. In such a situation, neither party being at fault, the reason seems to be cogent for the courts to take cognizance of anything of value, wherever found, which arose from the destruction of the contract, and adjust the equities of the parties therein, guided by their respective contract rights in the subject of the contract.

The argument in favor of the owner's rights to the entire compensation for the use of the vessel paid by the British government is this: The requisition of the ship by the government for an indefinite period completely frustrated the contract and put an end to all rights of both parties under it. This is true, first, because under the general law the contract ceases to operate when the particular thing contracted for ceases to be available for the purpose contemplated; and, second, because under the restraint of princes clause the requisition of the ship relieved the owner of all obligation to the charterer for the service of

the ship, and as a consequence from all obligation to account for the hire of it. Lord Haldane's statement, in *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, [1916] 2 A. C. 406, of the principle contended for, has been generally accepted by the British courts:

"When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally, whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the charter party under consideration, restraint of prices) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation."

Therefore, the owner contends, if the government pays more than the charter hire, it is the owner's gain; if less, it is the owner's loss. If this were not so, the charterer would be bound to pay the full charter hire, when the government paid less, or even nothing, for the use of the ship. This rule is logical and simple. It fixes the rights of the parties at the moment of requisition, freed from all doubts and perplexities as to their rights and obligations, to the end that they may immediately readjust their affairs. When this simple rule is once established and understood, no real hardship will grow out of it, since all charter parties will be made in contemplation of it. The hardship of applying it to some cases in the meantime cannot be denied, but it will be found in the practical administration of justice better to allow even this hardship than for courts to enter upon the confusing, if not impossible, task of adjusting the equities between the owner and the charterer. The vessel may be used, as in this case, in a service not contemplated by the charter; it may be altered to meet the needs of the government service; it may be injured in that service; the charterer's contracts may be so broken into by the requisition that he cannot use the vessel at the date of its release. The effort to measure these and other factors entering into the adjustment of the equities would involve the parties in intricate and costly litigation and delay.

[3, 4] The difficulty of deciding between these two lines of reasoning is reflected in the many elaborate discussions of the British courts. Reconciliation of the numerous cases is hardly possible. The result of the consideration of the British courts, as we understand, is this: If the contract for hire is completely frustrated by the requisition, the rights and obligations of both parties are ended. In that case, if the government pays compensation larger than the charter hire, it is the

owner's good fortune; if smaller compensation, or no compensation, it is the owner's misfortune. Whether the requisition frustrates the contract is a question depending on the extent of the interference. A requisition for a definite time, materially less than the unexpired period of the charter contract, works a mere interruption, and not a frustration; a requisition for a definite time extending beyond the unexpired period of the charter contract works a complete frustration.

This reasoning afforded no certain guide when the requisition was for an indefinite period, as it generally was. But the British courts applied the principle in this way: If consideration of all the circumstances existing at the time of the requisition led to the conclusion that it would probably continue beyond the charter period, then the charter is frustrated, the charterer is released, and the owner takes the compensation paid by the government—whether more or less than the charter hire. If, on the other hand, the circumstances indicated probable release of the vessel for a substantial time before the expiration of the charter period, the charter contract is held still in force; the charterer is liable to pay the charter hire for the period, and is entitled to any net compensation received by the owner beyond the charter hire. In the last condition, however, the net additional compensation is ascertained by taking into account any substantial loss or disadvantage to the owner, due to the requisition of the vessel. On the issue of the probable return of the vessel before the expiration of the charter period, the burden of proof is on the party asserting the frustration of the contract. In weighing this issue of probability the courts take into consideration, not only the conditions existing at the time of the requisition, but the real duration of the requisition. We have cited in the note the more important of the British cases dealing with the subject.<sup>1</sup>

In this country the same test of the certainty or probability of the requisition extending beyond the period of the charter was applied by the Circuit Court of Appeals of the Second Circuit in *The Claveresk*, 264 Fed. 276. The charter was for "about five years," ending April, 1918. In January, 1917, the ship was requisitioned, and on February 10, 1917, commenced service under the British government. While

<sup>1</sup> *Tamplin S. S. Co. v. Anglo-Mexican P. P. Co.*, [1916] 2 A. C. 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677, 8 British Rul. Cas. 550; *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme*, [1918] 1 K. B. 372, 87 L. J. K. B. N. S. 309, 23 Com. Cas. 231, 118 L. T. N. S. 196, 34 T. L. R. 27, 8 B. R. C. 546; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A. C. 119, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766; [1917] W. N. 352, 82 J. P. 61, 8 B. R. C. 483; *Bank Line, Ltd., v. Arthur Capel & Co.*, 35 T. L. R. 150, [1918] House of Lords; *Anglo-Northern Trading Co. v. Emlyn, Jones & Williams*, [1917] 2 K. B. 78, [1918] 1 K. B. 372; *Heilgers v. Cambrian Steam Navigation Co.*, 33 T. L. R. 348, 34 T. L. R. 372; *Chinese Mining & Engineering Co. v. Sale & Co.*, [1917] 2 K. B. 599; *Modern Transport Co. v. Duneric S. S. Co.*, [1917] 1 K. B. 370, 115 L. T. N. S. 535, 86 L. J. K. B. N. S. 164, 33 Times L. R. 55, 61 Sol. Jo. 71, 22 Com. Cas. affirming [1916] 1 K. B. 726, 8 B. R. C. 557; *Dominion Coal Co. v. British & Chilean S. S. Co.*, *Lloyds List Weekly Summary*, April 25, 1919; *Dominion Coal Co. v. Roberts*, 36 T. L. R. 837. The numerous English cases are discussed in the opinion and the note, 8 British Ruling Cases, 483, 507.

holding the contract frustrated by the requisition, the court refused to consider whether the charterer was entitled to an accounting for the additional compensation paid by the government under the requisition, because the libel was for damages.

In *Allanwilde Transportation Co. v. Vacuum Oil Co.*, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, 3 A. L. R. 15, the contract was for the carriage of a single specific cargo from New York to Rochefort, France. The voyage at the time contemplated was prevented by an indefinite embargo imposed because of the submarine menace. In holding the contract frustrated the court said:

"It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting 'restraint of princes, rulers, and peoples,' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. *The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation.* The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.)* 244 U. S. 12, 61 L. Ed. 960, 37 Sup. Ct. Rep. 490."

The language we have italicized seems to imply that in the view of the Supreme Court any inquiry as to the duration of the great war, or the continuance of an embargo or requisition growing out of it, would be too speculative and illusory to be made the basis of judicial action, and therefore that an indefinite embargo or requisition should be treated as in itself a frustration of the charter party.

In *Texas Co. v. Hogarth Shipping Corporation* (June 6, 1921), the ship was chartered for a voyage from a port in Texas to a port in South America. The restraint of princes clause was absent. On April 10, 1915, while being provisioned in British waters for the intended voyage, the ship was requisitioned by the British government and retained until October following, after the expiration of the time within which the voyage would have been made. The court holds the charter frustrated on this reasoning:

"Here the ship, although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charter party by the requisition. By that supervening act she was impressed into the war service of the British government for a period likely to extend—and which, as it turned out, did extend—long beyond the time for the charter voyage. In other words, compliance with the charter party was made impossible by an act of state, the charterer was prevented from having the service of the ship and the owner from earning the stipulated freight. The event apparently was not anticipated and there was no provision casting the risk on either party. Both assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it."

It is true in both these cases the charter was for a single voyage; and in the latter case the enterprise contracted for had not been entered upon. But an executory contract is no less binding than a contract partially performed as to the rights conferred and the obligations assumed. The only substantial distinction between a voyage charter and a charter for years, on the issue of frustration, is that in the former the embargo or requisition in most cases is certain to continue beyond the expected termination of the voyage, while in the latter there is difficulty in ascertaining whether the requisition would probably extend beyond the period of the charter. On the other hand, in the case of a voyage charter defeated by requisition, the adjustment of the rights of the owner and charterer in excess hire paid by the government is simple, while the effort to make such adjustment in case of a time charter defeated involves the court in a maze of uncertainty.

[5] In this case the testimony is conflicting as to the facts from which the probability or improbability of the release of the vessel could be inferred. In June, 1915, the date of the requisition, the war was increasing in intensity. The peoples involved were developing military strength, endurance, and resources beyond their own most extravagant estimates. Men of knowledge and vision could form no opinion of value as to the probable duration of the war, beyond the conviction that it would come to an end only with the exhaustion of the military resources of one or both sides. The necessity was becoming more acute for Great Britain to mobilize all her sea power, including her merchant marine, to meet the increasing losses and perils from submarines. According to the testimony of witnesses for libellant, vessels were released by the Admiralty from time to time; but many more were held under requisition until the end of the war. In view of these facts, and the conflicting testimony of the witnesses, we cannot resist the conclusion that at the time of the requisition release of the vessel during the period of the charter party was improbable. This conclusion is strengthened by the reflex light on the question afforded by the fact that the ship was actually held under the requisition beyond the charter period.

Weighing the matter by established judicial tests, we think the charter party was frustrated by the requisition, and that the District Court erred in awarding to the charterer the difference between the contract hire and the compensation paid by the government to the owner.

The decree of the District Court will therefore be reversed, and the cause remanded, with instructions to dismiss the libel. The costs in this court to be paid by the appellees and the costs in the District Court to be divided equally between the parties.

Reversed.

THE FRANKMERE.\*

GANS STEAMSHIP LINE v. ARNOT et al.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1921.)

No. 1873.

**Admiralty — 124—Premium on bond not taxable as costs without statute.**

The premium on the bond given for the release of a vessel cannot be taxed as costs, in the absence of a statute or rule to that effect.

Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel by the Gans Steamship Line against the British steamship Frankmere, George H. Arnot, master and claimant, and the Palace Shipping Company, Limited. From a decree dismissing the libel (262 Fed. 819), both parties appeal. Affirmed.

John W. Griffin, of New York City (Wharton Poor and Edward Sandford, both of New York City, Hughes, Little & Seawell, of Norfolk, Va., and Haight, Sandford, Smith & Griffin, of New York City, on the brief), for appellant and cross-appellee.

John M. Woolsey, of New York City (Floyd Hughes, of Norfolk, Va., on the brief), for appellees and cross-appellants.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. On the 28th day of October, 1913, in the city of New York, the Palace Shipping Company chartered, under the ordinary time charter, the British steamship Frankmere for a period of 3 years from the delivery of the steamer, for the sum of 1,560 pounds a month. The steamship was delivered on the 30th of November, 1913. The flat 3-year period expired November 30, 1916, and, under the overlap of the original charter party, the charterers would have had the right under an option to keep the vessel 45 days longer. The ship entered at once in the transatlantic trade on November 30, 1913, and so continued from that date until the 4th day of May, 1915, when she was requisitioned by the British admiralty. On the 7th day of May, 1915, upon coming out of dry dock at Genoa, over the protest of Gans Steamship Line, the libellant, duly made to the respondent, the ship was formally taken possession of by the British government, and thenceforth continuously used by it for a period beyond the expiration of the life of the charter. The government paid the owner for the use of the ship considerably more than the charter hire.

In its libel, filed July 17, 1915, the charterer alleged breach of the charter party by the owner, and claimed as damages the difference between the market value of the use of the ship for the unexpired time and the hire it had agreed to pay. The appeal is from the decree of the District Court dismissing the libel. The case is not distinguish-

\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 257 U. S. —, 42 Sup. Ct. 270, 66 L. Ed. —.

able from *Isles Steamshipping Co. v. Gans Steamship Line*, 278 Fed. 131. The opinion filed herewith in that case disposes of the merits of this.

Error is assigned by the master and owner of the *Frankmere* in the refusal of the District Court to tax as costs \$3,000, premium on the bond given for the release of the vessel. We agree with the District Court that, in the absence of a statute or rule on the subject, such a disbursement cannot be taxed. *The Texas*, 226 Fed. 897, 141 C. C. A. 501; *Parkerson v. Borst*, 256 Fed. 827, 168 C. C. A. 173.

The decrees of the District Court are affirmed.

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### FORD v. GRIMMETT.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1922.)

No. 8682.

1. Appeal and error  $\S$  544(3), 614, 717—Correctness of judgment depends only on pleadings, in absence of bill of exceptions, agreed statement of facts, or findings of fact, and opinion and unauthenticated notes of evidence cannot be considered.

In a case tried without a jury, where the record contains no bill of exceptions, agreed statement of facts, or findings of fact, there is nothing before the court, except the petition and answer, by which to test the correctness of the judgment, though the record does contain unauthenticated notes purporting to contain the evidence and an opinion of the District Judge.

2. Courts  $\S$  352—Trials in federal court without jury regulated by federal statute.

Though Act May 26, 1824, adopted for United States courts in Louisiana the practice of the courts of the state, the practice since 1865 as to trials by the court without a jury has been in accordance with Rev. St.  $\S$  649, 700 (Comp. St.  $\S$  1587, 1668; Act March 3, 1865,  $\S$  4).

3. Courts  $\S$  352—Trial by federal court without jury may be had under statute or independent of statute.

Neither the Judiciary Act of 1789 nor Act March 3, 1865 (Rev. St.  $\S$  649, 700 [Comp. St.  $\S$  1587, 1668]), made applicable to District Court by Judicial Code,  $\S$  291 (Comp. St.  $\S$  1268), deprived litigants of the privilege of submitting cases to the court for determination without the intervention of a jury, and cases may be tried by the District Court without a jury under the statute or independent of the statute.

4. Courts  $\S$  352—Stipulation essential to trial without jury under federal statute.

Under Rev. St.  $\S$  649, 700 (Comp. St.  $\S$  1587, 1668), a stipulation in writing is essential to secure a trial by the court without a jury, and where the record fails to disclose any waiver of a jury by stipulation in writing, the case must be considered as tried independent of the statute.

5. Appeal and error  $\S$  849(2)—Findings not reviewable, when jury trial not waived in writing.

Where a case is tried by the court without a jury without filing the waiver of a jury trial, essential under Rev. St.  $\S$  649, 700 (Comp. St.  $\S$  1587, 1668), the court acts as an arbitrator, and its determination of issues of fact is conclusive on the parties.

In Error to the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Action by William L. Grimmett against John McWilliams Ford. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank J. Looney, J. M. Foster, and W. A. Wilkinson, all of Shreveport, La., for plaintiff in error.

J. S. Atkinson and J. M. Grimmett, both of Shreveport, La., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Judgment was entered for the defendant in error, who was plaintiff below, upon his petition to recover from plaintiff in error possession of a certain tract of land. The petition alleged title in defendant in error under a homestead entry and a patent from the United States. The plaintiff in error alleged in his answer that the land in dispute was included in the swamp and overflowed lands granted by the act of Congress of March 2, 1849 (9 Stat. 352), to the state of Louisiana, and claimed title by mesne conveyances from the state.

[1] The judgment recites that the parties waived a jury, and that the case was regularly tried by the court. The record does not contain a bill of exceptions, agreed statement of facts, or findings of fact. It does contain unauthenticated notes, which purport to contain the evidence submitted at the trial, and also an opinion of the District Judge. We have nothing before us, therefore, except the petition and the answer, by which to test the correctness of the judgment. *Texas Ranger, etc., Co. v. Robinson* (C. C. A.) 272 Fed. 453.

Error is assigned upon the refusal of the court to hold that the act of Congress vested title to the land in dispute in the state. By the Judiciary Act of 1789 (1 Stat. 73) the trial of issues of fact in common-law actions in District Courts was required to be by jury. By section 4 of the act of Congress of March 3, 1865, now sections 649 and 700 of the Revised Statutes (Comp. St. §§ 1587, 1668), it was provided that—

“Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury.”

This later act, however, did not affect proceedings in District Courts until it was made applicable to them by section 291 of the Judicial Code (Comp. St. § 1268). *Rogers v. United States*, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853; *Campbell v. United States*, 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684; *Ex parte United States*, 226 U. S. 420, 33 Sup. Ct. 170, 57 L. Ed. 281.

[2] The act of Congress of May 26, 1824, 4 Stat. 62, adopted for United States courts in Louisiana the practice of the courts of that state; but since 1865 the practice in federal courts sitting in that state, as to the trial of cases before the court without a jury, has been in accordance with sections 649 and 700 of the Revised Statutes. *Mutual Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Flanders v.*

Tweed, 9 Wall. 425, 19 L. Ed. 678; *Generes v. Campbell*, 11 Wall. 193, 20 L. Ed. 110; *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395.

[3, 4] Neither the Judiciary Act of 1789 nor the act of 1865 operated to deprive litigants of the privilege of submitting cases to District or Circuit Courts for determination without the intervention of a jury. *Campbell v. United States*, 224 U. S. 99, 32 Sup. Ct. 398, 56 L. Ed. 684; *Kearney v. Case*, *supra*. Since the enactment of the judicial Code in 1911, which abolished Circuit Courts and conferred their powers and duties upon District Courts, two methods of trial exist before a District Court without a jury. One is independent of statute, while the other is provided for by sections 649 and 700 of the Revised Statutes.

A stipulation in writing is essential to secure a trial under these statutory provisions. *County of Madison v. Warren*, 106 U. S. 622, 2 Sup. Ct. 86, 27 L. Ed. 311; *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Abraham v. Levy*, 72 Fed. 124, 18 C. C. A. 469. Because of the failure of the record to disclose the waiver of a jury by stipulation in writing, it necessarily follows that this case is to be considered as not having been tried under sections 649 and 700, but by that other method which is independent of statute.

[5] In speaking of the mode of procedure which the parties must be presumed to have adopted, the Supreme Court said, in *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96:

"The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

And in *Campbell v. United States*, *supra*:

"In this state of the statute law the trial to the District Court without a jury was in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore was not subject to re-examination in an appellate court. *Campbell v. Boyreau*, 21 How. 223; *Rogers v. United States*, 141 U. S. 548. It follows that the Circuit Court of Appeals was without power to consider the sufficiency of the facts found to support the judgment. The power of that court was limited to a consideration of such questions of

law as may have been presented by the record proper, independently of the special finding, such as whether the pleadings were sufficient to support the judgment."

In this case error is not assigned upon the sufficiency of the pleadings. Whether the judgment is correct depends upon the evidence which was before the District Judge, but which an appellate court is without authority to review or consider.

It is contended, as a matter of law, that the mere selection of the land in suit by the state vested title in it; that an approval of the state's selection by the Secretary of the Treasury of the United States was unnecessary, and that his refusal to give it would not prevent title from passing under the act of Congress. But this contention assumes a fact, which it was incumbent upon plaintiff in error to prove, namely, that the state selected the land in suit. We are of opinion that the determination of issues of fact by the District Judge is conclusive upon the parties, and that the record does not present any question of law which we are authorized to review.

It is not intended to be, and it is not, conceded that the assignments of error could be considered, if it had been made to appear that a jury had been waived by a stipulation in writing, and that the trial had proceeded under sections 649 and 700 of the Revised Statutes. See *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *United States v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; *City of Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572; *Good Pine Lumber Co. v. Duke*, 229 Fed. 714, 144 C. C. A. 124.

The judgment is affirmed.

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**CROSS STATE LAND CO. v. PRUETT.**

(Circuit Court of Appeals, Fifth Circuit. February 4, 1922.)

No. 3769.

**Appeal and error** ⇐849 (2)—Nothing reviewable in case tried without jury without written waiver, except sufficiency of defense.

In a case submitted to the court without a jury and without any written stipulation waiving a jury, where no objection was taken to the sufficiency of the defense, nothing is presented for review.

In Error to the District Court of the United States for the Eastern District of Texas; W. Lee Estes, Judge.

Action by the Cross State Land Company against E. D. Pruett. Judgment for defendant, and plaintiff brings error. Affirmed.

C. A. Lord, of Beaumont, Tex., for plaintiff in error.

C. F. Stevens, of Houston, Tex., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. Plaintiff in error sued defendant in error in an action at law, and there was judgment for the latter.

The judgment recites that the case was submitted to the court without a jury. The assignments of error complain only of findings of fact

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upon which the judgment was based. No objection was taken to the sufficiency of the defense set out in the answer. It does not appear that the waiver of a jury was by stipulation in writing.

The record presents no question for review by this court, for the reasons stated in the opinion this day filed in the case of John McWilliams Ford v. William L. Grimmer, 278 Fed. 140, and the judgment is affirmed.

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**LYONS et al. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. NEWMAN et al. v. SAME. TAYLOR v. SAME.**

(Circuit Court of Appeals, Fifth Circuit. January 19, 1922.)

Nos. 3728, 3737, 3745.

**1. Injunction §118(1)—Bill to enjoin unlawful acts of striking employees held sufficient.**

A bill for an injunction alleged that complainant owned and operated in interstate and foreign commerce a large number of steamships and tugs; that defendants, who had been employees of complainant in such operation, quit work on an announced reduction of wages, and since then had intimidated, threatened, assaulted, and beaten persons employed by complainant to take their places and in many instances had compelled them by violence to cease work. *Held*, that such bill described the property and property rights sought to be protected with sufficient particularity, under Act Oct. 15, 1914, c. 323, § 20 (Comp. St. § 1243d).

**2. Exceptions, bill of §38—May be signed after allowance of writ of error, if during term.**

If a bill of exceptions is signed during the term at which the case was tried, it is not subject to objection in the appellate court on the ground that it was signed after the writ of error was sued out.

**3. Appeal and error §1046(5)—Statement in instructions, though not based on evidence, held without prejudice.**

In proceedings for contempt for violation of an injunction, where defendants were tried to a jury, a statement in the instructions that notice of the injunction had been published in the daily papers, though no proof of such fact was introduced, *held* not prejudicial, where defendants, though testifying in their own behalf, made no claim that they were ignorant of the injunction.

In Error to and Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Suit in equity by the United States Shipping Board Emergency Fleet Corporation against Dan Lyons and others. From an order granting a preliminary injunction, defendants appeal. Affirmed. Frank Newman and others, and Robert B. Taylor, defendants, bring error from orders adjudging them in contempt for violation of the injunction. Affirmed.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La. (W. J. Waguespack, Jr., of New Orleans, La., on the brief), for appellants and plaintiffs in error.

Louis H. Burns, U. S. Atty., and W. J. O'Hara, Asst. U. S. Atty., both of New Orleans, La., for appellee and defendant in error.

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Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. These three cases were argued and submitted together. In one of them is sought the reversal of a decree ordering the issuance of a preliminary injunction in a suit brought by the appellee, United States Shipping Board Emergency Fleet Corporation. In the other two cases orders of the court adjudging individuals in contempt for violations of the injunction issued in the first-mentioned case are complained of.

[1] The question of the sufficiency of the bill in the case in which the injunction was issued was not raised in the trial court. It is now contended that that bill was fatally defective, because it did not describe with particularity the property or property right sought to be protected by injunction, as required by the provisions of the statute as to injunctions in cases growing out of disputes concerning terms or conditions of employment. Section 20, Act Oct. 15, 1914, 38 Stat. 738 (Comp. St. § 1243d). That bill contained averments to the following effect: The complainant therein is and has been engaged in the business of operating steamships and tugs carrying interstate and foreign commerce, and of towing vessels laden with interstate and foreign commerce, and at the time of the filing of the bill had in the port of New Orleans approximately 85 steamships and 4 tugboats, all engaged in said commerce.

The defendants named in the bill prior to the filing thereof were employed by the complainant in operating its ships, or are identified with the employment of said former employees. After the complainant announced a reduction in the wages of all its employees in the engine, steward, and unlicensed deck departments, the defendants, who were previously employees of the complainant, voluntarily gave up their employment and/or have declined to return to work for complainant under the new wages. Complainant has been endeavoring to carry on its business since its former employees left its service. The men employed by the complainant in place of its former employees have been assaulted, beaten, threatened, and intimidated, and in many cases have been forced by violence to cease work on complainant's ships. Defendants and their sympathizers, by repeated acts of violence and repeated threats, have undertaken to intimidate and coerce complainant's employees and to prevent them from rendering their services to the complainant. Complainant's employees on two of its named ships were on stated dates forced to leave such ships by threats and violence of the defendants and/or their sympathizers.

The injunction granted against the persons named as defendants and other persons of names unknown forbade such unlawful conduct as was alleged in the bill. The averments of the bill clearly disclose that the ships and tugs used by the complainant therein in its alleged business and its right to carry on that business were the property and the property right sought to be protected by the relief prayed for. Those averments left no room for conjecture or surmise as to what was sought to be protected by injunctive relief. Nothing in the statute referred to indicates an intention to require greater particularity

of description than is involved in allegations which clearly make known to the court the property or property right subject to be prejudicially affected by alleged actual or threatened wrongful conduct which the court is asked to enjoin. We are not of opinion that the decree under which the injunction was issued is subject to be reversed on the above-mentioned ground.

[2] In one of the two cases involving an order made by the court in contempt proceedings for a violation of the injunction, there was a trial by jury pursuant to a demand by the persons proceeded against. Objection was made to the consideration of the bills of exceptions in that case on the ground that they were allowed and signed after the allowance of the writ of error. If a bill of exceptions is signed during the term at which the case was tried, it is not subject to objection in the appellate court on the ground that that was done after the writ of error was sued out. *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. Ed. 113.

The transcript in each of the contempt cases contains motions to quash and dismiss, filed in behalf of the persons proceeded against. Nothing in the record in either of those cases indicates that those motions were ruled on by the court or called to its attention. There is nothing before us to negative the conclusion that the hearings under the orders to show cause why the persons proceeded against should not be adjudged guilty of contempt for alleged violations of the injunction were entered upon and concluded without any objection to the sufficiency of the motions for such orders being made known to the court.

[3] The charge in the contempt case in which there was a trial by jury was to the effect that, while the injunction was in force, the parties proceeded against went in a named gasoline launch from New Orleans down the Mississippi river to a point where the steamship *Hodnot*, a vessel of complainant in the injunction suit, was tied up, and, going aboard that vessel, took, beat, and carried therefrom members of its crew to a place in New Orleans, and there assaulted and wounded said members of said crew, with the intent of intimidating them to abandon their employment as members of the crew of said steamship. An exception was reserved to a part of the court's charge to the jury, containing statements to the effect that, prior to the occurrence charged, notice of the injunction was published in the daily papers, which also contained accounts of the trial and conviction for violating the injunction of seven men who were members of the same union to which the persons proceeded against belonged. The ground stated in support of the exception was that no evidence had been adduced as to publication in newspapers of notice of the injunction or as to newspaper accounts of the trial and conviction mentioned.

Each of the persons proceeded against for contempt was a witness in his own behalf. No one of them denied knowledge of the injunction at the time of the alleged violation of it. So far as appears, a defense based on claimed ignorance of the injunction was not suggested during the hearing. Under the circumstances disclosed, it fairly may be inferred that the jury was not influenced in reaching the

verdict of guilty by the court's mention of unproved circumstances indicating the notoriety of the injunction, of which the persons proceeded against, who testified on the hearing under an order to show cause why they should not be adjudged guilty of contempt, did not claim to have been ignorant at and prior to the time of their alleged violation of it. The conviction under review is not subject to be reversed because of the court's statement which was excepted to, made under circumstances which negative the conclusion that the persons proceeded against were prejudiced thereby.

The charge given by the court contained correct and adequate instructions as to the presumption of innocence to be indulged in favor of the defendants and as to the burden and measure of proof required to warrant a conviction. This being true, the refusal of the requested charge dealing with those subjects was not a reversible error. The conclusion is that no reversible error was committed in any of the cases.

The judgments therein are affirmed.

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AMERICAN FILM CO., Inc., v. REILLY et al.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3650.

1. Trial ¶419—Motion for nonsuit at close of plaintiff's evidence waived by introduction of evidence by defendant.

A motion for nonsuit at the close of plaintiff's evidence is waived by the introduction of evidence by defendant.

2. Infants ¶74—Minor and parent joining in making contract may join in action for its enforcement.

Where a minor and her mother joined in making a contract for the services of the minor, they may join in an action for its enforcement.

3. Infants ¶58(1)—Minor having right to disaffirm contract not liable for nonperformance after disaffirmance.

A minor having the right to disaffirm a contract is not liable in damages for nonperformance after disaffirmance.

4. Contracts ¶305(3)—Where services were accepted and paid for damages not recoverable for nonperformance.

Where under a contract services were to be rendered and paid for each week separately, the employer cannot recover damages for partial nonperformance during a week for which payment was made without objection.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippe, Judge.

Action at law by Juliet Reilly and another against the American Film Company, Inc. Judgment for plaintiffs, and defendant brings error. Affirmed.

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Ford & Bodkin, of Los Angeles, Cal., and Thompson & Robertson, of Santa Barbara, Cal., for plaintiff in error.

E. A. Meserve, John G. Mott, and Albert M. Cross, all of Los Angeles, Cal., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Juliet Reilly, otherwise known as Mary Miles Minter, a minor, together with Pearl Miles Minter, her mother and guardian ad litem, brought an action against the plaintiff in error herein to recover certain installments of the salary of said Mary Miles Minter which were alleged to be due under a contract which provided for her performance of services as an artist for the period of two years commencing May 22, 1917. The contract was duly performed and the services were duly paid for until January 11, 1919. From the week ending on that date until the week ending on March 15, 1919, the plaintiffs contended that the weekly compensation of \$2,250 was earned by services duly performed each week. The defendant denied that full services were performed during those weeks, and it deducted from her wages various amounts. The action is brought to recover the amounts thus deducted, amounting in all to \$4,025. The jury returned a verdict for the plaintiffs for \$4,000. Before the expiration of the contract period the minor plaintiff ceased work and disaffirmed the contract on the ground of her minority.

[1, 2] The record is such that certain questions which were discussed in the briefs and on the argument are not properly before us. There was a motion for a nonsuit at the close of the plaintiffs' testimony, but the motion was waived by the defendant in introducing testimony for the defense, and at the close of the evidence there was no motion for an instructed verdict. Nor was any exception taken to the instructions of the court to the jury or to the court's refusal to give instructions. The denial of the defendant's motion for a new trial is not assignable as error. The only questions properly before us, therefore, are the rulings of the court below on the admission of testimony. Exception was taken to the admission of testimony for the plaintiff on the ground that the action was brought by the wrong party, and should have been brought by the mother of the minor plaintiff, instead of being brought as it was in their joint names. The parties who brought the action were the parties with whom the defendant made the contract. The contract provided for the weekly payments to the minor plaintiff and her mother, and the payments were thus made during the life of the contract. We have nothing to do with the question whether as between the minor plaintiff and her mother the latter was entitled to receive all the former's wages. It is sufficient to point to the rule that, where the contract of service provides that wages are to be paid as in the manner provided in the contract here involved, the action may be brought properly in the names of the minor and the adult. 14 R. C. L. 292; 22 Cyc. 628; Cain v. Garner, 169 Ky. 633, 185 S. W. 122, L. R. A. 1916E, 682, Ann. Cas. 1918B, 824; Story & Clark Piano Co. v. Davy, 68 Ind. App. 150, 119 N. E. 177.

[3] The court below properly excluded the evidence offered under

the defendant's second cause of action alleged in its cross-bill whereby damages were claimed to have been sustained by reason of the minor plaintiff's failure to perform services after the date when she disaffirmed the contract. A minor, having the right to avoid his contract, is not liable for damages for his failure to complete the same. *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Danville v. Amoskeag Co.*, 62 N. H. 133; *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286.

[4] It is contended that it was error to exclude evidence offered under the defendant's first cause of action of its cross-complaint, wherein damages were sought to be recovered for the minor plaintiff's failure to perform her contract before the disaffirmance, resulting in damage from loss of time and the expense of supporting the film companies. One question only was propounded in this connection, and that was: "During that week what salary were you paying the director?" There was no offer to show that the defendant was not bound to the payment of the director's salary irrespective of any default of the minor plaintiff. Under the contract the salary for each week was a separate installment, and the contract authorized no deduction of wages for fractions of a week. It provided, however, that the plaintiffs were not to be entitled to the weekly payment for any week during which the minor plaintiff should render no services because of her physical disability or refusal or failure to perform such services. Her full compensation was presumptively due her for each week, and the burden was on the defendant to prove a counterclaim for damages for her failure to perform. The proof was that there was part performance for each of the weeks concerning which the controversy arose. There could be no prejudice to the defendant in excluding evidence offered to show failure of the minor plaintiff to perform services during the time for which the defendant had paid in full without objection. The disaffirmance rendered the contract void ab initio, leaving the rights of the parties as if it had never existed.

It is contended that the court erred in overruling defendant's objection to proof of a conversation wherein the director employed by the defendant consented to the minor plaintiff's absence from the defendant's studio for two days, which is said to have been contrary to the express order of the defendant's general manager. Much of the testimony concerned controversies between the plaintiffs and the defendant as to certain alleged insubordination of the minor plaintiff and her refusal to obey general orders issued by the defendant. We cannot see that the rulings of the court on the admission and exclusion of testimony along this line involved any substantial rights of the defendant. The real question before the court and jury was whether the minor plaintiff failed to perform her contract, to the injury and damage of the defendant, during the weeks involved in the controversy. There was want of harmony between the manager and the director who had immediate charge of the artists and the production of the films. The minor plaintiff was suffering from toothache and asked for leave of absence for two days so that she might go to Los Angeles for dental treatment. The director who had the immediate control of the artists consented. The manager, however, required her

constant attendance and issued orders to that effect to the director. Undoubtedly under the contract the manager had the right to require the constant attendance of each artist. But, when all is said, the real question here is whether the court below erred in admitting or excluding evidence on the issue whether the defendant suffered damages from the minor plaintiff's failure to perform services. We have carefully considered all the assignments of error as to the admission and exclusion of such evidence, and we find no substantial merit in any of them. The judgment is affirmed.

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**BILES et al. v. GANDY.**

(Circuit Court of Appeals, Fifth Circuit. January 31, 1922.)

No. 3746.

**Specific performance**  $\Leftrightarrow$  119—**Plaintiff, suing to enforce sale contract, in which he agreed to procure release from third person, must show his ability to perform, if not prevented by defendant's acts.**

Where defendant contracted to sell plaintiff an interest in oil, gas, and mineral rights owned by her and her two sisters, and which were then in litigation with L., one of the conditions of the contract being that plaintiff would procure a release from L., and L. thereafter made a release as to the interests of all three sisters before plaintiff had procured any enforceable agreement with him, plaintiff was not entitled to specific performance, without showing that he would have obtained the release, if defendant and her sisters had not made such settlement, and that his inability to perform was caused by such settlement.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by William S. Biles and others against Lessie Shaw Gandy. From a decree for defendant, plaintiffs appeal. Affirmed.

William H. Hawkins, of Homer, La., and Joseph Moore, of Shreveport, La. (Moore, Johnson & Boatner, of Shreveport, La., on the brief), for appellants.

S. L. Herold and C. H. Lyons, both of Shreveport, La. (Thigpen, Herold & Lee and Wallace, Lyons & Wallace, all of Shreveport, La., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The relief sought by the bill filed by the appellants was the specific enforcement of a written contract whereby the appellee agreed to sell a one-half interest in her undivided oil, gas, and mineral rights in described land to George R. Slentz, one of the appellants, who, in making that contract, was acting for himself and as agent for the other appellants. That contract was entered into after the appellee and her two sisters, in a suit brought by them against one Langston in a Louisiana state court, had been decreed to be the owners of a described interest in said land, then under lease and producing oil, and while that suit was pending in the Supreme Court of Louis-

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iana on an appeal by Langston. The contract stated the consideration of the sale to be that appellee was to receive \$65,000, to be paid out of oil already run or to be run from said land, that she was to be paid "whatever income tax will be due the government by virtue of the income of this sale, to be based on the sum of \$65,000," and that a release of all claims asserted by Langston as to appellee's interest in said land was to be obtained by Slentz; the appellee's interest to be assigned upon compliance with the stipulations as to payment of income tax and the clearing of the title so far as the claim of Langston was concerned.

Slentz entered into negotiations with Langston for a release of appellee's interest in the land. After Langston had expressed a willingness to execute such a release for \$50,000, one-half in cash and the remainder in bankable paper, he not to be bound until he received the cash and paper, and while appellants were arranging to comply with those terms, Langston released his claim as to the interests of the appellee and her two sisters for \$100,000 in cash, which was furnished by A. R. Heintz, and a share in the oil to accrue to said interests. The attorneys for the appellee and her two sisters acted for them in effecting that settlement; a feature of the arrangement made being a transfer by the three sisters of a half-interest in their mineral rights to Heintz, who put up the money paid to Langston.

The granting of the relief sought was resisted on the grounds that the appellants failed to comply, or to be ready to comply, with their part of the contract within a reasonable time, that the provision as to payment of income tax was too vague and indefinite for the contract to be specifically enforceable, and that the appellants did not procure, or become entitled to, a release of Langston's claim to the appellee's interest. If the denial of the relief sought is sustainable on one of those grounds, the other grounds need not be considered.

In behalf of the appellants it is contended that their failure to obtain the release by Langston of his claim to the interest of which appellee was decreed to be the owner was due to the act of the latter in procuring a release by Langston of that interest when the appellants were ready, willing, and able to comply with their undertaking in that regard, that the appellee cannot rely upon a default which she herself caused, and that appellants, upon reimbursing the appellee for the outlay made by or for her to secure Langston's release, and paying the amount called for by the provision as to income tax, are entitled to a specific performance.

We are not of opinion that the evidence adduced required the conclusion that appellants would have obtained the release by Langston of the appellee's interest alone, but for the consummation of the transaction which resulted in his release of that interest, together with others. The appellants never acquired an enforceable right to a release by Langston. The evidence indicated that at one stage of the negotiation with Langston he indicated a willingness to release appellee's interest for \$40,000, but that, when appellants offered to pay that amount, Langston declined to accept it, saying he would have to have \$50,000. He remained at liberty to change his mind again. What happened shows that he preferred a settlement of the entire litigation in which he was engaged to a settlement as to a part only of his claim. It would

be a mere guess to say that, after it was disclosed to Langston that there was an opportunity for him to dispose of his entire claim for a satisfactory consideration, he would have released his claim to appellee's interest alone on the terms which the appellants arranged to comply with, if a compliance with those terms had been tendered before the disposition of the entire claim was effected. The evidence is not inconsistent with the conjecture that the appellants would have failed to obtain the release they sought, even if Langston had not made the settlement he did make before the appellants were ready to comply with the terms on which they expected to obtain the required release. The obtaining by the appellants of the stipulated release by Langston was a condition precedent to their acquisition of the right to the transfer contracted for.

"To entitle themselves to a decree for a specific performance of a contract to sell land it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced specific performance. In such a case, if the vendee wish to compel the other to fulfill the contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal." *Kelsey v. Crowther*, 102 U. S. 404, 408, 16 Sup. Ct. 808, 810 (40 L. Ed. 1017).

It is not necessary to decide whether the just stated rule would or would not have been applicable in the instant case, if the inability of the appellants to perform their part of the contract had been shown to have been caused by the appellee. We are not of opinion that the evidence adduced required or warranted the conclusion that it was so caused, or that the appellants would have been able to comply with what was required of them if the settlement which Langston made had not been consummated before the appellants were ready to comply with the terms on which they expected to obtain the stipulated release, to which they never had any enforceable right. Even if Langston had not released his entire claim, the ability of the appellants to perform their part of the contract would have remained subject to the consent of a third person, until that consent was so given as not to be subject to be withdrawn at will. It cannot properly be said that the appellee caused the default by the appellants, as Langston's consent to make the transfer sought by the appellants remained subject to be withdrawn for any reason, or without any reason, and was withdrawn, under circumstances not disclosing whether Langston's change of mind would or would not have occurred, but for the consummation of the trade for the release of his entire claim.

The conclusion is that the court properly refused to decree specific performance of the contract. The decree is affirmed.

In re FRIEND et al.  
Appeal of GORDON et al.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 69.

1. Bankruptcy  $\Leftrightarrow$ 440—Order denying petition for delivery of goods and accounts reviewable by appeal, and not by petition to revise.

An order of the bankruptcy court, denying a petition for the return of goods on which the petitioner claimed a lien, and the delivery of accounts and commercial paper arising from sales of other similar goods, was reviewable by appeal, and not by petition to revise.

2. Bankruptcy  $\Leftrightarrow$ 188(2)—Immaterial that contract under which petitioner claimed lien is with only part of members of firm.

Where property passing into the possession of the bankruptcy court on the bankruptcy of W. B. F. & Co., a firm consisting of two men and two women, was claimed by vendors under a contract attempting to give a lien, it was immaterial that the contract was with the two men, individually and as partners under the firm name of W. B. F. & Co.; the sale being to, and the agreement with, the firm now in bankruptcy.

3. Sales  $\Leftrightarrow$ 313—Agreement that vendor should have lien on goods and proceeds in hands of vendee held contrary to statute.

An agreement between an unpaid vendor, who still had possession of the goods sold, and the vendees, providing that the vendor had a valid and subsisting lien on the goods, that the goods should be consigned to the vendees for sale by them, and that the lien should apply to the proceeds of sales and cover all moneys, accounts, or commercial paper received as the result of sales, when unrecorded, was invalid, under Personal Property Law N. Y. § 134, giving the unpaid seller a right to retain goods for the price while he is in possession, and section 137, declaring that the unpaid seller loses his lien when the buyer or his agent lawfully obtains possession of the goods.

Appeal from and Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Henry Friend and others, doing business as W. B. Friend & Co., bankrupts. From an order denying their petition for the delivery to them of goods and accounts, Maurice Gordon and others appeal and file a petition to revise. Petition dismissed, and order affirmed.

Prior to October, 1920, the appellant partnership (Gordon & Cohen) sold to the bankrupts in the city of New York a quantity of velveteen. It was not paid for, and vendors sued for the purchase price. In said October this suit was compromised and discontinued, in pursuance of a written agreement made between the bankrupt firm and the vendors, appellants Gordon & Cohen. This agreement recites that at its date the velveteens are in the possession of the appellant vendors and are "held by them under their lien as unpaid sellers of said velveteen." It nowhere positively appears how or why the vendors retained possession of that which they had sold.

Said agreement continues with an acknowledgment by the bankrupts that they are "now indebted" to the vendors in the price of the goods. They agree to give (and gave) to the vendors certain promissory notes maturing at divers times, which in the aggregate made up the amount of indebtedness; i. e., the price of the goods. The writing continues by acknowledging that the vendors appellants "now have possession" of the goods, and that said vendors "have a

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

valid and subsisting lien" thereupon to the extent of the said purchase price; i. e., the aggregate of the said promissory notes. It is then agreed that the vendors "shall intrust" the said velveteens to the now bankrupt firm, but that such delivery shall not "mitigate or minimize or affect the said lien of the [vendors appellants] on or against said velveteens."

The next paragraph of this written agreement declares that said velveteens shall "subject to the said lien \* \* \* be consigned" to the now bankrupt firm "for sale by them, and the said lien on and against said velveteens shall continue and shall extend to and apply to the proceeds of sale" of the same. In the next paragraph of the agreement the bankrupt firm agrees to "receive and hold the said velveteens for the account of (vendors-appellant) and always subject to the said lien," which lien shall also cover all moneys, accounts, or commercial paper received as the result of the sale by the bankrupt firm of said velveteens. The agreement concludes with a proviso that, if default is made in payment of any of the promissory notes given, the vendors may enter any place where the velveteens or any commercial paper of the above-described kind are kept and "may remove [the same] and again take possession" without legal proceeding.

Some three months after the execution of this written contract and the consequent delivery of the velveteens to the bankrupts, the latter did default in respect of one of the promissory notes above mentioned, and thereupon made a general assignment to creditors, which was promptly followed by a petition in bankruptcy. During this three months some of the velveteens had been sold either on open account or against commercial paper, but a large quantity of the goods passed into the possession of the bankruptcy court, as did also the accounts, etc., last above referred to.

Thereupon Gordon & Cohen petitioned in the District Court for a return of the goods and delivery of the account, etc., arising from such sales as had been made thereof by the bankrupts, basing their demand wholly upon the contract above outlined. The firm in bankruptcy consists of four persons, all named Friend, two men and two women; this written contract was made with the two men "individually and as partners under the firm name of W. B. Friend & Co."

The District Court refused the petition, and the vendors thereupon took this appeal and petition to revise.

A. A. Silberberg, of New York City, for appellant and petitioner.

David W. Kahn, of New York City, for respondent.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The question presented is raised both by an appeal and a petition to revise. But the matter before the District Court was in effect an assertion by the vendors of a right to property in the possession of the court's representative in the bankruptcy; it was an endeavor by a third party to take something away from the estate in bankruptcy. Consequently the appeal taken is proper under *In re Prudential, etc., Co.* (C. C. A.) 270 Fed. 469, and the petition to revise is not proper.

[2] The fact that in the written agreement above recited but two Friends are named as the partners constituting the firm is quite immaterial. It is admitted that in ordinary parlance the bankrupt firm is the same firm as made agreement with the appellants; non constat but that the two women were subsequently admitted; but, even if that be not true, the sale was to a firm, and the agreement was with a firm, and that firm is now the bankrupt firm.

[3] All the transactions above referred to took place in New York, and it summarily states the difficulty in appellant's position to say that

the entire contract upon which appellant relies is a wholly unsuccessful attempt to evade sections 134-137 of the Personal Property Law (Consol. Laws, c. 41) of this state. Statute in effect September 1, 1911 (Laws 1911, c. 571).

By section 134 the unpaid seller of goods has the "right to retain them for the price while he is in possession of them." This is the vendor's lien which appellants exercised and to which they had good right. But section 137 declares that the "unpaid seller of goods loses his lien thereon \* \* \* (b) when the buyer or his agent lawfully obtains possession of the goods."

Nowhere in this record is it asserted that at any of the times mentioned the vendors appellants had title to the goods or owned the goods. They rest upon the proposition that their vendor's lien was by specific agreement kept alive and permitted to affect, not only the goods themselves while in possession of the bankrupt vendees, but the proceeds of those goods as far as such proceeds can be traced.

There was no record made of this agreement. It is a rather naïve instance of an attempted secret lien. There is no secrecy about a vendor's lien when he is in possession of that upon which the lien exists; and possession is sometimes a very technical word. But here there is no pretense of possession, and it is of the essence of appellant's position that, although the buyer lawfully obtained possession of the goods, yet nevertheless by secret agreement between vendors and vendee the lien was continued, and continued by this secret agreement.

This is flying in the face of the act; it is the sort of thing the statute is designed to prevent, and in so doing the act is in accord with the spirit of nearly all modern legislation. No multiplication of words can disguise the repugnancy of this transaction to the statute.

The petition to revise is dismissed, without costs, and the order appealed from is affirmed, with costs.

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### SHASTA COUNTY v. MOUNTAIN COPPER CO., Limited. \*

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3760.

**Taxation** — 485(4) — Increase of assessment by board of equalization in disregard of the evidence held invalid.

Under Pol. Code Cal. §§ 3673, 3679, relative to increases of assessments by boards of equalization, where the only evidence before the board was to the effect that the assessors had valued mining property at its full value, but the board arrived at a higher value by the adoption of a formula respecting the value of the ore, without receiving any evidence as to the cost of extracting, reducing, and marketing the ore, the increase was invalid.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

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➡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 462, 463, 66 L. Ed. —.

Suit by the Mountain Copper Company, Limited, against Shasta County. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 278 Fed. 158.

This and two other actions involve like questions and can be generally considered in this one opinion. In two of these three actions the Mountain Copper Company sought to recover portions of taxes paid under protest to the county of Shasta, Cal., for the fiscal year ending June 30, 1920, and in the other the Balaklala Consolidated Copper Company sought to recover for taxes paid by it. It is alleged that the county assessor put a value of \$125,000 upon the real property of the Mountain Copper Company and \$180,000, upon the property of the Balaklala Company; that these values were 50 per cent. of full cash values, made in pursuance of a custom to value all property at 50 per cent. of its real value; that the board of supervisors of Shasta county, sitting as a board of equalization, cited the corporations to appear and show cause why the assessments upon their respective properties should not be increased; that the companies appeared with counsel and officials, and presented evidence that the values were not in excess of those fixed by the assessor, but that the board, without receiving evidence to the contrary, arbitrarily and illegally fixed the valuation of the property of the Mountain Copper Company at \$549,000, and that of the Balaklala Consolidated at \$327,700; that the board, in increasing the valuation, acted fraudulently and capriciously, and without sufficient or any evidence to justify such increases.

The District Court held that the equalization as made was void and that the plaintiffs were entitled to recover all taxes paid on valuations in excess of those put upon the property by the assessor, and judgment was rendered in favor of plaintiffs for all taxes paid on valuations in excess of sums assessed by the assessor.

Jesse W. Carter, Dist. Atty., of Redding, Cal., and Morrison, Dunne & Brobeck, of San Francisco, Cal. (Edward Hohfeld, of San Francisco, Cal., of counsel), for plaintiff in error.

C. W. Durbrow, of San Francisco, Cal., and W. D. Tillotson, of Redding, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The method which the board of equalization pursued was explained by the county auditor, who said that the board gave to him the following figures for the mines which belonged to the Mountain Copper Company: Mineral contents, 2.3 per cent. copper, which means 46 pounds per ton, less 8 pounds, or 38 pounds net. At \$.1798, \$6.83 per ton, 268,000 tons, gives a value of \$1,830,440; 30 per cent., \$549,132. The assessed value is \$549,000.

One of the supervisors testified that he did not think that the board took any evidence in connection with the formula or method adopted, to show what it would cost to extract, reduce, and market the ore; that the board discussed the matter, and knew that the general supposition was that the mine had produced large profits; and that the purpose was to use the same relative value as was placed on other properties all over the county. Another member said that the action of the board was based on the tonnage blocked out and the metal content, and the average price of copper and gold and silver during the preceding 10 years, and then taking 30 per cent. of that amount as

the assessed value, but that the board did not take any evidence to ascertain the exact cost of mining and reduction, or take into consideration the net value that might be in the ore after expenses of reduction and marketing were allowed. Witness said that the board acted on their own judgment in adopting 30 per cent. as the basis for assessment, and without evidence as to the value of the properties, except that of the general manager. The general manager testified positively that, while in years past the mine of the Mountain Copper Company had been profitable, in March, 1919, it was abandoned as exhausted. There was no contradiction of this evidence.

The power of the board of equalization, under section 3673 of the Political Code of California, is:

"After giving notice in such manner as it may by rule prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money."

It appears that it was the custom of the county assessors of Shasta county to assess all property in the county so as not to exceed 50 per cent. of the value of such property, as indicated by usual and ordinary sales. By section 3679 the board must use the abstract and all other information it may gain, from the records or elsewhere, in equalizing assessments. But by the only evidence produced the Mountain Copper Company property was worth not to exceed \$250,000, or an assessable valuation of \$125,000. While there was some testimony that the board considered other matters, there can be no dispute that as a fact the board acted upon the formula stated, and without any justifiable showing put the value of the property at 30 per cent. of the value worked out under the formula.

The board may have meant to equalize justly, yet it is very plain that they adopted a method which had no substantial evidence to support it, and which appears to have worked gross injustice. In the evidence concerning the value of the Balaklala property before the board the tonnage was put at 112,500 tons as the total value of the ore, which, multiplied by 78 cents, gave approximately \$80,000 as the value, and no other person, except the general manager, gave evidence of value.

In *People v. Reynolds*, 28 Cal. 112, the Supreme Court of California held that a board of equalization has no more right to add to the assessed value of property, without evidence authorizing them to do so, than a court or jury has to find fact and determine the rights of litigants without evidence. That view was approved in *Oakland v. So. Pac. Co.*, 131 Cal. 229, 63 Pac. 371. In *Los Angeles Gas & Elec. Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, the court, after stating the general rule that the conclusion of assessing officers when honestly arrived at, and when not made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, although erroneous, held that an assessment will be voided where the board has proceeded arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of

imposing unequal burden upon certain taxpayers, or unless, or where, there is something equivalent to fraud in the action of the board. *Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

The cases are such that the board appears to have disregarded all evidence that the values were as fixed by the assessor, and without evidence to support their action increased the assessments involved to the great injury of the rights of the mining companies. The equalizations were therefore invalid, and it was properly so held.

Decrees affirmed.

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**SHASTA COUNTY v. MOUNTAIN COPPER CO., Limited.\***

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3761.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit by the Mountain Copper Company, Limited, against Shasta County. Judgment for plaintiff, and defendant brings error. Affirmed.

Jesse W. Carter, Dist. Atty., of Redding, Cal., and Morrison, Dunne & Brobeck, of San Francisco, Cal. (Edward Hohfeld, of San Francisco, Cal., of counsel), for plaintiff in error.

C. W. Durbrow, of San Francisco, Cal., and W. D. Tillotson, of Redding, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Upon authority of *County of Shasta v. Mountain Copper Co., Limited*, 278 Fed. 155, the decree of the District Court is affirmed.

Affirmed.

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**SHASTA COUNTY v. BALAKLALA CONSOL. COPPER CO.\***

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922. Rehearing Denied February 20, 1922.)

No. 3762.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit by the Balaklala Consolidated Copper Company against Shasta County. Judgment for plaintiff, and defendant brings error. Affirmed.

Jesse W. Carter, Dist. Atty., of Redding, Cal., and Morrison, Dunne & Brobeck, of San Francisco, Cal. (Edward Hohfeld, of San Francisco, Cal., of counsel), for plaintiff in error.

F. J. Solinsky, of San Francisco, Cal., W. D. Tillotson, of Redding, Cal., and C. W. Durbrow, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Upon authority of *County of Shasta v. Mountain Copper Co., Limited*, 278 Fed. 155, the decree of the District Court is affirmed.

Affirmed.

\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 462, 463, 66 L. Ed. —.

**DOMINION PHOSPHATE CO. v. LANG et al.**

(Circuit Court of Appeals, Fifth Circuit. January 28, 1922.)

No. 3777.

1. Sales ⇐153, 377—Tender of delivery unnecessary after repudiation by other party; allegation of buyer's repudiation renders allegation of seller's tender unnecessary.

The seller is not required to tender delivery of the goods after notice from the buyer that it would not be accepted, so that a declaration alleging repudiation of the contract by the buyer sufficiently alleges a breach, without an allegation of tender of delivery.

2. Pleading ⇐193 (8)—Erroneous claim for damages does not make declaration demurrable.

Where the declaration alleges a cause of action for breach of contract, it is not rendered demurrable because it makes claim for damages which cannot be recovered under the facts alleged, or because it incorrectly alleges the measure of damages.

3. Limitation of actions ⇐127 (4)—Amended declaration for breach of same contract held not to state new cause of action.

Where demurrer was sustained to the original declaration for breach of contract, because the damages claimed were not recoverable under the facts alleged, an amended declaration alleging breach of the same contract does not state a new cause of action, and should be permitted, though the statute of limitations had run against the cause of action after the original declaration was filed.

In Error to District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by the Dominion Phosphate Company against J. M. Lang and another, partners as J. M. Lang & Co. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

W. A. Carter, of Tampa, Fla., for plaintiff in error.

Peter O. Knight, of Tampa, Fla., for defendants in error.

Before WALKER and BRYAN, Circuit Judges.

BRYAN, Circuit Judge. In its declaration plaintiff in error alleges that by contracts in writing it sold to the defendants in error large quantities of phosphate rock, some of which defendants in error afterwards refused to accept and gave notice to plaintiff in error that they did not intend further to comply with their contracts; that the mining operations of plaintiff in error had been greatly lessened by reason of the storage in its bins of the phosphate rock bought by defendants in error, and that it had been thereby deprived of the profits it could have earned in the mining and sale of phosphate rock to others, to its damage, etc.

A demurrer to the declaration was sustained, the court being of opinion that the damages claimed were not recoverable under the facts pleaded in the declaration. Thereafter plaintiff in error made application to file an amended declaration, seeking to recover as damages the profits it would have earned if the contracts had been per-

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

formed, or the difference between the contract price, and the market value. That application was denied, upon the ground that the amended declaration tendered set up a new cause of action which was barred by the statute of limitations. Plaintiff in error declining to plead further, there was judgment final on demurrer. Errors are assigned upon the orders sustaining the demurrer and denying the application to amend.

[1] We are of opinion that the original declaration states a cause of action, because we think it sufficiently, though imperfectly, alleges breaches of the contracts. It was unnecessary to allege tender of delivery of the phosphate at the point of shipment, as provided in the contracts, according to allegations contained in the declaration, after notice that such delivery would not be accepted. *Sullivan v. McMillan*, 26 Fla. 543, 8 South. 450, and cases there cited.

[2] A cause of action being alleged, the question arises whether a demurrer lies for failure correctly to allege the measure of damages. In 21 R. C. L. 514, it is said:

"It is well settled that demurrer is not a proper method of determining what is the proper measure of damages, where a cause of action is presented entitling the plaintiff to some damages, even though they are merely nominal. And so a demurrer does not lie to a declaration because it claims other or greater damages than the case made legally entitles the plaintiff to recover. Such questions are, as a rule, properly raised and settled by objections to the testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or may be cause for reforming the declaration, when calculated to embarrass the fair trial of the case."

The rule in Florida appears to be as just above stated. See *W. U. Tel. Co. v. Milton*, 53 Fla. 484, text 491, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077, and cases there collected. It was error, therefore, to sustain the demurrer.

[3] We are of opinion, also, that the proposed amended declaration does not set up a new cause of action, and, consequently, that the court below erred in denying the application to file it. The allegations of fact are substantially the same in both the original declaration and the amendment tendered. The cause of action set out in each is the breach of the same contracts. In *S. A. L. Railway v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006, it is said:

"If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. [Citing cases.] But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested."

In the cited case, suit was brought in a state court in North Carolina. The Supreme Court of the United States stated the substance of the original complaint in the following language:

"That the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere, that the plaintiff was in its employ, that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Va., through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition."

An amendment alleging facts which brought the cause of action within the provisions of the federal Employers' Liability Act (Comp. St. §§ 8657-8665) was held not to state a new cause of action. This case appears to us to be ruled by *Friederichsen v. Renard*, 247 U. S. 207, 38 Sup. Ct. 450, 62 L. Ed. 1075, in which it is said:

"The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought," etc.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

KING, Circuit Judge, took no part in the consideration or decision of this case.

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**MARKS RIBBON CO. et al. v. PILSBURY.**

**In re DA COSTA.**

(Circuit Court of Appeals, Fifth Circuit. February 6, 1922.)

No. 8724.

- 1. Bankruptcy** ~~§~~166(4)—Payments by insolvent, effecting preference, are voidable, if creditor had reason to believe preference would result.

Where it was clearly shown that the payments in controversy were made when the bankrupt was insolvent, and that they operated as a preference, such preference was voidable by the trustee, under Bankruptcy Act, § 60b (Comp. St. § 9644), as amended, if at the time the creditor had reasonable cause to believe such payments would effect a preference.

- 2. Bankruptcy** ~~§~~303(3)—Evidence held to sustain finding creditor knew bankrupt was insolvent and that preference would result.

Evidence that a creditor forced the bankrupt to pay a part of a debt not yet due, because the creditor believed that bankrupt was attempting to transfer his assets into cash and to conceal it from his creditors, and that the creditors had prepared an affidavit of attachment charging the debtors with such intent, *held* to sustain a finding that the creditors had reasonable cause to believe that the bankrupt was insolvent, within Bankruptcy Act, § 1 (Comp. St. § 9585), providing that a person shall be deemed insolvent when his property, exclusive of that he has conveyed or concealed to defraud his creditors, shall not be sufficient to pay his debts, and that the creditors also had a reasonable cause to believe that the payments would effect a preference.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Edward Pilsbury, as trustee of the estate of Philip Da Costa, bankrupt, against the Marks Ribbon Company, and others. Decree for complainant, and defendants appeal. Affirmed.

Edwin T. Merrick, Ralph J. Schwarz, and Morris B. Redmann, all of New Orleans, La., for appellants.

St. Clair Adams, of New Orleans, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

**WALKER, Circuit Judge.** This is an appeal from an order in favor of the appellee, the trustee of the estate of Philip Da Costa, a bankrupt, who attacked as voidable preferences two payments made by the bankrupt to the appellant, Marks Ribbon Company, a partnership, one of \$500, made on February 20, 1918, by means of a certified check of the bankrupt, and the other made on February 21, 1918, by the bankrupt assigning an open account for \$1,553.28, due to him from a mercantile firm in New Orleans. The voluntary petition under which the bankruptcy was adjudged was filed on February 23, 1918. When the payments were made, the bankrupt was indebted to Marks Ribbon Company, for merchandise sold, in the sum of \$2,522.62; that debt not being due when the payments were made. The making of those payments resulted from insistent demands made on the debtor by a member of the creditor firm.

The evidence disclosed that payment was demanded before the debt was due, because circumstances of which a member of the creditor firm was apprised led him to believe that the debtor was dishonest, and was going to run away after converting, as far as possible, his assets into money, with intent to conceal it from his creditors. On February 20th the creditor firm had its lawyers prepare a petition for a writ of attachment against the debtor's property. That petition, which was sworn to by a member of the creditor firm, contained the following:

"Now your petitioner shows unto this honorable court that the defendant debtor is about to leave the state permanently without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure; and your petitioner further shows that the defendant has converted or is about to convert his property into money or evidence of debt with the intent to place it beyond the reach of his creditors."

[1] The evidence adduced clearly showed that when the attacked payments were made the bankrupt was insolvent, and that those payments operated as a preference. This being so, under amended section 60b of the Bankruptcy Act (Comp. St. § 9644), that preference was voidable by the trustee if, when the payments were made, the creditor had reasonable cause to believe that such payments would effect a preference. Collier on Bankruptcy (12th Ed.) 903.

[2] In behalf of the creditor it is contended that the evidence showed that it believed, and had good reason to believe, that the debtor had assets worth more than the amount of his liabilities. Though the creditor so believed, the evidence showed that, when the payments in question were made, it had reasonable cause to believe that the debtor was insolvent within the meaning of the following provision of section 1 of the Bankruptcy Act (Comp. St. § 9585):

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

The evidence adduced well warranted the conclusions that the appellant firm exacted the payments in question before the debt owing to it was due because it believed that there was danger that the debt,

if it remained unpaid until it was due, would be rendered uncollectable by the debtor's flight and concealment of his assets; that when the appellant firm received those payments it believed that the debtor already was, or soon would be, insolvent within the meaning of the Bankruptcy Act; and that any one to whom that debtor was indebted on an unsecured demand was likely to lose his debt in whole or in part by failing to obtain prompt payment of it. Under the evidence it is not fairly open to question that the member of the appellant firm who acted for it thought that, to the extent of the payments made, an advantage over other creditors would be obtained, and that, when those payments were made, appellants had reasonable cause to believe that there by a preference would be effected.

It follows that the decree appealed from was not erroneous. That decree is affirmed.

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**VIOLETTE et al. v. UNITED STATES.\***

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3700.

**1. Conspiracy §43(6)—Counts charging conspiracy to possess and transport intoxicating liquors held sufficient.**

Counts of an indictment charging that defendants conspired to possess intoxicating liquor with intent to use, in violation of the National Prohibition Act, and to effect the object of the conspiracy had possession of 600 quarts of liquor with intent so to use it, and conspired to transport intoxicating liquor without permit or without making record, and to effect the object of the conspiracy, transported such liquor, are sufficient.

**2. Intoxicating liquors §236(5)—Finding of still and supplies held to warrant inference of intent.**

Evidence that a still was found in a building on the premises of one defendant, and that the other defendant was present, and that there were also found quantities of mash, sugar, hops, and yeast, and Canadian liquor and moonshine whisky, held sufficient to warrant the jury in inferring defendants' intent.

**3. Intoxicating liquors §233(2)—Testimony of surrounding circumstances relevant, to show intent in possession of liquor.**

Testimony of the circumstances surrounding the discovery of the still and of the conduct of defendants was relevant to show their intent with reference to the liquor.

**4. Criminal law §829(3)—Requested charges defining conspiracy held sufficiently covered.**

Where the court had quoted the statutory definition of conspiracy, and had sufficiently covered the essential elements in further explanation, there was no error in refusing requests for instructions as to what constituted conspiracy.

**5. Criminal law §1167(2)—Invalid counts unnecessary to sustain judgment, do not harm accused.**

Where defendants were convicted on five counts, two of which were sufficient, and were sustained by the evidence, the verdict being general, and the judgment being under the whole indictment, and the sentence not exceeding that which might have been imposed under the two good counts, defendants cannot complain that the other three counts were insufficient.

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➡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 257 U. S. —, 42 Sup. Ct. 332, 66 L. Ed. —.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Fred Violette and another were convicted of conspiracy to violate the revenue and liquor laws, and they bring error. Affirmed.

Dan J. Heyfron, Chas. A. Russell, John E. Patterson, Chas. N. Madeen, and H. H. Clarke, all of Missoula, Mont., for plaintiffs in error.

John L. Slattery, U. S. Atty., and Ronald Higgins and Wellington H. Meigs, Asst. U. S. Attys., all of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judge.

HUNT, Circuit Judge. Plaintiffs in error, to be called defendants, seek review of conviction under five counts of an indictment which charged (1) conspiracy to carry on the business of distillers without giving a bond as required; (2) conspiracy to make and ferment a certain mash fit for the production of spirits in a building other than a distillery authorized by law; (3) conspiracy to have in their possession and custody and under their control a certain still set up, without having registered the still with the collector of internal revenue, as required by law; (4) conspiracy to have in their possession intoxicating liquor, with intent to use the intoxicating liquor in violation of the National Prohibition Act, and to effect the object of the conspiracy, had in their possession intoxicating liquor, about 600 quarts, with intent to use the same in violation of the National Prohibition Act; (6) conspiracy to transport intoxicating liquor, whisky, without first obtaining a permit from the Commissioner of Internal Revenue so to do, and without making record showing in detail the amount and kind to be transported and the consignee and the place of transportation, and that to effect the object of the conspiracy defendants did unlawfully transport without first obtaining a permit and doing the things required by law.

Plaintiffs in error cite *United States v. Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. —, to support their argument that the first three counts are fatally defective, in that the National Prohibition Act (41 Stat. 305) repealed sections 3281, 3282, and 3258, R. S. U. S., of the Revenue Laws (Comp. St. §§ 5994, 6021, 6022). Inasmuch as the judgment against defendants must be affirmed for other reasons, we refrain from consideration of that question, which has been certified by this court to the Supreme Court under section 239, Judicial Code (Comp. St. § 1216), in *Brooks v. United States*, 43 Sup. Ct. —.

[1] It is clear that the fourth and sixth counts are sufficient. The fourth charges that the defendants unlawfully conspired to have intoxicating liquor in their possession intended for use in violating the National Prohibition Act. The possession with the unlawful intent is plainly alleged. The sixth count is a sufficient charge of conspiring to transport whisky without a permit from the Commissioner of Internal Revenue, and without making a record as required by law.

[2, 3] The evidence showed that a still was found in a building near the residence of Violette and on his premises, and that Moret was sitting near the still; that in the house in which the still was placed there were quantities of mash and sugar, hops, and yeast, a condenser, and gal-

lons of mash in process of fermentation, capable of producing strong alcoholic liquor; that in a nearby building the officers found sacks containing Canadian liquor and barrels of "moonshine" whisky. The jury were authorized to draw inferences of guilt as to the intention of the defendants. Testimony of the circumstances surrounding the discovery of the still and of the conduct of the defendants was relevant to show what they were intending to do with the liquor.

[4] There was no error in refusing certain requests for instructions as to what constituted conspiracy. The court quoted the statutory definition and sufficiently covered the essential elements in further explanation.

[5] The verdict having been a general one, and the judgment having been under the whole indictment, and the sentence not having exceeded that which lawfully might have been imposed under counts 4 and 6, defendants cannot complain. *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173.

Judgment affirmed.

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COBB v. McDONALD-WEIST LOGGING CO.

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921.)

No. 3699.

1. Bankruptcy  $\Leftrightarrow$  314(3)—Corporations  $\Leftrightarrow$  657(3)—Statute avoiding contracts by foreign corporations not complying with law not applicable, when neither party was a citizen; failure of foreign corporation to file statements held not to justify striking out claim filed on contract with such corporation.

Comp. Laws Alaska 1913, § 660, avoiding contracts made with a citizen of that district by a foreign corporation or company failing to comply with statutory provisions as to filing statements or certificates, has no application, where neither of the parties to the contract was a citizen of Alaska, and failure to file such statements furnishes no ground for striking out a claim in bankruptcy based on such a contract.

2. Bankruptcy  $\Leftrightarrow$  314(3)—Statute avoiding contracts for failing to file certificates inapplicable, where bankrupt has accepted benefits.

Comp. Laws Alaska 1913, § 657, making every contract entered into by any foreign corporation, or any company, or any agent, without first having filed statements, certificates, and consents, voidable at the election of the other party thereto, furnishes no ground for striking out a claim in bankruptcy by a foreign corporation, where the bankrupt corporation had accepted the benefits of the contract with the claimant.

3. Bankruptcy  $\Leftrightarrow$  254—Trustee held not entitled to elect to declare bankrupt's contract void.

Where a bankrupt corporation has accepted the benefits of a contract made with a foreign corporation, which has failed to comply with Comp. Laws Alaska 1913, § 657, making contracts by a foreign corporation or its agents voidable at the election of the other party, where statements have not been filed as required, the trustee of the bankrupt cannot exercise the option of declaring such contract void.

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

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$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Proceeding by the McDonald-Weist Logging Company for the allowance of its claim in bankruptcy filed against the estate of the Craig Lumber Company, bankrupt. An order by the referee in bankruptcy refusing to expunge the claim was affirmed, and E. L. Cobb, trustee, appeals. Affirmed.

See, also, 266 Fed. 692.

John H. Cobb, of Juneau, Alaska, for appellant.

Roden & Dawes, of Juneau, Alaska, and Arthur I. Moulton, of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The judgment appealed from in this case affirmed an order made by the referee in bankruptcy, refusing to expunge from the list of claims against the bankrupt a claim filed by the appellee for \$27,871.50, with interest thereon from December 20, 1918, at 8 per cent. per annum as a general claim, and remanding the cause to the referee for further proceedings.

The contention of the appellant is that the claim was based on a void contract and therefore unenforceable. Both the appellee and the bankrupt were corporations of the state of Washington. By the law of Alaska all corporations and joint-stock companies organized under the laws of the United States or the laws of any state or territory thereof were required before doing business within the district of Alaska, to file in the office of the secretary of the district and in the office of the district court of the division wherein they intended to carry on business, certain designated statements, certificates, and consents, and should forfeit a certain designated amount of money. Comp. Laws of Alaska, § 654. et seq. Section 657 of such Compiled Laws is as follows:

"If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the district to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the treasury of the United States."

And section 660 provides that:

"If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

[1] Since neither of the parties to the contract in question was a citizen of Alaska, we quite agree with the court below that section 660 of the statute of that territory, making void any and all contracts made with a citizen of that district by a foreign corporation or company failing to comply with the provisions above referred to, has no application to the present case.

[2] The provision of section 657, making every contract entered into by any foreign corporation or company, or by any agent or agents thereof, without having first filed the required statements, certificates, and consents "voidable at the election of the other party thereto," is also plainly inapplicable to the present case, for the reason, not only that it does not appear that the bankrupt corporation ever elected to treat the contract it made with the appellee as void, but, on the contrary, it affirmatively appears from the record that it accepted the benefit of the contract to a large extent. See section 6708 of Thompson on Corporations, 2d Ed., and the numerous cases there cited.

[3] That the trustee of the bankrupt cannot under such circumstances be permitted to exercise such option is too plain for discussion. The judgment is affirmed.

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**MCDONALD-WEIST LOGGING CO. v. COBB.**

(Circuit Court of Appeals, Ninth Circuit. December 5, 1921. Rehearing Denied January 9, 1922.)

No. 3704.

**Logs and logging §=27(4)—Corporation a "person," within statute conferring lien for labor on logs.**

Under Comp. Laws Alaska 1913, § 709, giving every person performing labor on or who assists in obtaining or securing sawlogs, a lien for work or labor done, a corporation contractor may claim a lien, as being included within the word "person."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Proceeding by the McDonald-Weist Logging Company against E. L. Cobb, as trustee in bankruptcy of the Craig Lumber Company, bankrupt. From a decree for defendant, plaintiff appeals. Reversed and remanded, with directions.

Roden & Dawes, of Juneau, Alaska, and Arthur I. Moulton, of Portland, Or., for appellant.

John H. Cobb, of Juneau, Alaska, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case is related to Cobb, Trustee, v. McDonald-Weist Logging Company, 278 Fed. 165, wherein we held that the contract between the Craig Lumber Company and the McDonald-Weist Logging Company was valid and enforceable.

The point presented by this appeal is whether the McDonald-Weist Company could lawfully claim a lien filed for work done in cutting certain logs pursuant to the terms of the contract. Section 709, Compiled Laws of Alaska, provides:

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§= For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Every person performing labor upon, or who shall assist in obtaining or securing, sawlogs \* \* \* or other timber shall have a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing sawlogs \* \* \* or other timber mentioned herein."

It is argued that the statute does not give a lien to a contractor or a corporation. The general rule is that a corporation is included within the word "person." *Lewis' Sutherland, Statutory Construction*, 770; 14 C. J. 1233. In *Wetzel & T. R. Co. v. Tennis*, 145 Fed. 458, 75 C. C. A. 266, 7 Ann. Cas. 426, after specifying that at common law a corporation is deemed a person, when the circumstances in which it is placed are identical with those of a natural person, the court, citing many cases, held that, where a lien is given to every workman, laborer, or other person the right could be claimed by a corporation. The remedy is designed to be general in favor of the party by whom the service is rendered. Such a view appeals to us as a fair construction of the Alaska statute. *Gaskell v. Beard*, 58 Hun, 101, 11 N. Y. Supp. 399; *Day v. Green*, 63 Or. 293, 127 Pac. 772; *Doane v. Clinton*, 2 Utah, 417; *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. Rep. 779; *Bloom on Liens*, Sec. 44. Statutes which contain restrictive words or expressions, such as those which give the right of lien for "personal services" or "manual labor," are (17 R. C. L. 1118) to be distinguished from the Alaska statute, which is general in its terms, and in which we find no language indicative of the intention to restrict the operation to natural persons only.

The decree is reversed, and the case remanded, with directions to proceed in accordance with the view herein indicated.

Reversed.

### KIRKLIN v. ELLERBE.

(Circuit Court of Appeals, Fifth Circuit. February 1, 1922.)

No. 3775.

1. Courts  $\S$  285—That plaintiff's title arises from patent or act of Congress does not give federal court jurisdiction.

In a suit to enjoin defendant from trespassing on or interfering with plaintiff's possession of land, the mere fact that plaintiff's title comes from a patent or under an act of Congress does not show that a federal question arises, so as to give a federal court jurisdiction.

2. Courts  $\S$  299—Jurisdiction of federal court cannot be shown by allegations that defense will raise federal question.

Jurisdiction of a federal court on the ground that a federal question is involved must appear by the petitioner's statement of his own claim, and cannot be made to appear by the assertion in his pleading that the defense raises or will raise a federal question.

3. Courts  $\S$  299—Petition held not to show suit involved federal question.

In a suit to enjoin defendant from trespassing on or interfering with plaintiff's possession of land, a petition alleging that defendant falsely

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

pretended to enter on the land under a homestead entry, but that, if any homestead entry was made, which the petitioner denied, it was an absolute nullity, etc., *held* not to show, by a statement of facts such as is required in good pleading, that the suit really and substantially involved a dispute or controversy as to a right depending on the construction or effect of the Constitution, laws, or treaties of the United States, that the suit in whole or in part arose out of such controversy, or that a decision of the case depended on such construction.

**4. Courts — 299—Not enough to allege that federal question arises.**

Where jurisdiction of a federal court is invoked on the ground that a federal question is involved, it is not enough to allege that such a question arises, and it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial.

In error to the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by Mrs. Cecelia Leonard Ellerbe against Jasper B. Kirklin. Judgment for plaintiff, and defendant brings error. Reversed, and case dismissed.

Rhydon D. Webb and James E. Smitherman, both of Shreveport, La. (Smitherman & Tucker and Thatcher & Webb, all of Shreveport, La., on the brief), for plaintiff in error.

Leon O'Quinn, of Shreveport, La. (Blanchard, Goldstein & Walker, of Shreveport, La., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This suit was commenced by filing a petition which alleged that the plaintiff therein was in possession of the west half of a named quarter section of land in Caddo parish, Louisiana, that the defendant therein had trespassed and depredated on said land, and prayed that the defendant be restrained by injunction from trespassing or entering upon said land or from interfering in any manner with petitioner's possession thereof. Diversity of citizenship was not alleged, and the only ground of jurisdiction claimed is that a federal question was involved. The petition contained averments to the effect that the land mentioned was included in the grant by Congress to the state of Louisiana of swamp and overflowed lands, and in a grant by that state to the board of commissioners of the Caddo levee district, a corporation, and was sold and conveyed by that corporation to two named persons, who sold and conveyed it to the plaintiff. The petition also contained the following:

"Your orator avers that their title to said land and rights as owner and possessor result from acts of Congress of the United States and depend on the construction of same. That defendant falsely pretended to enter upon said land under a homestead entry made under the laws of the United States, but your orator avers that, if any homestead entry of said land exists, which is denied, same is an absolute nullity. That no rights whatever can or do exist thereunder, and that, even though your orators were without title, their possession of inclosed land cannot be divested, nor can such land be entered upon under a homestead entry. Your orators aver that this cause raises federal questions, the determination of which depends on the construction of acts of Congress of the United States and presents a case of which this honorable court has jurisdiction."

[1-4] The mere fact that the title of the plaintiff comes from a patent or under an act of Congress does not show that a federal question arises. Jurisdiction on that ground must appear by the petitioner's statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleading that the defense raises or will raise a federal question. The plaintiff in the first instance is confined to a statement of his cause of action, leaving it to the defendant to set up what is relied on as a defense. *Joy v. St. Louis*, 201 U. S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776. Furthermore, without regard to the rule which was stated and applied in the just cited case, the petition does not show by a statement of facts, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States; that the suit, in whole or in part, arose out of such controversy, or that a decision of the case depended upon such construction. It was not made to appear that there was any difference or dispute between the parties as to the meaning or effect of any law of the United States. Where jurisdiction is invoked on the ground that a federal question is involved, it is not enough to allege that such a question arises in the case. It must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial. *Blumenstock Bros. v. Curtis Publishing Co.*, 252 U. S. 436, 40 Sup. Ct. 385, 64 L. Ed. 649; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 573, 20 Sup. Ct. 222, 44 L. Ed. 276. We do not think that the record shows that the case is one of which the court has jurisdiction.

The judgment is reversed, and the case is dismissed for want of jurisdiction.

### SAMLIN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3746.

1. Criminal law §1144(13, 14, 19)—Without bill of exceptions, evidence and instructions presumed sufficient and correct and presumed that exceptions to evidence and verdict were not saved.

On writ of error to a conviction for crime, where there is no bill of exceptions, the court must assume that there was evidence to sustain the verdict, that the jury was properly instructed, and that accused saved no exceptions to the admission of testimony or to the form of the verdict.

2. Indictment and information §191(½)—Charge of maintaining nuisance for sale sustains conviction for selling.

Under Rev. St. § 1035 (Comp. St. § 1701), providing that the defendant may be found guilty of any offense necessarily included in that with which he is charged a verdict convicting defendant of unlawfully selling intoxicating liquor convicts of an offense within the charge of the information that he maintained a common nuisance; that is a building where intoxicating liquor was sold in violation of the National Prohibition Act (41 Stat. 305).

**3. Criminal law §—882—Verdict for unlawfully selling liquors held general, not "special verdict."**

In a prosecution for maintaining a common nuisance, that is, a place where intoxicating liquors were unlawfully sold, a verdict finding defendant guilty of unlawfully selling intoxicating liquors is a general verdict and not a "special verdict" which generally speaking is one in which the jury find all the facts and refer the decision on those facts to the court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Verdict.]

In Error to the District Court of the United States for the District of Montana.

John Samlin was convicted of unlawfully selling intoxicating liquor, and he brings error. Affirmed.

McIntire & Murphy, of Helena, Mont., and Frank Hunter, of Miles City, Mont., for plaintiff in error.

John L. Slattery, U. S. Atty., and Ronald Higgins and Wellington H. Meigs, Asst. U. S. Attys., all of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The question presented in this case is whether the judgment of the court below should be reversed, for the reason that the verdict of the jury found the plaintiff in error guilty of a crime not charged in the information. The information alleged that on or about March 19, 1921, the plaintiff in error, at a designated place, "did then and there maintain a common nuisance, that is to say, a building where intoxicating liquor, to wit, whisky, was kept and sold, in violation of title II of the National Prohibition Act." The verdict of the jury was:

"We, the jury in the above-entitled cause, find the defendant guilty of the unlawful sale of intoxicating liquor, to wit, whisky, on the 11th and 19th of March, 1921."

[1, 2] There is no bill of exceptions. We must assume that there was evidence to sustain the verdict, that the court properly instructed the jury, and that the plaintiff in error saved no exceptions to the admission of testimony or to the form of the verdict. The inquiry is whether the verdict is compatible with the indictment. Section 1035, Rev. Stats. (Comp. St. § 1701), provides:

"In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment."

In 22 Cyc. 468, it is said that a conviction cannot be had of a crime—

"unless the indictment in describing the major offense contains all the essential averments of the less, or the greater offense necessarily includes all the essential ingredients of the less."

Upon that rule and the statute we think the judgment of the court below is sustainable. The offense charged in the information is the

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maintaining of a common nuisance, a place where intoxicating liquor is sold. There is implied in the definition of the offense the sale of liquor in violation of law. If the plaintiff in error maintained such a nuisance—that is, if he maintained a place where intoxicating liquor was sold—he rendered himself subject to the charge of selling intoxicating liquor in violation of law. The act of any one on his premises in selling liquor in carrying on his business was imputable to him as his own act, and he was answerable therefor. The verdict is, we think, a permissible verdict under the offense charged in the information. *State v. Way*, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603; *United States v. Dixon*, 1 Cranch, C. C. 414, Fed. Cas. No. 14968; *United States v. Read*, 2 Cranch, C. C. 198, Fed. Cas. No. 16126.

[3] It is contended that the verdict is a special verdict, and the rule is invoked that to support a conviction upon a special verdict, the verdict must find all the ultimate facts necessary to such conviction. But this is not a special verdict. *Commonwealth v. Fischblatt*, 4 Metc. (Mass.) 354; *State v. Turner*, 19 Iowa, 144. A special verdict is, generally speaking, one in which the jury find all the facts and refer the decision upon those facts to the court. *Suydam v. Williamson*, 20 How. 427, 432, 15 L. Ed. 978. The verdict here is general. It finds the defendant guilty of an offense which, as we have found, is included within the offense charged in the information.

The judgment is affirmed.

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### MORRIS & CO. v. FELS & CO.

(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2777.

**Appeal and error  $\Leftarrow$  1062(4)—Error in submitting contract to jury for construction held harmless where it was correctly construed.**

The fact that a court erroneously submitted a contract to the jury for construction held not ground for reversal, where the jury construed the contract as the court should have construed it as matter of law.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by Fels & Co. against Morris & Co. Judgment for plaintiff and defendant brings error. Affirmed.

Furth, Singer & Bortin, of Philadelphia, Pa., and John M. Lee, for plaintiff in error.

Ralph Evans, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns certain tank-car, load lots, of stearine sold, as was alleged, by Morris & Co., a corporate citizen of Maine, engaged in meat packing in Chicago, to Fels & Co., a corporate citizen of Pennsylvania, engaged in soap

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$\Leftarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

making in Philadelphia. The stearine, which was shipped from Chicago to Philadelphia on bills of lading accompanying a draft, was paid for by Fels & Co. before examination. Alleging the stearine shipped proved subsequently not the stearine provided for by the contract, Fels & Co. tendered its return to Morris & Co. The latter company refused to receive it. By mutual arrangement, it was sold for the benefit of whom it might concern. Fels & Co. then brought suit against Morris & Co. to recover the money it had paid. On trial, the jury found in favor of Fels & Co., and to review a judgment in that company's favor, entered on the verdict, Morris & Co. sued out this writ of error, and the controlling assignment of error is that the court erred "in failing as a matter of law, to construe the contract between the parties as it was written." The contract being established, the court left the construction of the contract to the jury, instructing in substance that if they found the contract was as Fels & Co. contended, the verdict should be for Fels & Co.; otherwise, they should find for the defendant.

By the verdict, the fact is established that the sale was one of Morris & Co.'s brand of yellow stearine which, concededly, was not delivered. Assuming the court committed error in that it should have itself construed the contract instead of submitting it to the jury, the burden now rests on the defendant to satisfy us that the true construction of the contract was that the subject of sale was not of Morris & Co.'s brand of yellow stearine. But to our mind, that is just where the defendant's effort to escape liability failed, for a careful study of the telegrams and correspondence satisfies us that the court below instead of leaving the construction and application of the contract to the jury, should have itself held the contract was for the sale of Morris & Co.'s own yellow stearine and not merely for a stearine of that general kind.

Without entering into a detailed discussion of the writings involved, we note the facts of the Morris & Co.'s offer through its agent, of "tank Morris white grease stearine" and "twenty tank yellow grease stearine"; of Fels & Co.'s understanding of this as an offer of Morris own "yellow" grease stearine by its reply "should like to try tank Morris yellow grease stearine accept car price mentioned"; Morris & Co.'s agent's telegram of confirmation of this order and understanding, "Confirm tank Morris yellow grease stearine"; Fels & Co.'s following letter "acknowledging your confirmation of the tank car of Morris' yellow grease stearine"; confirmation of that order by sale note, viz.:

"We have sold you for account of Morris & Co. \* \* \* one (1) seller's tank (about 60,000#) yellow grease stearine. \* \* \* Seller warrants regular quality of yellow grease stearine."

As to the two additional cars of stearine, we note: Morris' offer, through its agent which confirmed sale of "tank Morris yellow grease stearine" and offered "two more tanks yellow grease stearine"; also, Fels & Co.'s understanding of that offer as one of Morris & Co.'s stearine in its telegram and offer, "Offer 16.50 Chicago two tanks additional Morris yellow grease stearine"; acceptance of that offer

and understanding in the wire acceptance by Morris & Co.'s agent, viz., "Answering your message of yesterday Morris confirms two tanks yellow grease stearine"; the bill of sale, "We have sold you for account of Morris & Co. \* \* \* two (2) seller's tanks (about 60,000# each) yellow grease stearine. \* \* \* Seller warrants regular quality of yellow grease"; and Fels & Co.'s letter confirming the exchange of telegrams, viz., "We understand that you have booked us with two additional seller's tank cars of Morris. yellow grease stearine."

In view of the above, it is clear that, as the jury by its verdict construed the contract in fact as the court should have construed it in law, Morris & Co. have not shown the court below committed any error to their prejudice.

The judgment below is therefore affirmed.

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### CABRILLOS v. ANGEL et ux.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 3725.

**Adoption** ⇐2—**Citizens** ⇐2—California statute authorizing adoption by aliens of infant citizen held not to change child's status, and constitutional.

The adoption statute of California (Civ. Code, § 221 et seq.), which permits the adoption of infants by residents of the state having certain qualifications, without requiring that they be citizens, does not change the status, as a citizen, of an infant adopted, and the fact that thereunder aliens may adopt an infant who is a citizen of the United States does not render it invalid, as abridging the privileges or immunities of citizens, in violation of the Fourteenth Amendment.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Petition by Louisa Cabrillos, on behalf of Alfonso Cabrillos, an infant, against Emillio Angel and Chonita Angel, for a writ of habeas corpus. Writ denied, and petitioner appeals. Affirmed.

F. C. Austin and R. C. Noleman, both of Los Angeles, Cal., for appellant.

George A. Hooper, of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant sought by habeas corpus to obtain the custody of her infant son. Her petition for the writ and the return thereto show that on June 17, 1919, by virtue of proceedings in the superior court of California for Los Angeles county, the infant was adopted by the appellees, who by the judgment of that court were

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found to be residents of that county and state. The court below dismissed the writ.

The appellant contends that the provisions of the Civil Code of California (Civ. Code, § 221 et seq.), under which the proceedings for adoption were had, and the decree of adoption, are void, for the reason that the infant so adopted was and still is a citizen of the United States, and the persons who adopted him were and still are aliens, citizens of the republic of Mexico, and are about to leave the United States and take with them the said infant to Mexico, where they intend to remain. The statutes of California permit the adoption of infants by residents of the state, who possess certain qualifications. They do not confine the right of adoption to citizens. The question here presented is whether, under those statutes or by virtue of the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, the adoption of an infant citizen by aliens residing within the state of California is void.

The appellant cites decisions of the highest court of California which define the status of an adopted child, and the incidents and consequences of the relation between an adopted child and his parents, but they present no decision to the effect that resident aliens may not adopt a minor who is a citizen of the United States, or that by virtue of such adoption the minor loses his citizenship, or that a law authorizing such adoption operates to abridge the privileges or immunities of citizens of the United States. We know of no state statute which confines the right of adoption to citizens. It is generally provided that any person being a resident of the state and 21 years of age is capable of adopting a child as his own. 1 C. J. 1375. But in some states adoption by non-residents is permitted. Woodward's Appeal, 81 Conn. 152, 70 Atl. 453; Caldwell's Succession, 114 La. 195, 38 South. 140, 108 Am. St. Rep. 341.

The judgment is affirmed.

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PEARSON v. MALLORY S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1922.)

No. 3708.

**Wharves — 21—Patching a hole in a wharf with a two-inch plank held not negligence as to a licensee.**

The nailing of a two-inch plank over a hole in defendant's wharf held not to constitute negligence as to plaintiff, who, when a visitor on the wharf in the daytime, fell over the plank and was injured.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action at law by Martha E. Pearson against the Mallory Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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Eldridge Cutts, of Fitzgerald, Ga., for plaintiff in error.  
W. A. Carter, of Tampa, Fla., and W. E. Kay, of Jacksonville, Fla.,  
for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Martha E. Pearson (hereinafter styled plaintiff) brought suit against the Mallory Steamship Company herein-after styled defendant) to recover for personal injuries sustained by her by a fall on defendant's wharf, on which she was a visitor. Her declaration alleged that the injuries were produced by her foot coming in contact with a plank about two inches thick nailed over a hole, thus causing a projection above the regular line of the floor of the wharf of about two inches. The negligence charged was the nailing of the board over the hole, causing such projection, instead of inlaying it, so as to make an even surface. It was not alleged that the projection was not plainly visible or the plaintiff did not know of its existence.

The court below rendered the following opinion:

"The declaration alleges that plaintiff was injured by striking her foot against a board nailed over a hole projecting two inches above the surface of the wharf. It is not alleged it was in the nighttime and the wharf improperly lighted, etc. The sole ground of negligence relied upon is that the board repairing the hole was nailed down, leaving the edges projecting two inches above the surface of the wharf. Does such a method of repair constitute negligence? is the question for decision. I do not think so. To require the wharf owner to keep the surface of the wharf perfectly smooth, free from all projections, would be to require him virtually to insure the safety of persons using said wharf on business or as licensees, and dispense with the doctrine of negligence."

The declaration was dismissed on demurrer, as stating no cause of action. Plaintiff brings error on this judgment.

The position of the plaintiff as stated in her declaration was that of a mere visitor; "the relation of licensor and licensee" existed, where "the licensee can only recover for setting a trap or for active negligence." *Greenfield v. Miller*, 173 Wis. 184, 180 N. W. 834, 837, 12 A. L. R. 982; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

The facts stated show no negligence on the part of the defendant. There was no concealment of the patch made by the plank; there was no circumstance explaining why it was not apparent to the plaintiff. It is not even averred that plaintiff was ignorant of its existence. It is not averred that it was not a usual or customary manner of repairing such holes, or that there was another customary way. It was not averred that the place was a designated footway, or even usually used as such. The sole averment of negligence is that the plank was nailed over the hole, instead of having been inlaid. We do not think this was negligence, under the facts pleaded as regards the plaintiff.

The judgment of the District Court is affirmed.

**TORREY v. UNITED STATES.**

(Circuit Court of Appeals, Fifth Circuit. January 18, 1922.)

No. 3743.

**Intoxicating liquors** ¶242—Unless specially prescribed, imprisonment not authorized for first offense against Prohibition Act.

Under National Prohibition Act Oct. 28, 1919, tit. 2, §§ 25, 29, a sentence to imprisonment is not authorized on a first conviction for possessing liquor or property designed for the manufacture of liquor intended for use in violation of the act.

In Error to the District Court of the United States for the Southern District of Mississippi; Geo. W. Jack, Judge.

Criminal prosecution by the United States against Walter Torrey. Judgment of conviction, and defendant brings error. Conviction affirmed, sentence vacated, and case remanded for proper sentence.

James A. Teat, of Jackson, Miss. (A. M. Pepper, of Lexington, Miss., and Chalmers Potter, of Jackson, Miss., on the brief), for plaintiff in error.

Julian P. Alexander, U. S. Atty., of Jackson, Miss. (H. McK. Fulgham, Asst. U. S. Atty., of Jackson, Miss., on the brief), for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. On a verdict finding the plaintiff in error (herein referred to as the defendant) guilty on counts 3 and 5 of the indictment the court sentenced him to pay a fine of \$100 and all costs, and to be confined in the Hinds county jail at Jackson, Miss., for the period of 90 days from the date of the sentence. The third count charged that the defendant, at a time and place stated, "did knowingly and unlawfully possess intoxicating liquor, to wit, whisky, contrary to the form of the statute in such case made and provided." The fifth count charged that, at a time and place stated, the defendant "did knowingly, unlawfully, and feloniously have and possess property designed for the manufacture of intoxicating liquors intended for use in violation of the National Prohibition Act, to wit, an apparatus for distilling intoxicating liquors, contrary to the form of the statute," etc.

The assignments of error are based upon the action of the court in overruling a motion to exclude all the evidence offered in behalf of the government, and in refusing a requested instruction to the jury to find for the defendant. We are of opinion that the direct and circumstantial evidence adduced supported a verdict of guilty on the two counts mentioned, and that there was no error in the rulings complained of. The record does not indicate that, prior to the commission of the offenses of which the defendant was found guilty, he had been guilty of either of those offenses. On his first conviction of those offenses, he was not subject to be punished by imprisonment. National Prohibition Act, §§ 25, 29, 41 Stat. 305.

The judgment of conviction is affirmed. The sentence imposed is vacated, and the cause is remanded, to the end that the defendant be sentenced as authorized by law.

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**CANAL-COMMERCIAL TRUST & SAVINGS BANK v. BANK OF PLANT CITY.**

(Circuit Court of Appeals, Fifth Circuit. February 4, 1922.)

No. 3739.

**1. Appeal and error ⇨232(2)—Different objection to evidence not considered.**

Where plaintiff in error in the court below made only one objection to the admissibility of evidence, a different objection on appeal will not be considered.

**2. Appeal and error ⇨1097(1)—Questions decided on former writ of error not considered.**

Where all the questions made on writ of error have been decided on a former writ of error, they will not be again considered.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Bank of Plant City against the Canal-Commercial Trust & Savings Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry P. Dart, Jr., Edwin T. Merrick, and Ralph J. Schwarz, all of New Orleans, La., for plaintiff in error.

Harry McCall, of New Orleans, La., for defendant in error.

Before BRYAN and KING, Circuit Judges.

KING, Circuit Judge. This case has been before this court before. It is reported in 270 Fed. 477. It is not perceived where the case made by the present record differs materially from that then presented and decided.

In the brief of counsel it is stated that objection was made to the introduction of the drafts and bills of lading attached, without other proof tending to show that they were the documents referred to in the telegrams.

[1] While we think the evidence was sufficient to show that they were such documents, we find no such objection to have been made to their introduction. The objection made as stated in the bills of exception was alone "on the ground that it was not shown that the plaintiff had complied with either the letter or the spirit of the guaranty given by the defendant" by said telegrams.

[2] This objection was properly overruled by the court. We think that all the questions made in this case are concluded by the former decision of this court herein.

The judgment of the District Court is affirmed.

WALKER, Circuit Judge, took no part in the consideration or decision of this case.

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⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**JOHNSTON v. EMERSON PHONOGRAPH CO., Inc.**

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 184.

**Receivers** ¶152—Seller, shipping goods and forwarding bill of lading before receivership, not entitled to payment in full.

Where goods were shipped by a seller, and the bill of lading forwarded to the buyer, before the appointment of a receiver for the buyer, title passed to the buyer prior to the receivership under Personal Property Law N. Y. § 100, and in the absence of fraud or misrepresentation, or stoppage of the goods in transit, the seller was not entitled to an order requiring the receiver to pay for the goods in full.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Mary S. Johnston against the Emerson Phonograph Company, Inc., in which receivers were appointed, and were ordered to pay in full the claim of the Brilliantone Steel Needle Company. From an order requiring the receivers to pay such company \$1,110, they appeal. Reversed, and claimant's petition denied.

David W. Kahn, of New York City, for appellants.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. On December 9, 1920, receivers of defendant were appointed. Prior thereto, defendant had ordered 15 cases of needles from Brilliantone Company. These needles were shipped from the factory of Brilliantone Company at Lowell, Mass., on December 6, 1920, directed to defendant at Scranton, Pa. The needles were received at Scranton on December 26, 1920. The original bill of lading was immediately forwarded to defendant. Title to the merchandise thus passed to defendant prior to the appointment of the receivers. Section 100, Personal Property Law of New York (Consol. Laws, c. 41).

No fraud nor misrepresentation in inducing the sale is alleged nor proved. The goods were not stopped in transitu. In brief, there is nothing in the record which differentiates the case in principle from *Hyman v. Trow Directory Co.* (C. C. A.) 261 Fed. 991.

The order was inadvertently made, and therefore is reversed, and the claimant's petition should have been denied.

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**PEACE v. UNITED STATES.**

(Circuit Court of Appeals, Seventh Circuit. December 14, 1921.)

No. 2915.

1. Criminal law  $\Leftrightarrow$ 552(1)—Verdict of guilty may be based on circumstantial evidence.

A jury may find a verdict of guilty on circumstantial evidence.

2. Witnesses  $\Leftrightarrow$ 48(1)—Felon not incompetent as witness.

The old common-law rule of the incompetency of felons as witnesses is not in force in the federal courts.

In Error to the District Court of the United States for the Eastern District of Illinois.

Criminal prosecution by the United States against C. E. Peace. Judgment of conviction, and defendant brings error. Affirmed.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

McCawley Baird, of East St. Louis, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted of having felonious possession of property stolen from an interstate shipment.

[1] Evidence for the government was largely circumstantial. We are of opinion that a finding of guilt was reasonably deducible. As to the right of the jury to base a verdict of guilt upon circumstantial evidence, we refer to *Applebaum v. United States* (C. C. A.) 274 Fed. 43.

[2] Two of the government's witnesses were convicted felons. Plaintiff in error's contention that they were incompetent witnesses is based upon *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; and *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991. But the old common-law rule of the incompetency of felons was explicitly repudiated in *Rosen v. United States*, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406.

The judgment is affirmed.

**Petition of CANADIAN PAC. RY. CO.****THE PRINCESS SOPHIA.**

(District Court, W. D. Washington, N. D. September 30, 1921. On Rehearing, November 25, 1921.)

No. 4553.

1. Shipping  $\Leftrightarrow$ 203—Limited liability statute to be liberally construed.

The limited liability statute (Rev. St. §§ 4283-4285 [Comp. St. §§ 8021-8023]) was enacted for the benefit of the shipping interest, and should be construed in a spirit of fairness, with a view of giving the shipowner the full benefit of the immunities intended.

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**2. Shipping ⚡204—Insurance not part of owner's interest in vessel.**

Under Rev. St. § 4283 (Comp. St. § 8021), providing that in certain cases a shipowner shall not be liable beyond the value of his interest in the vessel and her pending freight, insurance collected by him for loss of the vessel when the event occurred for which he seeks limitation of liability, is not a part of his interest in the vessel, and is not required to be surrendered under section 4285 (Comp. St. § 8023).

**3. Shipping ⚡205—Owner of foreign ship may limit liability.**

The owner of a foreign vessel may limit his liability, under Rev. St. §§ 4283-4285 (Comp. St. §§ 8021-8023).

**4. Shipping ⚡206—"Privity or knowledge" of shipowner.**

"Privity or knowledge," as used in Rev. St. § 4283 (Comp. St. § 8021), imports actual knowledge of the things causing or contributing to the loss, or knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it.

**5. Shipping ⚡208—Owner appointing competent agents not liable for their negligence or default, "privity or knowledge."**

Where the owner in good faith appoints a competent agent to equip, man, or maintain a vessel or her machinery, any acts of omission or commission of the agent, not participated in personally by the owner, do not constitute "privity or knowledge," within the meaning of the limitation of liability statute (Rev. St. § 4283 [Comp. St. § 8021]).

**6. Shipping ⚡208—Privity or knowledge of corporation must be that of its managing officers.**

The privity or knowledge of a corporation shipowner, which will preclude its limitation of liability under Rev. St. §§ 4283-4285 (Comp. St. §§ 8021-8023), must be that of the managing officers of the corporation.

**7. Shipping ⚡209 (3)—Certificates of inspection held conclusive evidence of proper equipment.**

An unexpired certificate of inspection by Canadian authorities, held by a Canadian steamship at the time of her sinking, and a United States certificate issued pursuant to Rev. St. § 4400, as amended (Comp. St. § 8152), held to establish that she was properly equipped.

**8. Shipping ⚡13—Statute prescribing qualifications held not to apply to foreign vessels.**

The provision of Seamen's Act March 4, 1915, § 18 (Comp. St. § 8363a), that no vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes, and except as provided in section 1 of this act (section 8306), shall be permitted to depart from any port of the United States unless she has on board a crew having certain stated qualifications, held not to apply to foreign vessels.

**9. Shipping ⚡13—Foreign vessels subject to regulatory statute.**

The proviso to Rev. St. § 4488, added by amendment by Seamen's Act March 4, 1915, § 14 (Comp. St. § 8258), "that foreign vessels, leaving ports of the United States, shall comply with the rules herein prescribed as to life-saving appliances, their equipment and the manning of same," applies only to such foreign vessels as are subject to the operation of the original section, as defined in Rev. St. § 4400 (Comp. St. § 8152).

**10. Seamen ⚡4—Jones Act not retroactive.**

Seamen's Act March 4, 1915, c. 153, § 20 (Comp. St. § 8337a), as amended by Jones Act June 5, 1920, § 33, enlarging the right of action for injury or death of seamen, is not retroactive, and does not apply to causes of action accruing prior to its enactment.

**11. Shipping ⚡207—Liability for injury to passengers or their effects from violation of statute cannot be limited.**

Rev. St. § 4493 (Comp. St. § 8269), providing that vessels and owners shall be liable to passengers for their effects caused by failure to comply

with statutory requirements to the full extent of the injury, is supplementary to section 4283 (Comp. St. § 8021), which declares the basic law of liability, and liability for damage coming within the provisions of section 4493 cannot be limited either by owners of domestic vessels or of foreign vessels invoking limitation of liability under section 4283.

On Rehearing.

12. **Shipping ¶207—Violation of navigation rules does not subject owner to unlimited liability for damage to passengers.**

Failure to comply with International Navigation Rules (Comp. St. § 7834 et seq.) does not subject the shipowner to unlimited liability for damage to passengers or their effects, under Rev. St. § 4498 (Comp. St. § 8269), which deprives such owner of the right to limit liability for such damage only when "it happens through any neglect or failure to comply with the provisions of this title," of which the navigation rules are not a part.

13. **Shipping ¶208—Neglect of watchman not with privity of owner.**

While neglect of a shipowner to provide watchman, as required by Rev. St. § 4477 (Comp. St. § 8247), would render such owner liable under section 4493 (Comp. St. § 8269) for injuries to passengers or their effects which happen through such neglect, the neglect of a watchman provided to perform his duty is without privity of the owner.

14. **Shipping ¶13—"Coastwise steam vessel" defined.**

"Coastwise seagoing steam vessels," required by Rev. St. § 4401 (Comp. St. § 8153), to have a licensed pilot, are vessels engaged in the domestic trade or plying between port and port in the same country, as distinguished from those engaged in foreign trade, and the provision does not apply to foreign ships.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Coastwise Steam Vessel.]

In Admiralty. Petition of the Canadian Pacific Railway Company, as owner of the steamship Princess Sophia, for limitation of liability. Granted.

See, also, 269 Fed. 651.

On October 24, 1918, the Princess Sophia, owned by the Canadian Pacific Railway Company, stranded on Vanderbilt reef, in Lynn Canal, Alaska, and during the night of October 25th the vessel foundered, resulting in the loss of the vessel and cargo and of the lives of all of the passengers and crew on board. Suits for damages were asserted. On the 28th day of February, 1919, the owner petitioned this court, seeking to obtain the benefit of sections 4283, 4284, and 4285, R. S. (sections 8021, 8022 and 8023, Comp. St.), limiting the liability for all loss resulting, and prayed that a trustee be appointed, to whom the interest in the steamship and her pending freight might be transferred and monition issued, warning all persons having claims by reason of the catastrophe to present the same within a fixed time, and that the owner be decreed not liable for loss, or, if liable, its liability be limited to the property surrendered. A trustee was named, and the interest of the company in the steamship and pending freight was transferred to him. A lifeboat afterwards discovered was reported to the court, and its value paid to the trustee.

Answers have been filed by many claimants, contesting the petitioner's right to limit liability, and it is affirmatively charged that the petitioner operated the steamship as a common carrier for passengers and freight for hire between the ports of Skagway and Vancouver and Seattle, and extensively advertised throughout Canada and the United States its lines of steamers, particularly that of the Princess Sophia, as being well adapted to navigate the waters of the inside passage to Alaska; that the officers were specially quali-

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fied to sail in such waters, and were familiar with the dangers, reefs, and rocks; that the vessel was staunch and strong; that on the 23d of October the Princess Sophia was at Skagway, and that the passengers purchased tickets and went aboard and became passengers for hire, and that its officers failed to carry out such statements, etc.; that the route over which the petitioner operated its vessels was a dangerous route, and extremely difficult to navigate with safety in fog, rain, snowstorm, and thick weather, especially and particularly that portion known as Lynn Canal; that on account of such dangers there is placed a lighthouse at Eldred Rock, 30 miles south of Skagway to the starboard, and a light at Point Sherman, 38 miles south of Skagway, and a light at Sentinal Island, 60 miles south of Skagway; that a vessel navigating such route in clear weather at night could see the light at Point Sherman until the light at Sentinal Island was picked up; that Vanderbilt reef is about 18 miles south of Point Sherman and about 1½ miles to the westward of the regular route traveled by vessels passing to the starboard; that it is dangerous to attempt the navigation of said passage at night, unless vessels can pick up Point Sherman light before passing Sentinal Island light, before reaching the vicinity of Vanderbilt reef; that vessels cannot undertake said route during heavy rains or snowstorms or thick weather with any degree of safety, and in doing so run great risk of being wrecked, all of which was well known to the officers and agents and employees of the petitioner; that the petitioner made it a practice to run and operate steamers for many years over said route at an unlawful rate of speed in thick weather, and at night when such lights could not be seen, in violation of law and rules of navigation; that such was the usual and customary method of navigating the steamship Sophia, and it was well known, permitted, authorized, and directed by the petitioner and its officers naming various persons; that the Princess Sophia left Skagway at 10:10 p. m. October 23d, at which time she had on board a large and excessive number of passengers, and more than she had accommodations for, and more than she was permitted by law to carry; that she proceeded in a reckless and careless manner, at an excessive rate of speed, and at about 12 o'clock p. m. ran into a blinding snowstorm, and continued to run in such snowstorm without being able to pick up Eldred Rock light, and without being able to pick up Sentinal Island light, and while so running at full speed struck and ran upon Vanderbilt reef at about 2 o'clock a. m. October 24th; that upon striking said reef she rose out of the water and ran the greater part of her length on said reef, with such force as to tear away plates on the bottom of said vessel, and tore a hole from the bow on the starboard side about 2 feet wide, to about 60 feet aft, throwing many passengers from their berths and causing great fear and anxiety among her passengers; that immediately upon striking said reef wireless messages were sent to managing officers of the petitioner at Juneau, Skagway, Ketchikan, Vancouver, Victoria, and Prince Rupert; that shortly thereafter the tide rose, causing the vessel to pound hard upon the rocks and causing great fear and distress among the passengers, which information was conveyed by wireless from the officers of said steamship to the officers and agents of the petitioner; that the lives of the passengers upon said steamship upon her stranding were immediately placed in great peril; that it was the duty of the petitioner, its officers, agents, and employees, to take immediate steps to remove said passengers to places of safety, which could have readily and easily been done by lowering lifeboats of said steamship upon Vanderbilt reef at low tide, and launching the same to the leeward of said reef, and allowing the passengers to step down from the steamer upon said reef and into said lifeboats, which could have readily been done; that lifeboats could then have been rowed to vessels standing by, and her passengers transferred; that such lifeboats could have been rowed to boats within the vicinity of said rocks, where all the passengers could have been landed without difficulty, or that said passengers could have been saved by launching the two aft starboard lifeboats from said vessel into the water and transferring the passengers from lifeboats into other vessels standing near by, or by lowering lifeboats at high tide and transferring the passengers to the vessels standing by; that this could have been done at all times until noon of October 25th, and other methods of transferring passengers were set out; that, in order to save the expense of removing the passen-

gers, petitioner decided to keep the passengers on board the Princess Sophia until it could send one of its vessels from Vancouver to Vanderbilt reef, a distance of 950 miles; that in accordance with such plan petitioner at 11 p. m. October 24th sent the steamship Princess Alice, with directions to go to Vanderbilt reef and take the passengers from the Princess Sophia and carry them to their destination; that it would take about 65 hours for the Princess Alice to reach Vanderbilt reef; that the vessels Peterson, Estebeth, Amy, King & Winge, Cedar, Atlas, Sitka, Elsinore, Osprey, Prince George, and other vessels were in the vicinity of said rock, ready and willing to take the passengers to places of safety, but the petitioner refused to allow the passengers to leave said steamship Sophia, although urgent demands were made of them; that at 4 p. m., October 25th, a violent storm arose in Lynn Canal, with a strong north wind, and at high tide, about 6 p. m., the wind and waves drove said vessel over and across the reef causing her to founder; that it had been generally known for many years that during the fall and winter months violent storms arose suddenly in Lynn Canal with little warning, and that petitioner well knew that such storms were likely to arise at any time, and in case of such storm the Princess Sophia would be driven from the reef and would founder; that notwithstanding this fact petitioner decided to keep and require all passengers to remain upon the Sophia until they could be taken therefrom by the Princess Alice; that the Princess Sophia was unseaworthy when she left Skagway, and that she was not equipped with sufficient lifeboats, life preservers, or life-saving appliances as required by law, and that the crew were insufficient in numbers, and were incompetent and not able-bodied seamen; that many of the crew were sick and unable to perform their duties; that said vessel did not carry pilots; that she was insufficiently manned, equipped, and not provided with a full and complete crew to perform their duties; that Captain Locke, master of the steamship, was 67 years of age, and was not given sufficient pilots, and required to stand long watches, and was under great mental and physical strain, and had become weakened physically and mentally, and was addicted to the use of alcoholic liquors to excess, and was under the influence of liquor on said voyage; that he had become incompetent, and not a safe master, all which was known to petitioner.

Charges of incompetence and unfamiliarity with the waters of Lynn Canal, carelessness and inefficiency, and disqualification were made against the officers of the petitioner, of which the petitioner had knowledge; that the compass and the barometer on the steamship were not in good order and condition; that the compass had not been tested or swung for a long time, and the barometer did not correctly indicate atmospheric pressure and change in weather; that all of the acts of negligence, incompetence, and unseaworthiness were known to the petitioner, and that the petitioner was at fault and guilty of gross negligence in connection with the loss and foundering of said steamship.

The petitioner replies, placing at issue all of the allegations of the affirmative matter, and asserts affirmatively that its managing or supervising officer or agents had instructed the navigating officers and employees connected with the navigation of its steamers, including the steamship Princess Sophia, to navigate and operate said steamers in a cautious and careful manner, and under no circumstances to operate the same in a manner contrary to law and the rules of navigation; that written instructions were furnished to the navigating officers of all the vessels, cautioning them against running risk which by any possibility might result in accident, and to bear in mind that the safety of life and property intrusted to their care is the ruling principle by which they must be governed in the navigation of their ship, and that no saving of time on their voyage is to be sought at the risk of accident; in thick foggy weather and in storms speed must be reduced, and, if soundings are to be had, lead is to be used, and the whistle must be blown at short intervals as prescribed by law; that at least two officers must be on the bridge and a double lookout kept, all water-tight compartments closed, and all possible precautions taken. Such notices were delivered to the officers navigating the steamship Princess Sophia.

It is admitted that after the stranding a wireless message was sent by Captain Locke to Captain Troupe, manager of the British Coast Steamship Service at Victoria, who was operating said vessel, advising Captain Troupe that such vessel had stranded, which message was received at about 9:11 o'clock a. m. October 24th at Victoria. It is admitted that Lowle, agent at Juneau, received a message from the wireless operator at Juneau at about 2:15 a. m. (3:15 ship's time) on October 24th, advising him that the said vessel had stranded on Vanderbilt reef, and was calling for help, and that about 8 o'clock a. m. Lowle received a further message from the wireless operator at Juneau to the effect that the Sophia was pounding heavily and was lowering her boats; states that, since all lives on board were lost, petitioner was not advised as to the conditions existing at and in the vicinity of Vanderbilt reef and on board the vessel at the time she stranded, but from the information conveyed to it by wireless, the lives of the passengers were placed in peril; that the Sophia was in command of a competent and experienced master and officers and crew, and that the advisability as to what should be done with relation to the removal of the passengers were matters to be determined by the master, officers, and crew, who had opportunity to consult with the passengers, many of whom were experienced seamen; that upon the petitioner's direction the Peterson, with a capacity of 150 or 200 passengers, arrived on the scene at 9 a. m. October 24th, the Estebeth, with a capacity of from 85 to 150 passengers, arrived at 10 a. m. the same day, the Amy, with a capacity of 150 passengers, arrived at 11:20 a. m. October 24th, the King and Winge, with a capacity of 100 passengers, arrived at 6:20 p. m. the same day, and the Cedar, with a capacity of 400 passengers, arrived at the rock at 8 p. m., and the Lone Fisherman, Sitka, and Elsinore, with total capacity of 350 to 400 passengers, arrived at the scene the afternoon and evening of October 24th; that there were no other vessels in the vicinity of Juneau capable of rendering any assistance; and further alleges that if there was any fault on the part of any one in the removal of the passengers from the stranded ship, such failure was due to an error in judgment on the part of the navigating officers, and was without privity of knowledge or fault of the petitioner or any of its managing officers or agents. It admits that on the afternoon of October 25th a violent storm was raging in Lynn Canal, and alleges that such storm had been raging throughout the 24th and 25th. It specifically denies that it or any of its officers or agents decided to keep or require the passengers to remain on board the stranded ship awaiting the arrival of the steamship Princess Alice.

Upon motion and stipulation of the parties a commissioner was appointed to take testimony at various places in Alaska and in the city of San Francisco. The issue was finally presented on testimony taken in open court, and at the conclusion was submitted upon such testimony and depositions taken. The only issue now before the court as submitted is as to the right of a limitation of liability.

Bogle, Merritt & Bogle, of Seattle, Wash., for petitioner.

William Martin and H. A. P. Myers, both of Seattle, Wash., for claimants and respondents.

NETERER, District Judge (after stating the facts as above). [1] The first matter to be determined is the liability of the petitioners under the Liability Act. There is a distinction between a general liability for acts of omission or commission with relation to imposed duties and liability under the limited liability act. A distinction, then, between the shipowner's liability under the general maritime law and his liability under the Limited Liability Act must be kept in mind. The shipowner is liable for any damage for loss caused by a defective condition of his vessel, either in equipment or crew, whether he had knowledge or not. The Liability Act, however, abridges the shipowner's liability under the general maritime law, and limits it to his interest in the

ship and freight, unless he has privity or knowledge of deficiency, except as hereinafter stated. Section 4283, R. S. (section 8021, Comp. Stat.):

"The liability of the owner of any vessel \* \* \* for any loss, damage, or injury \* \* \* done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"The rule of custom from which the liability of the ship's owner is limited is said to have begun in the Middle Ages, and more particularly in the Mediterranean, where commerce first acquired activity, and extended after the fall of the Western Empire. \* \* \*" 7 Cyc. 383.

Mr. Justice Brown, in *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381, said:

"By the common law, as administered both in England and America, the personal liability of the owner of a vessel for damages \* \* \* is \* \* \* limited only by the losses and by his ability to respond. \* \* \* The civil law, too, as well as the general law maritime, made no distinction in this particular in favor of shipowners, \* \* \* nor did the ancient Laws of Oleron or Wisby or the Hanse towns suggest any restriction upon such liability. Indeed, it is difficult, if not impossible, to say when and where the restrictions of the modern law originated. They are found in the *Consolato del Mare*, which, in two separate chapters, expressly limits the liability of the part owner to the value of his share in the ship. Vinnius, an early continental writer, states that by the law of the land the owners were not chargeable beyond the value of the ship and the things that were in it. The Hanseatic Ordinance of 1644 also pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them. But however the practice originated, it appears, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe, since the French Ordinance of 1681, which has served as a model for most of the modern maritime codes, declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight \* \* \*"

—and held that:

"Being in derogation of the common law \* \* \* the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."

Mr. Justice Nelson, in *Moore v. American Transportation Co.*, 24 How. 1, 16 L. Ed. 674, said:

"The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and the continent of Europe."

Mr. Justice Bradley, in *The Norwich v. Wright*, 13 Wall. 104, 20 L. Ed. 585, said:

"The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry."

Again, in *P. & N. Y. S. S. Co. v. Hill*, 109 U. S. 588, 3 Sup. Ct. 385, 27 L. Ed. 1038, the same justice uses this language:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the man-

ner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with a view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, \* \* \* the law will hardly be worth the trouble of its enactment."

Judge Gilbert, in *Boston Marine Ins. Co. v. M. R. L. Co.*, 197 Fed. 703, 117 C. C. A. 97, said:

"\* \* \* The law should be construed in a spirit of fairness, with a view of giving the shipowner the full benefit of the immunities intended. \* \* \*"

This sentiment was taken from *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

[2] The claimant urges at the outset that insurance on the vessel should be considered an interest in the vessel, and transferred to the trustee. Testimony of insurance was offered, but refused, at the trial. This is finally disposed of by the Supreme Court in *The City of Norwich*, 118 U. S. 468, at page 493, 6 Sup. Ct. 1150, 1156 (30 L. Ed. 134), where the court said:

"The next question to be considered is whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer, as a part of their interest in the same. The statute (section 4283), declares that the liability of the owner shall not exceed the amount or value of his interest in the vessel and her freight; and section 4285 declares that it shall be a sufficient compliance with the law, if he shall transfer his interest in such vessel and freight, for the benefit of the claimants, to a trustee. Is insurance an interest in the vessel or freight insured, within the meaning of the law?"

And after extended discussion (118 U. S. on page 504, 6 Sup. Ct. 1163, 30 L. Ed. 134) it says:

"We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat the principal object of the law."

For dissenting opinion see *The Great Western*, 118 U. S. 526, 6 Sup. Ct. 1172, 30 L. Ed. 156.

[3] It is next urged that, the *Sophia* being of foreign registry, the owner may not take the benefit of the Limitation Act; but this question is settled by the Supreme Court in *The Titanic v. Mellor*, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. 1171, in which it is said:

"The general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under Rev. Stat. § 4283, is established. *The Scotland*, 105 U. S. 24; *La Bourgogne*, 210 U. S. 95."

Recurring to section 4283, *supra*, it is apparent that the vital issue in limitation of liability is privity or knowledge of the owner.

"Privity means participating with others in the knowledge of a secret transaction; privately knowing; specially in law having any knowledge of or connection with something." Std. Dict.

"To know is to be thoroughly acquainted. In a strict sense the clear and certain apprehension of a truth." Std. Dict.

Judge Sawyer in *Lord v. Goodall & C. S. S. Co.*, Fed. Cas. No. 8,506, said:

"The meaning of the words 'privity or knowledge' \* \* \* is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss."

In *McGill v. Mich. S. S. Co.*, 144 Fed. 788, 75 C. C. A. 518, the Ninth Circuit Court said:

"The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster. \* \* \*"

And in *Boston Marine Ins. Co. v. Metropolitan, etc., Co.*, 197 Fed. 703, 117 C. C. A. 97, the said court said:

"On the voyage on which the collision occurred, the *San Pedro* was one man short of the number of seamen required by her certificate of inspection, and it is urged that the trial court erred in finding that that shortage was not one of the proximate causes of the loss. \* \* \* We think there was no error, therefore, in the finding that the shortage of the crew was not a *contributory cause of the loss*. It is to be observed in this connection, also, that the manager was not privy to, and had no knowledge of, such shortage. \* \* \*" (*Italics mine.*)

In *Coggeshall, etc., Co. v. Early*, 248 Fed. 1, 160 C. C. A. 141, express finding that there was a shortage of the crew was held did not contribute directly to the loss because the owner had no privity or knowledge of such shortage.

[4] Privity or knowledge, as used in the statute, imports actual knowledge causing or contributing to the loss or knowledge, or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it. *Butler v. Boston S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; *City of Columbus* (D. C.) 22 Fed. 460; *In re Meyer* (D. C.) 74 Fed. 881; *The Longfellow*, 104 Fed. 360, 45 C. C. A. 379; *The Southside* (D. C.) 155 Fed. 364; *The Rochester* (D. C.) 230 Fed. 519. Judge Brown in *The Colima* (D. C.) 82 Fed. 665, at page 679, said:

"The knowledge or privity that excludes the operation of statute, must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts, or conditions, or through some kind of personal participation in them \* \* \*"

Judge Wolverton, in *The Indrapura* (D. C.) 171 Fed. 929:

"There must be personal participation in the act of delinquency or omission leading to the loss."

Judge Gilbert, in *The Annie Faxon*, 75 Fed. 312, 21 C. C. A. 366:

"It is sufficient if the corporation employ, in good faith, a competent person to make such inspection [boiler]. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases. \* \* \*"

Mr. Justice White, in *La Bourgogne*, supra:

"Mere negligence, pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute."

[5] It appears to be well settled that, where the owner in good faith appoints a competent agent to equip, man, or maintain a vessel or her machinery, any acts of omission or commission of the agents, not participated in personally by the owner, do not constitute privity or knowledge. The *Annie Faxon*, 75 Fed. 312, 21 C. C. A. 366; The No. 6, 241 Fed. 69, 154 C. C. A. 69; *Boston Marine Ins. Co. v. Metropolitan, etc., L. Co.*, 197 Fed. 703, 117 C. C. A. 97; *Quinlan v. Pew*, 56 Fed. 111, 5 C. C. A. 438; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; *The Marie Palmer (D. C.)* 191 Fed. 79; *The Murrell (D. C.)* 200 Fed. 826.

Judge Gilbert, in *Boston M. I. Co. v. Metropolitan, etc., L. Co.*, supra, said:

"But we cannot concede that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge, and our attention has been directed to no authority which so holds. In *Moore v. American Transportation Co.*, 24 How. 1, 16 L. Ed. 674, the court said: 'The act was designed to promote the building of ships and to encourage persons engaged in the business of navigation.' And in *La Bourgogne*, the court affirmed that the law was to be administered in a spirit of fairness with the view of giving to shipowners the full benefit of the immunities intended to be secured by it for the encouragement it will afford to commercial operations."

Judge Putnam, in *Quinlan v. Pew*, supra, said:

"We are also constrained to the belief that this statute, which the Supreme Court directs shall be interpreted broadly, has regard for the usual necessities of the occupations of life, and in that respect intends that owners may avail themselves of the proper facilities common to business men, and be relieved, so far as it is concerned, whenever and so far as they have appointed a suitable representative, be he master, consignee, or other agent, to supervise the ship, either at sea or at the home port or otherwise, and either for fitting her away, or navigating her after she is so fitted away. The law, for the purposes of this case, cannot make a distinction between the owner who has but one vessel, and time and opportunity to give it his personal attention, and the owner who has many vessels, or whose necessities call him long distances from his residence, or whose infirmities, sickness, inexperience, or sex renders him or her incapable of attention to affairs of this nature."

Judge Hanford, in *The Jane Gray (D. C.)* 99 Fed. 582, said:

"I consider that, for the safety of her passengers, the vessel ought to have carried a sufficient number of life preservers, and her captains should have made a requisition for them, although there is no statutory requirement; but, as the owners depended upon the captain to see that the equipment of the vessel for the voyage was complete in every particular, they are exempt from personal liability for his neglect in this regard. \* \* \* Having employed men of experience and skill in such work to overhaul the vessel, make what repairs were found to be needed, and supply and equip her for the voyage and stow the cargo, and there being no evidence of neglect or mistake in these

particulars on the part of the owners or their employ  s, I must find that they did exercise due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied."

In *The Erie Lighter* 108 (D. C.) 250 Fed. 490, it was held:

"It is also entirely well settled that an owner, and, in the case of a corporation, the managing officer or officers (in this case the superintendent of the marine department), may employ others to perform the duties ordinarily imposed by law upon the owner, such as equipment, examination, repairs, etc., and if due diligence is exercised in selecting persons competent for such work, losses or damages done or occasioned through their fault, without actual complicity or knowledge on the part of the owner, are done or occasioned without the 'privity or knowledge' of the owner, within the meaning of the Limited Liability Acts. *Craig v. Continental Ins. Co.*, supra; *The Annie Faxon* (D. C. Wash.) 66 Fed. 575, affirmed 75 Fed. 312 \* \* \* (C. C. A. 9th Cir.); *The Colima*, supra; *The Jane Gray* (D. C. Wash.) 90 Fed. 582; *Van Eyken v. Erie R. R. Co.* \* \* \* 117 Fed. 712; *McGill v. Michigan S. S. Co.*, 144 Fed. 788, \* \* \* *Oregon Lumber Co. v. Portland & Asiatic S. S. Co.*, supra [162 Fed. 912]; *Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co.*, supra; *Quinlan v. Pew*, supra; *The Tommy*, 151 Fed. 570."

[8] The privity or knowledge within the statute must be that of the managing officers of the corporation, *Hill Mfg. Co. v. Providence & N. Y. S. Co.*, 113 Mass. 495, 18 Am. Rep. 527; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; and when brought home to the principal officers of the corporation it is chargeable, *The Colima*, supra. In *The Erie Lighter*, supra, the court said:

"Whether the petitioner is entitled to a limitation of liability, of course, depends upon whether the damages which the claimant seeks to recover were done or occasioned without the petitioner's 'privity or knowledge,' within the meaning of the Limited Liability Act. As the petitioner is a corporation, its 'privity or knowledge' must be that of its managing officers [citing *Craig v. Continental Ins. Co.*]. While ordinary agents and servants, including a master of a vessel, are not within that category, a 'managing officer' is not necessarily one of the head executive officers, but is any one to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business [citing cases]. The petitioner, long before the accident in question, had committed the general management and superintendence, including maintenance and repair of its vessels, to a superintendent of its marine department. The latter was therefore clearly a managing officer of the corporation within the before mentioned rule, and his 'privity or knowledge,' if any, is chargeable to the petitioner."

And in that case, petitioner being a railroad corporation operating a fleet of tugs and barges in connection with its railway business, the court held that privity or knowledge within the meaning of the statute, to deprive the petitioner of the right to limit liability—privity or knowledge of acts of commission or omission contributing to the damage—would have to be established in the management of the petitioner's marine department, and in *Re Eastern Dredging Co.* (D. C.) 159 Fed. 541, it was held that the marine superintendent in charge of dredgers acting under a general manager was an employee, as distinguished from a managing officer, and in order to hold the company it was necessary to show that the general manager was chargeable with the privity or knowledge. In *La Bourgogne*, supra:

"The loss might have happened by the negligence of the owner of the vessel. Such loss might yet not have been occasioned with a knowledge or privity of such owner."

These expressions were directed to a consideration of section 4283, supra, without regard to any other acts of Congress.

It is established by the testimony that the Canadian Pacific Railway Company is a corporation of the Dominion of Canada, and on the dates in issue was the sole owner of the steamship Princess Sophia, and operated the same between the port of Vancouver, British Columbia, and the port of Skagway, Alaska, via way ports, in what is known as the British Columbia coast steamship service of the Canadian Pacific Railway. In 1900 the Canadian Pacific Railway Company purchased from the Canadian Pacific Navigation Company a fleet of boats in British Columbia and Alaska coast service, whose main office was located at Victoria, B. C. Captain J. W. Troupe prior to this time was in the employ of the railway company as superintendent of its rail lines in the Nelson, B. C., district, and also as manager of a fleet of boats owned by the railway operated on the Kootenay, Arrow, and Slocan Lakes, connecting with transcontinental railroads then under construction. Troupe has been continuously in the steamship business since 1871, as purser, master, and manager. Upon the purchase of the Canadian Pacific Navigation fleet by the petitioner, Troupe was moved to Victoria and placed in charge of this fleet as general manager, and has since been so employed. The fleet at that time consisted of 11 vessels, of about 8,500 tons, and approximately 300 officers and men. At the time of the disaster it consisted of 26 steamers and 6 barges, with 34,817 tonnage, and total number of officers and men employed approximately 750 seamen of all classes, in addition to some 60 certificated deck officers.

In 1911 Troupe appointed Captain Neroutsos as marine superintendent, with the duty of details of operation of the fleet; Troupe looking after the building, purchase and sale of vessels, and general policy of the company, all matters having relation to freight and passenger traffic, major alterations and repairs of the fleet, and generally speaking all matters outside of the mere operating details. Neroutsos reported direct to Captain Troupe in connection with all matters connected with detailed operation. Neroutsos had been in the employ of the British Columbia coast steamship service as deck officer and master 10 years prior to his appointment, and acted as marine superintendent for 7 years, and had been engaged as seaman, officer, and master since 1882, and had had previous experience as port superintendent of Frank Waterhouse & Co. of Seattle, and assistant to Lloyd's surveyor at Tacoma and Portland. Captain Locke, master of the lost ship, was a mate in the employ of the Canadian Pacific Navigation Company, and was continuously in the employ of the Canadian Pacific Railway from 1900 to 1918, the time of his death, and was familiar with Alaskan waters. From the record before the court there is no question as to Captain Locke's efficiency, and there is nothing to indicate that he was incompetent by reason of intoxicants or otherwise on this voyage. In 1909 Captain Troupe issued a book of rules and regulations for the government of the vessels of the company, in harmony with the International Rules of Navigation. These were in force at the time of the disaster. From time to time until the casualty, by circulars, the at-

tention of the officers of the vessels was challenged to these and they were cautioned to obey the rules and to take *no chances*.

It is strenuously urged that Lowle, at Juneau, was the petitioner's managing agent in Alaska. The most that can be said is that he was the freight and passenger agent in Alaska, but had nothing to do with the navigation or operation of vessels. It is also contended that Captain Troupe directed, or that some one in authority did direct, the holding of the passengers on the Sophia on board until the arrival of the Alice from Vancouver. This contention fails. There is nothing in the record to sustain it. Messages could only be sent to and from the wreck by wireless. No messages between the Sophia and Vancouver, or elsewhere, could be exchanged, unless sent over the United States cable office at Juneau, and only then by wireless or by cable. The entire records of the cable office and the wireless stations are in evidence. The master of the ship, so far as the petitioner is concerned, was left to the free exercise of his own judgment in the emergency, and for his error of judgment the petitioners may not be held. The master of the ship in disasters must be left to the free exercise of his own judgment.

Much is said in the brief of claimants with relation to the insufficiency of the crew, and in the particular that only two quartermasters were upon the vessel, and that they would become exhausted by standing watches; but this contention is not supported by the evidence, which shows that they did not stand watches for 24 hours, but that they were relieved by petty officers, and it is conceded that the casualty took place within 4 or 5 hours after leaving the port of Skagway, and there is no testimony which would indicate that the calamity was caused by reason of such contention. There is testimony that some of the deck hands were boys from 16 to 19 years of age, and that the vessel was therefore not properly manned, measured by the laws of the United States. In *The Jane Gray*, supra, it was said:

"As the owners depended upon the captain to see that the equipment of the vessel for the voyage was complete in every particular, they are exempt from personal liability for his neglect in this regard. \* \* \*"

This was in effect indorsed by the Circuit Court of Appeals in *Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co.*, 197 Fed. 703, 117 C. C. A. 97. In *The Norge* (D. C.) 156 Fed. 845, the court said:

"Her officers and crew were well qualified. She had a small number of boys on board, but they were competent to perform their duties, and no real criticism can be made against the steamer in such respect."

In the instant case there is no testimony of the inefficiency of these boys. They all had some experience as seamen. They were not able seamen within the provisions of the La Follette Act (38 Stat. 1164), but were men of some experience. It is also strongly urged that the master and officers of the vessel were incompetent, and that the crew, by reason of the boys employed, were not within the requirements. This contention is not sustained. The officers were clearly competent, and as to the boys employed the owners had a right to rely on the master and officers, whose duty it was to see to the proper equipment

and manning of the ships in the regard mentioned, and it should be said in this connection that there is nothing in the case to indicate that the boys were not competent, and since the disaster was not one of sudden emergency requiring immediate action, the vessel remaining on the reef for 40 hours, nearly 2 days, and there being on the vessel as passengers some 85 experienced seamen and boatmen, employees of the American & Yukon Navigation Company, returning from the 1918 season's work.

Among these were 4 masters, 1 mate, and 22 deckhands; the others being engineers and stewards. All these men, it appears, had much experience in handling boats on the Yukon. While this fact does not take from the duty of the owners to discharge its duty in properly manning the vessel it may be considered only as to whether the incompetency of the boys can have contributed to the disaster, since there was ample time to select boat crews from the experienced seamen among these men and the crew to remove the passengers by the use of the steamship's boats, if it had been deemed feasible or practicable under the conditions of the weather by the master; the lives of these men also depending on the event.

It is also urged that, because of influenza epidemic upon the vessel, many of the crew were disabled on the voyage from Vancouver to Skagway, and were not in physical condition to perform their duty as seamen. This largely is conjecture. There is some testimony that some members of the crew at Skagway were indisposed. The extent is not shown, nor the disease from which they were suffering, if any. It also appears that there were added to the crew at Skagway some 8 or 10 seamen from the Yukon river.

[7] As to the general equipment of the ship for the voyage, the evidence shows that the vessel was thoroughly inspected by Cullum, steamboat inspector of the Dominion of Canada, for her annual inspection from the 23d to the 26th days of March, 1918 and he issued an annual certificate dated March 26, 1918. On October 19, 1918, a permit was issued to the steamship, authorizing her to carry a total of 350 passengers, exclusive of her crew, upon placing on board four additional buoyancy appliances of the capacity of 26 persons each. These additional buoyancies were approved prior to the 19th of October. All of the life-saving equipment on board the steamship was inspected at this time by the steamboat inspector at Vancouver, and the following official entry was recorded:

"To Whom It May Concern: I hereby certify that additional life-saving equipment sufficient for 100 persons has been placed on board the steamer Princess Sophia, of Victoria, B. C., official No. 130620, and said steamer Princess Sophia may therefore be permitted to carry 100 persons in addition to the number stated on her regular passenger certificate, making a total of 350 passengers allowed to be carried, from the 19th of October to the 31st of October, 1918."

The United States inspector for the district of Seattle testified, under the reciprocal provisions of Rev. Stat. § 4400 (Comp. St. § 8152), American inspectors, in issuing certificate to a foreign vessel, check up the equipment on board the foreign vessel as specified in their foreign certificate. He further identified circular instruction from the

Secretary of Commerce, specifying the Dominion of Canada as one of the foreign countries whose inspection laws approximate that of the United States. The certificate issued to the *Sophia* was in effect at the time of her loss. In addition to the Canadian steamship inspector's testimony, Captain Harrison testified that when he took charge as first officer of the *Princess Sophia* on October 1, 1918, he held fire and boat drill and inspected all the ship's boat tackle, gear, appliances, blocks, and equipment, and found them to be in first-class condition, and sent a written report to the marine superintendent. The compass was inspected and found to be in good adjustment up to October 8, 1918. There is no testimony to the contrary. Testimony also shows the barometer was in good condition. From the evidence presented it would appear that the steamship was properly manned and equipped and seaworthy for the voyage in conformity to the Canadian laws, and found by the United States inspectors to come within the requirements of section 4400 of the Revised Statutes.

Claimants contend that, although the steamship was a Canadian vessel, the inspection laws of the United States apply, and her efficiency in point of equipment, life-saving appliances, and crew is to be measured by the law of the United States and rules appertaining to American vessels, and that the inspection which was made by the United States inspectors was not an inspection based upon the requirements, but rather credited to the Canadian inspection. I think the record discloses that prior to 1905 it was officially determined that the inspection laws of the Dominion of Canada approximated those of the United States, and that Canadian vessels were examined pursuant to the requirements of title 52, Rev. Stat. Under the conditions named in the proviso of section 4400, Rev. Stat., the Board of Inspectors pursuant to the provisions of section 4405, Rev. Stat. (Comp. St. § 8159), promulgated rules and regulations to carry forward the provisions of section 4400. These rules so promulgated have the force of law. *La Bourgogne*, supra. It is conceded, I think, that the vessel complied with the Canadian law. The provisions for equipment are contained in sections 4399 to 4462, Rev. Stat. (Comp. St. § 8151 et seq.), and for transportation of passengers and merchandise, including the manning of vessels, safety appliances, etc., are contained in sections 4463 to 4500, being title 52, Rev. Stat. (Comp. St. § 8225 et seq.). Section 4400, brought forward from section forty-one of the Act of February 28, 1871, provides:

"All steam vessels navigating waters of the United States which are common highways of commerce, are open to general or competitive navigation, excepting public vessels of United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title."

This section was amended August 7, 1882 (22 Stat. 346), by subjecting all foreign vessels carrying passengers from any part of the United States to any other places or country to the provisions of sections 4417 Rev. Stat. (8172, Comp. Stat.), 4418, Rev. Stat. (8173, Comp. Stat.), 4421, Rev. Stat. (8182, Comp. Stat.), 4422, Rev. Stat. (8183, Comp. Stat.), 4423, Rev. Stat. (8184, Comp. Stat.), 4471, Rev. Stat. (8241, Comp. Stat.), 4472, Rev. Stat. (8242, Comp. Stat.), 4473, Rev.

Stat. (8243, Comp. Stat.), 4479, Rev. Stat. (8249, Comp. Stat.), 4482, Rev. Stat. (8252, Comp. Stat.), 4488, Rev. Stat. (8258, Comp. Stat.), 4489, Rev. Stat. (8259, Comp. Stat. 1913), 4496, Rev. Stat. (8272, Comp. Stat.), 4497, Rev. Stat. (8273, Comp. Stat.), 4499, Rev. Stat. (8275, Comp. Stat.), and 4500, Rev. Stat. (8276, Comp. Stat.).

This section was further amended March 1, 1895 (28 Stat. 699). This amendment is immaterial to this issue. Further amendment was made February 15, 1902 (32 Stat. 34), as follows:

"Provided, however, that when such foreign passenger steamers belong to countries having inspection laws approximating those of United States, and have unexpired certificates of inspection issued by the proper authorities in the respective countries to which they belong, they shall be subject to no other inspections than necessary to satisfy the local inspectors that the condition of the vessel, her boilers, and life saving equipment are as stated in the current certificate of inspection."

The *Sophia* at the time of the disaster was equipped and manned as required by Canadian law. She had unexpired certificates from the Canadian authorities (section 4400) and also had been inspected by the local United States authorities in harmony with the proviso and had proper certificate. It must be clear under the proviso that the proper certificates of the proper authorities of such foreign countries is conclusive proof that the vessel is properly equipped as required by such foreign laws, and the local inspectors shall subject such vessel to no other inspection than necessary to satisfy such local inspectors that the condition of the vessel, etc., is as stated in the current certificate of inspection.

[8] It is further contended that the *La Follette* or Seamen's Act of March 4, 1915, in any event applies. This act is entitled:

"An act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." 88 Stat. 1164.

Section 1 of this act amends section 4516, R. S. (section 8306, Comp. Stat.). Section 2 (Comp. St. § 8363b) regulates hours of service in the merchant marine of the United States. Section 3 amends section 4529, R. S. (section 8320, Comp. Stat.). Section 4 amends section 4530, R. S. (section 8322, Comp. Stat.). Section 5 amends section 4559, R. S. (section 8348, Comp. Stat.). Section 6 amends Act March 3, 1897 (29 Stat. c. 389), relating to fees. Section 7 amends section 4596, R. S. (section 8380, Comp. Stat.). Section 8 amends section 4600, R. S. (section 8382, Comp. Stat.). Section 9 amends section 4611, R. S. (section 8391, Comp. Stat.). Section 10 amends section 23 of "An act to amend the laws relating to American seamen of December 21, 1898," relating to provisions (Comp. St. § 8392a). Section 11 amends Act June 26, 1884, relating to advances and allotments to seamen (E):

"And provided further that this section shall apply to seamen on foreign vessels while in the harbors of the United States. \* \* \*"

Section 12 repeals section 4536, R. S. (section 8325a, Comp. St.). Section 13 (Comp. St. § 8363a) has relation to qualification of seamen, and provides that:

"No vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in section one of this act, shall be permitted to depart from any port of the United States unless she has on board a crew not less than seventy-five per centum. \* \* \*"

Section 14 amends section 4488, R. S. (section 8258, C. S.), and contains this clause:

"Provided, that foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life saving appliances, their equipment, and the manning of same."

Section 15 relates to reports of accidents to barges while in tow through the open sea. Sections 16 and 17 (Comp. St. §§ 8382a, 8382b) abolish arrest, etc., for desertion and imprisonment for desertion on American and foreign vessels while in port. Section 18 (Comp. St. § 8382c) provides that the act shall take effect as to American vessels within 8 months and as to foreign vessels within 12 months. Section 19 amends section 4581, R. S. (section 8372, C. S.), and modifies the fellow servant rules as to personal injuries on board.

Claimants contend that sections 13 and 14 apply to foreign vessels. That the Congress has power to legislate with relation to foreign vessels in the waters of the United States is determined in *Strathearn v. Dillon*, 252 U. S. 348, 40 Sup. Ct. 350, 64 L. Ed. 607; *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200; *Neilson v. Rhine Co.*, 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208.

The issue raised by the two sections referred to is to an extent of first impression. I think it may safely be said that by the amendment of a section applicable to United States vessels only, unless by express terms the amendment is extended to foreign vessels, the scope will not be broadened. Section 13 is not an amendment, but an independent expression, and must be construed in consonance with the general purpose and intentment of the act, which by its title is to promote the welfare of *American seamen* in the merchant marine of the *United States*, and contains no expression extending the provisions to foreign vessels. It is limited to American seamen on United States vessels; some provisions of the act being expressly extended to foreign vessels, and, being withheld from section 13, the intent of the Congress is clear the rule of construction, "*expressio unius est exclusio alterius*." *U. S. v. Barnes*, 222 U. S. 513, 32 Sup. Ct. 117, 56 L. Ed. 291. The expression "*no vessel of 100 tons or more*" is broad and comprehensive, and must be held to have relation only to the subject legislated upon, and be limited to the general context as expressed in the title of the act.

[8] Section 14 is more difficult of solution. This section has been very fully and ably discussed by Attorney General Gregory in an opinion rendered on request of the President. 30 Opinions of Attorney General, p. 441. At page 442 he says:

"This section 14 of the seamen's bill is an additive amendment to section 4488 of the Revised Statutes, which itself had been previously amended in respects not material here by the Acts of March 2, 1889 (25 Stat. 1012), April 11, 1892 (27 Stat. 10), and March 3, 1905 (33 Stat. 1024). Section 4488 was originally enacted as section 52 of the Act of February 28, 1871, entitled 'An act to provide for the better security of life on board of vessels propelled in whole or in part by steam,' etc. (16 Stat. 440). Section 41 of the last named

act, which became section 4400 of the Revised Statutes, defined the vessels 'subject to the operation of the act, and, of course, to the operation of its section 52, now section 4488 Revised Statutes. This section 41, was amended by the Acts of August 7, 1882 (22 Stat. 346), March 1, 1895 (28 Stat. 699), February 15, 1902 (32 Stat. 34), and March 17, 1906 (34 Stat. 68), the last amendment being a complete redraft. Since section 14 is expressly an amendment of pre-existing law, which is to be found in these sections 4400 and 4488 of the Revised Statutes. \* \* \*

Continuing on page 448 says:

"I conclude, therefore, that the words 'foreign vessels' in the proviso under discussion can only be read as 'foreign vessels subject to the operation of section 4488, of which this proviso is amendatory.' This reading meets the declared purpose of the conference committee, accords with the principles of construction applicable to such an amendatory proviso, and makes the amendment harmonize with the large underlying purpose (security of life) of the section on which it was imposed, and also of the act to which that section belongs."

This construction of the Attorney General will be adopted.

[10] It is further contended that as to the seamen the liability may not be limited under the "Jones Act." Section 20 of the La Follette Act, supra (Comp. St. § 8337a) provided that in an action to recover damages for an injury sustained on board of the vessel, the fellow servant rule shall not apply. June 5, 1920, this section was amended by section 33 of the Jones Act (41 Stat. 988), as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in cases of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. \* \* \*

This statute creates a substantive right—adds to one and takes from another—changes the relation of the parties at the time of the casualty. It introduces a new policy and changes the existing statutes. The accident occurred 20 months prior to the passage of this act, and it may not be given retroactive effect. Judge Gilbert, in *Winfree v. N. P. Ry. Co.*, 173 Fed. 65, 97 C. C. A. 392, 44 L. R. A. (N. S.) 841, in denying retroactive effect of the Employers' Liability Act (35 Stat. 65 [Comp. St. §§ 8657-8665]) at page 66 said:

"It is not presumed that Congress intended to impose civil liability upon carriers founded upon transactions which at the time of their occurrence gave no rise to a legal demand against them."

The authorities cited by the claimant (*Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483; *Cooley, Constitutional Limitations*, pp. 529, 543) are fully answered by Judge Gilbert saying retroactive effect is given only to such laws as were "intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof." This deci-

sion was affirmed by the Supreme Court. 227 U. S. 296, 33 Sup. Ct. 273, 57 L. Ed. 518.

[11]. It is finally urged that section 4493 must be construed with section 4283, and, as so construed, the liability as against the claims of passengers or their dependents for both personal injuries or baggage may not be limited. This is a more difficult question to determine, it being contended by the petitioner that, while these sections may be construed *pari materia*, it has no application to foreign ships. Judge Gilbert, in *The Annie Faxon*, *supra*, said:

“ \* \* \* Sections 4283 and 4493 stand together in the Revised Statutes, and provide for two distinct classes of liability—the one prescribing the general rule that, for damage through negligent acts done without the privity or knowledge of the owner, liability should not exceed the amount or value of the interest of such owner in the vessel and her freight then pending; the other providing that for injury occurring through the neglect or failure of the owner to comply with the provisions of title 52 of the Revised Statutes for the regulation of steam vessels \* \* \* liability to the full amount of the damage. They are statutes in *pari materia*—the one creating a general rule of limitation of liability, the other making exceptions in favor of passengers. Section 4493, as appears by its title as well as by its provisions, was intended to provide for better security of life on-board steam vessels. In *Sherlock v. Alling*, 93 U. S. 99, a broad construction was given to that section; and it was held that under its provisions the master, the owner, and the vessel are liable for damages sustained by a passenger, arising through neglect to comply with the provisions expressed in title 52, no matter where the fault might lie. \* \* \* ”

The Circuit Court of Appeals of the Sixth Circuit, in *Great Lakes Towing Co. v. Mill Transp. Co.*, 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769, in considering Act March 3, 1851 (section 4283, R. S.; section 8021, C. S.), and section 18, Act June 26, 1884 (section 8028, C. S.), held that these sections should be held as parts of one entire scheme, and that section 18 was intended as an extension merely of the relief provided by the act of 1851 (section 4283 R. S.; section 8021 C. S.), and that the act of 1851 (section 4283, R. S.; section 8021, C. S.) was regarded as the basic law, to which section 18 of the act of 1884 (section 8028, C. S.) was intended to be a supplement. This view also obtains in *Richardson v. Harmon*, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, and a like view in *Capitol Transportation Co. v. Cambria Steel Co.*, 249 U. S. 334, 39 Sup. Ct. 292, 63 L. Ed. 631. Section 4493, R. S. (section 8269, C. S.), was enacted February 28, 1871, and provides:

“Whenever damage is sustained by any passenger or his baggage, from \* \* \* or other cause, the master and the owner of such vessel \* \* \* shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect, or failure to comply with the provisions of this title. \* \* \* ”

The same reasons given in *Great Lakes Towing Co. Case*, *supra*, indorsed by the Supreme Court in *Richardson v. Harmon*, *supra*, apply here, and upon such authority section 4493 must be held to be intended as supplementary to section 4283, R. S. (section 8021, C. S.), the basic law, and from such conclusion, if the owner is guilty of negligence which was the proximate cause of the loss of the lives of passengers, the liability for such death and baggage may not be limited, whether or not the owner was privy to or had knowledge of such acts.

The contention that the provisions of this section do not apply to foreign vessels cannot be sustained. It is a part of the entire scheme with relation to the merchant marine, and supplemental to section 4283, R. S. (section 8021, C. S.), and a part of the basic law which the Supreme Court says extends to foreign ships, *Titanic v. Mellor*, supra; and the petitioner, claiming the benefits under this section, must be held to the limitations placed upon it, and thus stand at the bar of the court on a parity with domestic owners. Considered in the light of reason and in connection with the scheme as a whole, having in mind the remedies or safeguards sought and the expression of the Circuit Courts of Appeals in the several circuits and of the Supreme Court, the conclusion as stated in *The Virginia* (D. C.) 264 Fed. 986, is inevitable.

Petitioner intimates that the conclusion in that case was inspired by the fact that the owner had privity or knowledge, but this is dispelled by the court when it says:

"I have concluded that the negligence of the petitioners does not amount to privity or knowledge, within the meaning of those words as used in section 4283."

We next come to a consideration as to the negligence of the petitioner. The testimony agrees that the *Sophia* left Skagway at 10 o'clock p. m., and that she struck Vanderbilt reef at 2 o'clock a. m. The distance is conceded, I think, approximately 56 knots. The normal speed of the *Sophia* is shown by the testimony to be approximately 12 knots per hour. It is established, if not conceded, that during a portion of this time a blinding snowstorm was raging in Lynn Canal and in the vicinity of the catastrophe. Many witnesses testified as to the severity of this snowstorm, and there is no doubt in my mind that a severe snowstorm was pending and that the *Sophia* foundered while in the fog and storm. From the admitted or established facts, it is shown that the vessel moved 56 knots in approximately 4 or 5 hours, an average speed of 14 knots if made in 4 hours, and over 11 knots if made in 5 hours. Bearing in mind the relation of the route of the ship to the light off Point Sherman, and the light on Sentinel Island, and the location of Vanderbilt Reef, and the fog and snow that is reasonably shown to have prevailed in this vicinity, and the stage of the tide and the relation of Vanderbilt reef to the tide, the character and extent of the wound received by the *Sophia*, "a clear rip the full length, 72 feet"—"no solid place in the length"—the rip being approximately 2 feet wide, the vessel not having much cargo beside the passengers, the conclusion is unavoidable that a proper lookout was not maintained, and that the vessel was going at an excessive speed, and either one or both of these acts of commission and omission was the proximate cause of the foundering of the ship and the death of the passengers. Article 16 of International Rules (section 7854, C. S.) provides:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. \* \* \*"

The Supreme Court, in *Chamberlain v. Ward*, 21 How. 548, at page 571, 16 L. Ed. 211, said:

"Ocean steamers usually have two lookouts in addition to the officer of the deck, and in general they are stationed one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and during the time they are so engaged they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the Lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating on those waters are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the seas."

This was restated and approved by the Supreme Court in *The Colorado*, 91 U. S. 692, 23 L. Ed. 379. The statement has application to the Alaskan waters, including Lynn Canal. There is no testimony before the court to show that a proper lookout was not maintained, as all on board perished. There is testimony that the lookout who had signed for shipment and who had acted in that capacity on previous voyages failed to report when the vessel was ready to sail and did not ship. This fact of itself indicates nothing. The only testimony as to what transpired must be deduced from the circumstances. Moderate speed may be given as such rate of speed, in view of the particular circumstances, as will enable the steamer to seasonably and effectively avoid collision with a vessel or charted obstruction by slackening or stopping and reversing within the distance at which such vessel or charted object may be seen. *The Batavier*, 40 Eng. L. & Eq. 25; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; *The City of New York* (C. C.) 35 Fed. 604, affirmed 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84. In *The Nacoochee* the court held a speed not moderate which was not slow enough to enable the ship to avoid a vessel sighted in her track at a distance of from twice to three times her length. *Vanderbilt* reef was charted, its location was known to the navigating officers, and it was also known that it was dangerous. The Supreme Court, in *The Nacoochee*, supra, referring to *The Batavier*, supra, said:

"The rule laid down in the last-named case is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate"

—and referred to *The Pennsylvania*, infra. If such care is exacted for the protection of "any craft," equal care must be exacted for the life of passengers on a vessel, if the rate of speed would endanger the vessel to collision with a charted object which might have been seen or ought to have been seen. Even though charted objects are not named in the statutes, the principle enunciated is applicable. *The Oceania Vance* (D. C.) 217 Fed. 973, affirmed 233 Fed. 77, 147 C. C. A. 147; *The Rhode Island* (D. C.) 17 Fed. 554. In this case the object was stationary and fixed, while the position of a moving craft is shifting. There is less excuse for colliding with a fixed, charted object than with a moving vessel. Ordinary care on the part of the lookout and moderate speed would have prevented the catastrophe. Navigating through a storm of the character disclosed by the testimony, at a speed which would carry the vessel upon the reef 72 feet, inflicting the injury dis-

closed under the circumstances shown in the testimony, is contrary to the International Rules of Navigation (section 7854, C. S.; Act Cong. Aug. 19, 1890), and a violation of the rule of ordinary prudence in navigation, and establishes a presumption of negligence, which, unless overcome, is conclusive.

"The burden rests" on a ship to show, whenever she disregards the statutory regulations, not merely that such disregard "might not have been one of the causes of the collision," or even "that it probably was not, but that it could not have been." *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148.

The intent and purposes of the Congress in safeguarding life is manifest by section 4493, R. S. (section 8269, C. S.), supplementing section 4283, and finds expression in the Jones Act, *supra*, having reference to the protection of seamen (which, however, has no relation to this issue), and gives emphasis to the care for human life. *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *The Oregon*, 133 Fed. 618, 68 C. C. A. 603; *Phila. & Reading Ry. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502.

There is much conjecture and speculation injected into the case by the claimants. Substantially all testimony offered was admitted into the record. I think what has been said disposes of all the material contentions raised, whether they have been specifically referred to or not, and where not specifically referred to are deemed immaterial to this issue, or not sustained, and it follows that the liability of the petitioner may be limited as to the cargo of claimants, but not as to the claims of passengers or their dependents or their baggage.

#### On Rehearing.

[12] On the ground that the court erred in its application of section 4493, R. S., to the facts in issue, and in concluding that liability could not be limited to the claims of passengers or their dependents, or their baggage, petition for rehearing was filed, a rehearing granted, and the cause assigned for reargument. The issue has been fully briefed and ably argued at bar. On the former hearing this issue was not fully briefed nor much discussed at bar.

Article 16 of the International Rules (26 Stat. 326, section 7854, C. S.) was enacted August 19, 1890, and it is contended by claimants is an enactment by the Congress on the same subject as section 42 (Comp. St. § 8257), and parts of section 43, relating to pilots on coastwise vessels, etc., of the Act of Feb. 28, 1871, and section 4477, R. S., 16 Stat. 453 (Comp. St. § 8247), and that, considered in relation with 4493, brought forward from section 43, *supra*, denying limitation of liability as to passengers, their dependents and baggage on the contingency stated, the meaning of the Congress is clear that violation of article 16, *supra*, and its relation to section 4493, *supra*, should be considered as a part of the entire scheme with relation to the merchant marine, and supplemental to 4283, R. S.; that all acts passed by prior and subsequent Congresses have relation and should be considered, and cites *State v. Omaha El. Co.*, 75 Neb. 637, and 106 N. W. 979 at 983, 110 N. W. 874, where the court says:

"We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and that no one act should be singled out for expression and be considered apart from the general trend of legislation upon the subject. Statutes in pari materia are to be construed together, and repeals by implication are not favored. The courts will regard all statutes upon the same general subject matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. They are to fill up the gaps left by former attempts to amend the evil."

And counsel also quotes Mr. Justice Swayne in *Jones v. Guaranty & Ind. Co.*, 101 U. S. 626, 25 L. Ed. 1030, as follows:

"A thing may be within a statute but not within its letter, or within the letter and yet not within the statute."

[13] It is further contended that section 4477, R. S., of title 52, provides:

"Every steamer carrying passengers during the nighttime shall keep a suitable number of watchmen in the cabins, and on each deck, to guard against fire or other dangers, and to give alarm in case of accident or disaster"

—and that, irrespective of article 16, *supra*, the limitation as to passengers and dependents and baggage must be denied, since watchmen were not kept on each deck as lookout, as provided by this section, which is within title 52, and therefore within the exception in section 4493, *supra*. It is also urged that by "labored" construction the Supreme Court did "add to the statute in face of the provisions contained in section 4 of the act of 1851"—the original act on limitation of liability—and cites *Butler v. Boston & Savannah S. S. Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017. Without further comment I will simply say that the rule announced in the *Butler* Case is *stare decisis*.

The conclusion of the court heretofore stating that "ordinary care on the part of the lookout and moderate speed would have prevented the catastrophe" is not a finding of "neglect to keep the watchman," as provided in section 4478, R. S. (Comp. St. § 8248), fixing the penalty for violation of provisions of section 4477, *supra*. Neglect on the part of the watchman, or lookout, is not a finding of "neglect to keep a watchman."

[14] *Neglect of the watchman* to perform his duty, with nothing more, is without privity of the owner. The *Colima* (D. C.) 82 Fed. 680; The *Longfellow*, 104 Fed. 367, 45 C. C. A. 379; *Butler v. Boston S. S. Co.*, 130 U. S. 549, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; *The Titanic*, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. 1171; *Richardson v. Harmon*, 222 U. S. 105, 32 Sup. Ct. 27, 56 L. Ed. 110; *Coggeshall v. Early*, 248 Fed. 1, 160 C. C. A. 141; *The Rochester* (D. C.) 230 Fed. 520. There is no finding or testimony that there was no watchman.

It is also contended on the rehearing that section 4401, R. S. (Comp. St. § 8153), was violated, in that no licensed pilot was provided, and such fact alone sustains the decision announced. Section 4401 relates to "coastwise seagoing vessels," and not to foreign ships. Coastwise indicates vessels engaged in the domestic trade, or plying between port

and port in the same country, as contradistinguished from those engaged in foreign trade. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *City Council of S. F. v. California Steam & Nav. Co.*, 10 Cal. 504; *U. S. v. Patten*, 27 Fed. Cas. 460, No. 16007; *Ravesies v. U. S. (D. C.)* 35 Fed. 917.

Section 4401, *supra*, was before the Supreme Court in *Butler v. Boston, etc.*, *supra*, and (130 U. S. at 554, 9 Sup. Ct. 618, 32 L. Ed. 1017) it was said:

"The main allegation relied on by the appellants [claimants] to bring the case within the steamboat inspection law is that the second mate was in charge of the vessel at the time of the accident, and that he was not a licensed pilot. The libeled owners deny this, and claim that it is immaterial, if true. There is no proof on the subject, but suppose it were admitted to be true, how could the owners have prevented the second mate from being in charge? By virtue of his office and the rules of maritime law, the captain or master has charge of the ship and of the selection and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when out on the high seas."

The language quoted has application to section 4477. The duty to "keep a suitable number of watchmen" on a passenger steamer at sea is clearly on the master. In the former decision it was inadvertently said:

"If the owner is guilty of negligence which was the proximate cause of the loss of lives of passengers, the liability for such death and baggage cannot be limited, whether or not the owner was privy to or had knowledge of such acts."

The language is too comprehensive. This is what should have been said: Neglect or failure to comply with the provisions of the law having relation to limitation of liability statutes would not bar liability for such death, etc.

The contention that all statutes upon the same general subject-matter are part of one system or scheme with relation to the merchant marine, and should be construed together, was heretofore considered by the court, and it was then stated that "the petitioner claiming the benefit of this section [4483] must be held to the limitations placed upon it, and thus stand at the bar of the court on a parity with domestic owners," and unless inhibited by statute such rule must be followed.

At bar emphasis is placed upon the penalties provided for certain conduct by sections 6 and 57 (section 5344, R. S. [Comp. St. § 10455]) act of 1871, *supra*, and section 4478, R. S. (Comp. St. § 8248); but these sections can have no controlling effect of themselves as limiting the operation of section 4283. Section 4493 is brought forward from section 43 of the act of 1871, *supra*, and this section was brought forward from section 30 of the act of 1852 (10 Stat. 72), with this difference: Section 4493 contains this phrase, "failure to comply with the provisions of this title, \* \* \*" whereas section 30 and 43, *supra*, each read "failure to comply with the provisions of law herein prescribed. \* \* \*"

In the revisory act of June 22, 1874 the laws (Rev. St. 1873) were embraced in 73 titles, and title 52 pertained to "regulation of steam

vessels," chapter I, "inspection," chapter II, "transportation of passengers and merchandise," and by the provision of section 5600 (Comp. St. § 10597):

"The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title, under which any particular section is placed."

And section 5596, R. S. (Comp. St. § 10593), provides:

"All acts of Congress passed prior to said first day of December one thousand eight hundred seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature \* \* \* and all acts of Congress passed prior to said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

Reference may only be had to the prior acts for the purpose of ascertaining the intent of the Congress.

It is strongly contended by claimants that, since section 3 of the Act of March 3, 1851 (9 Stat. 635), is the original limitation of liability statute carried forward to section 4283, R. S., and that section 41, Act 1871, *supra*, refers particularly to inland waters of the United States, the provision excluding foreign vessels from the operation of the "provisions of law herein prescribed" (43) had no relation to section 3, Act 1851, *supra*, and that section 43 (4493) does apply to foreign vessels, since there is no restriction as to the act of 1851; that section 43 was brought forward from section 30 of the Act of August, 1852, and must be considered in *pari materia* with section 3 of the act of 1851, and reading these sections together it is apparent that section 3, Act 1851, and section 30, Act 1852, had application to the same vessel in the same water, and that not until the Act of June, 1886 (24 Stat. 80), was the Liability Act of 1851 made to apply to foreign vessels. Section 4, Act June 19, 1886, provides:

"That section four thousand two hundred eighty-nine of the Revised Statutes be amended so as to read as follows: Section 4289. 'The provisions of the seven preceding sections, and of section 18 of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June twenty-sixth, one thousand eight hundred eighty-four [23 Stat. 57], relating to the limitations of the liability of the owners of vessels, shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.'"

The seven preceding sections include section 4483, R. S. Section 18, referred to, reads:

"That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action, nor shall the same apply to wages due to persons employed by such shipowners."

And claimants contend that the petitioner, claiming the benefits under this section, must be held to the limitations placed upon it and thus stand at the bar of the court on a parity with domestic owners, and that the issue here upon the named statutes is concluded by the expression given in *La Bourgogne*, supra, where the court says (210 U. S. at page 116, 28 Sup. Ct. 671, 52 L. Ed. 973):

"The petitioner is here seeking the benefits conferred by a statute of the United States, which it could not enjoy under the general maritime law. Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the absence of privity or knowledge, the benefits of the statute should be awarded. It is true that under the rules promulgated by this court the petitioner is accorded the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and, as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise"

—and (210 U. S. on page 140, 28 Sup. Ct. 680, 52 L. Ed. 973) where the court says:

"Moreover, as we have said previously, as the petitioner is here an actor, seeking to avail of the benefits of a statute of the United States, it becomes the duty of the courts of the United States to determine the question of fault by the International Rule as they interpret it. And in the nature of things it cannot be that the vessel which seeks the benefit of the law of the United States can be held to be in fault and not in fault concerning the same act or acts."

And in support they say that the English and Canadian decisions are to the effect that, on application for limitation of liability under such laws, foreign ships are given the same status as British or Canadian ships. Halsbury, in his *Laws of England* (1914) vol. 26, p. 375; Mayer, *Admiralty Law and Practice of Canada* (1916) p. 143.

The issue here must be determined by our law as construed and applied by the Supreme Court. The statements of Chief Justice White in *La Bourgogne*, supra, must be considered in connection with the issue determined, having relation to the limitation placed in section 4400 to the issue here. In 210 U. S. at page 133, 28 Sup. Ct. 677, 52 L. Ed. 973, the Chief Justice stated:

"As originally enacted, the first chapter of title 52 of the Revised Statutes related generally to the subject of inspection of steam vessels. The second section (4400) excluded from the operation of the title 'vessels of other countries,' and therefore all the sections of that chapter, as well as of the following words: ' \* \* \* And all foreign steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of' seventeen enumerated sections. [These sections are set out in the original opinion]. When the sections thus enumerated are examined it becomes apparent that they were particularly designated because the amendment of their context was deemed especially appropriate to the fruition of the general purpose of the statute, which was to bring foreign steam vessels under the sway of the requirements of the laws of the United States as to equipment, inspection, etc., hitherto applicable only to domestic vessels."

Section 4400, title 52, was heretofore considered with relation to the approximation of the inspection laws of Canada to those of the United States, and the Canadian vessels to the requirements of title 52, but was not considered in any other relation. The amendment of section 4400 as set out in the opinion included 17 enumerated sections extending the provisions thereof to foreign vessels. Section 4493 is not included. Section 41 of the act of 1871, *supra*, provides:

"That this act shall not apply to \* \* \* vessels of other countries."

And this provision is carried forward to section 4400, which bears upon the congressional intent; and the status with relation to 4493 is not changed by the amendment of August 7, 1882, *supra*, and resort may not be had to legislation antedating December 1, 1873, in construing sections of Revised Statutes, unless there is uncertainty or ambiguity. *United States v. Bowen*, 100 U. S. 508, 18 L. Ed. 675. Here, however, resort is unnecessary, as 4400, *supra*, contains the provisions of the previous act. Justice Brown, in *The Oregon*, 158 U. S. 186, at 199, 15 Sup. Ct. 804, 810 (39 L. Ed. 943), says:

"Indeed, the forty-first section of the act [1871] expressly provides that it shall not apply to public vessels of the United States, or to vessels of other countries."

In view of the language employed by the Supreme Court, and granting limitation to foreign owners, it would, upon the express issue here, appear that this court is concluded, and from what is hereinafter stated further inquiry or analysis of this question is unnecessary.

Nor does the amendment of August 7, 1882 (22 Stat. 346), include section 4477, and when section 4400 was further amended March 1, 1895 (28 Stat. 699), exempting vessels of foreign countries having inspection laws approximating those of the United States under certain conditions from the provisions of inspection laws contained in title 52, section 4493 was withheld.

Article 16, International Rules, is a part of the general laws for the protection of life at sea, but is not a part of title 52, nor is it a part of title 48. The original enactment of the substance of this section was by Act of April 29, 1864, 13 Stat. 58 (Comp. St. § 7963). *Spencer on Maritime Collisions*, § 19, p. 37, says:

"In the year 1863 England adopted a system of rules or Orders in Council based upon navigation rules then prevailing upon the high seas. \* \* \* The English rules of 1863 were substantially adopted by Congress in 1864, and were adopted by a large part of the maritime world, and have been with slight alterations in force ever since."

Section 4233, R. S., was brought forward from article 16, Act 1864, *supra*. This act was amended in 1885 (23 Stat. 438, article 13):

"Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed."

Rule 21 of section 4233 (Comp. St. § 7963) reads:

"Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed."

The enactment of the International Code in August, 1890, replaced all prior legislation on that subject.

At the time of the enactment of the revisionary act of 1874, and also the act of 1871, *supra*, the substance of article 16 so far as it relates to this issue, existed as a rule of conduct upon the high seas, while a part of the act of 1871 in the arrangement of titles was placed under the head to which it logically belonged, navigation, the liability provided by section 43, *supra*, is restricted to a violation of the provisions of the act, and primarily the act deals with inspection. From its inception the enjoined duties of article 16 were set forth in the act of 1864, and were not incorporated in the act of 1871, but were carried forward to 4233 under title 48, and by this separate and distinct legislation the intent of the Congress appears plain that the liability imposed by section 43, carried into 4493, did not concern a violation of the enjoined duties under the act of 1864 carried into 4233, R. S., which are replaced by article 16, *supra*. The Virginia and The Anna Faxon were erroneously applied to this issue. In The Virginia (D. C.) 264 Fed. 986 at page 996, it is said:

"The inspection laws and regulations were not obeyed and this disobedience had its part in causing the deaths, the injuries to the passengers, and the loss of their baggage."

Careful consideration has been given to this issue, and there is no conclusion that I can reach from any view of approach other than that the conclusion granting limitation of liability only to cargo is erroneous. This court is limited by express legislation as construed and applied by the Supreme Court. Legislation is a matter for the Congress, and not a matter of decree by the court.

Liability should be limited to passengers and baggage, as well as cargo.

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## BANCO NACIONAL ULTRAMARINO v. NEWTON, Collector of Customs.

(District Court, E. D. New York. October 19, 1921.)

1. Customs duties  $\S$  55—In action against collector, defense that he was acting for disclosed principal held good.

In an action against a collector of customs for delivering plaintiff's property to a third party, a separate defense alleging that defendant acted solely as the known and disclosed agent and officer of a known and disclosed principal, to wit, the United States, and was acting solely in his official capacity, was not insufficient to state a defense, though the trial may result in establishing that he was guilty of personal misconduct, neglect, or wrongdoing.

2. Pleading  $\S$  355—Separate defenses questioning sufficiency of complaint and jurisdiction of court stricken on motion.

Separate defenses alleging that the complaint does not state facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the action, will be stricken on motion as surplusage; these being grounds of demurrer.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**3. Pleading ~~¶~~359—Separate defenses alleging that complaint did not show acts done under color of office stricken as sham.**

In an action against a collector of customs for delivering plaintiff's property to third parties, a complaint alleging that defendant was acting in his official capacity *held* to show sufficiently that he was acting under color of his office, so that a separate defense asserting that the complaint failed to set out the fact that the acts averred were committed by defendant under color of his office will be stricken as sham.

At Law. Action by the Banco Nacional Ultramarino against Byron R. Newton, Collector of Customs, District No. 10. On demurrer and motion to strike separate defenses. Demurrer overruled, and motion granted.

Richard M. Page, of New York City (William H. Smith, Jr., of New York City, of counsel), for plaintiff.

Wallace E. J. Collins, U. S. Atty., of Brooklyn, N. Y. (Frederick L. Kopff, of Brooklyn, N. Y., of counsel), for defendant.

GARVIN, District Judge Plaintiff has demurred to the fourth separate defense set forth in defendant's answer to the amended complaint upon the ground that the same is insufficient in law. The demurrer is brought on for argument, with a motion by plaintiff to strike out the "first," "second," and "third" defenses contained in defendant's answer, on the ground that they are irrelevant, and the "fifth" defense on the ground that it is sham.

[1] The action is to recover \$6,279, the value of 381 boxes of sardines, the property of plaintiff, which defendant, without authority and unlawfully, delivered to the firm of R. C. Williams & Co., after he had taken possession thereof in his official capacity. The fourth separate defense is alleged thus:

"That in and about all the matters and things averred and purported to be averred in the amended complaint, the defendant was in all things acting solely as the known and disclosed agent and officer of a known and disclosed principal, to wit, the United States of America, and was acting solely in his official capacity for the said disclosed principal, and in pursuance of and conformity with the duties imposed upon him by law."

While a trial may result in establishing that the defendant was guilty of personal misconduct, neglect, or wrongdoing, for which he must respond personally to plaintiff, as held in the cases of *Brissac v. Lawrence*, Fed. Cas. No. 1888, 2 Blatchf. 121, and *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. Ed. 203, the court is not justified in holding that an allegation that defendant acted in pursuance of and in conformity with the duties imposed upon him by law is no defense. Indeed, it is difficult to conceive of a defense more perfect. The demurrer must be overruled.

The first three defenses contained in defendant's answer are (1) that complaint does not state facts sufficient to constitute a cause of action; (2) that the court has no jurisdiction of the subject of the action; (3) that there is a defect of parties, in that R. C. Williams & Co. is not a party defendant. Defendant consents to the striking out

~~¶~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of the third defense, and to that extent the motion to strike out will be granted.

[2] The first and second defenses are grounds of demurrer. They have no proper place in an answer, are surplusage, and the motion to strike them out will be granted.

[3] Plaintiff moves to strike out the fifth defense as sham. This defense is as follows:

"That the complaint fails to set forth facts sufficient to constitute a cause of action against the defendant, in that it fails to set forth the fact that all the matters and things averred and purporting to be averred in the complaint were committed by the defendant while acting under color of his office."

An examination of the amended complaint discloses that the action is brought upon the theory that that defendant was acting "in his official capacity," which is only another way of saying "under color of his office." This is clear from the wording of paragraphs fourth, fifth, seventh, and ninth of the amended complaint, which read:

"Fourth. In or about the month of January, 1920, a shipment consisting of three hundred and eighty-one (381) cases of imported sardines (hereinafter called the "articles") arrived on board the Steamship Goa at the port of New York and were discharged from said steamship and entered at the custom house at said port by the firm of R. C. Williams & Co., of New York City (hereinafter called the "firm") with the permission and consent of defendant, as such collector, acting through his official representatives, and defendant thereupon took possession of said articles in his said official capacity. The custom house entry numbers assigned to said articles were No. 97258 for three hundred and thirty-one (331) cases and No. 98728 for fifty (50) cases thereof.

"Fifth. As shown by the manifest and papers of said steamship, the articles were consigned to the order of the shipper, F. V. Rocha Leao (hereinafter called the "shipper"), but were delivered, in or about the month of January, 1920, by the defendant, as such collector, acting through his official representatives, to the firm without the production or surrender of the bill of lading therefor, upon the delivery to the defendant, as such collector, of the indemnity bonds hereinafter referred to."

"Seventh. At or prior to the time of the delivery of said articles to the firm, as aforesaid, the defendant acting under color of his said office and through his official representatives, demanded and received from the firm two (2) surety bonds of indemnity conditioned upon the production and delivery to the defendant, as such collector, of a valid bill of lading for the articles, properly indorsed by the shipper or consignee as the case might be, within thirty days from the date of such bonds, one of which, bearing No. 8485, was in the penal sum of eight thousand five hundred dollars (\$8,500) and the other, bearing No. 8586, was in the penal sum of fifteen hundred dollars (\$1,500)."

"Ninth. It was the practice and custom of the defendant as such collector, through his official representatives, to deliver imported articles to alleged purchasers thereof, without requiring production and delivery of the order bill of lading therefor, upon receiving surety bonds of indemnity, as aforesaid, and this practice and custom were known to and authorized by defendant, acting under color of his said office, at all times mentioned in this complaint."

This defense should be struck out as sham. The court, therefore, concludes that the demurrer should be overruled, and that the motion should be granted.

**In re NOSTRAND LEATHER GOODS SHOP, Inc.**

(District Court, E. D. New York. November 9, 1921.)

1. **Bankruptcy**  $\S$  154—Purchaser returning lease and fixtures in condition in which received entitled to credit for agreed valuation.

Where a bankrupt, without complying with Personal Property Law, N. Y.,  $\S$  44, had transferred a stock of goods, lease, fixtures, and good will for \$3,000, \$1,000 of which was for the lease and fixtures, and was the fair value thereof, and the lease and fixtures were returned to the receiver in the same condition as when the transferee received them, he was entitled to be credited with \$1,000, the valuation of the lease and fixtures.

2. **Bankruptcy**  $\S$  303 (1)—Purchaser, who did not keep record of sales, not entitled to complain that doubts as to amount of property are resolved against him.

Where one to whom a bankrupt had transferred a stock of goods without complying with Personal Property Law, N. Y.,  $\S$  44, made sales and kept no record thereof, he could not complain if doubts as to the amount of goods sold were resolved against him.

In Bankruptcy. Application by Louis Hamburg for the return of certain property to him by Thomas J. F. Kirk, receiver in bankruptcy of the Nostrand Leather Goods Shop, Inc. On report of a special commissioner. Report confirmed.

Emanuel F. Kirk, of Brooklyn, N. Y., for petitioner.

Leon Dashew, of New York City, for trustee.

GARVIN, District Judge. An application was made by Louis Hamburg to compel Thomas J. F. Kirk, receiver in bankruptcy herein, to turn over 12 promissory notes, aggregating the sum of \$1,000, a chattel mortgage given to secure payment thereof, and the sum of \$1,181.21. The receiver appeared and filed an answer in writing, thus raising issues which were referred by the court to a special commissioner, who has filed a report, which is now before the court for confirmation.

Shortly before the petition in bankruptcy was filed, the bankrupt transferred its entire stock, lease, fixtures, and good will to Hamburg for a consideration of \$2,000 in cash and \$1,000 in notes. A receiver in bankruptcy was appointed, who took possession of the property, and has now attacked the validity of the transfer, upon the grounds that it was a transfer of merchandise in bulk and that five days' notice to creditors was not given, as required by section 44 of the Personal Property Law of the state of New York (Consol. Laws, c. 41). There is apparently no dispute that the sale was void. The question involved has to do with how much the trustee in bankruptcy, since elected, is entitled to hold.

When the transfer to Hamburg was made, it was agreed between the parties that, of the total consideration of \$3,000, \$1,000 represented good will, lease, and fixtures, and the balance the value of the stock of merchandise. The special commissioner has found that the receiver came into possession of the following: Received from the bankrupt, \$1,050; received from Louis Hamburg, cash, \$325; received from

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Louis Hamburg, notes, \$1,000. In addition, the receiver took the fixtures, lease, and some merchandise.

Hamburg contends that the fixtures and lease were worth \$1,000, and the merchandise which was turned over to the receiver \$1,824.45. The receiver (now the trustee) contends that the merchandise, lease, and fixtures have a valuation of the amount brought when they were sold at auction, which was \$1,438, and no more. No evidence was adduced that, at the time of the attempted transfer by the bankrupt, \$1,000 for the lease and fixtures and \$2,000 for the stock, the prices agreed upon by Hamburg and the bankrupt, were not fair valuations.

[1] The record shows that the lease and fixtures were delivered to the receiver by Hamburg in the same condition as when Hamburg received them from the bankrupt. It follows that the conclusion of the special commissioner that Hamburg should be credited with the agreed valuation of the lease and fixtures, to wit, \$1,000, is correct.

[2] Hamburg took possession of the property late in May. He continued business, and sold from time to time a part of the stock, until June 10, keeping no record of sales, and replacing all or some of the goods sold, according to his own statement. From June 10 to June 20 the receiver was in possession. During this time Hamburg, with the consent of the receiver, sold goods worth approximately \$310, which he paid to the receiver. From June 20 to July 10, during which time Hamburg was again in possession, he continued to sell, keeping no record of sales. It thus appears that Hamburg, by his own conduct in failing to keep a record of sales, first by disposing of the property, and again by failing to make a record of sales, has made it impossible to ascertain the valuation of the property received by him. The observations of Judge Learned Hand in *Bentley v. Young* (D. C.) 210 Fed. 202, 31 Am. Bankr. Rep. 506, apply:

"In hastily removing and disposing of this stock, they have effectually prevented any accurate finding upon its value, and while in this suit I cannot penalize them for that, yet, when there is fair doubt, they who have destroyed the evidence must be content if it is resolved against them."

Applying these principles, the special commissioner has found that the receiver took possession of the following property:

Cash paid by bankrupt.....	\$1,050
Cash paid by Louis Hamburg.....	310
Value of fixtures and lease.....	1,000
Merchandise .....	1,022
Notes .....	1,000
Total .....	<u>\$4,382</u>

The commissioner has further found, as a result of the foregoing, that Hamburg should receive \$382, less \$50 paid him by a subtenant for one month's rent of apartment, and less \$83.33, one-third of the month's rental of the store, or \$248.67.

The trustee claims that the purchasers are entitled to no refund whatever, on the ground that the sale was fraudulent. The special commissioner has considered this claim and finds insufficient proof of fraud, a finding which is warranted by the record. The recom-

mendations of the commissioner that the expenses of the sale be charged to the trustee is proper.

The report of the special commissioner is confirmed.

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### THE ANGELO TOSO.

(District Court, E. D. New York. June 28, 1921.)

**Shipping** ¶141(1, 3)—Vessel held not liable for freezing of lemon cargo.

A steamship held not liable for damage to a cargo of lemons by freezing, where a part was shipped on a bill of lading expressly excepting damage by frost and the remainder on a bill excepting perils of the sea and loss or damage occasioned by causes beyond the carrier's control, and by reason of exceptionally stormy weather the ship was driven from her course, her rudder broken, and she was compelled to make the port of Halifax for repairs, where the freezing occurred without any negligence on her part.

In Admiralty. Suit by Anthony di Gristina against the steamship *Angelo Toso*; the *Societa Nazionale di Navigazione*, claimant. Decree for claimant.

Finkler & McEntire, of New York City, for libelant.

Loomis, Barrett & Jones, of New York City, for claimant.

GARVIN, District Judge. A libel has been filed to recover damages sustained as a result of the freezing of lemons, a part of the cargo of the steamship *Angelo Toso*, which left Palermo, Italy, on November 22, 1919, bound for New York. She stopped at various ports, including Messina. A portion of her cargo consisted of 5,849 boxes of lemons (including the 5,247 boxes referred to in the libel). Of these, 3,843 boxes were shipped at Palermo and 2,006 at Messina. The ship was two years old, in the best of condition, in every respect seaworthy, and in charge of a competent and experienced master. The lemons were packed and stowed in the most approved manner. During the voyage the usual precautions for the care of the cargo were observed. Shortly after the vessel left the Azores, she encountered a most unusual period of heavy weather, such as had never been equaled in the experience of her captain. These weather conditions caused the boat to leak, broke her rudder, and made it necessary for her to seek Halifax, the nearest available port—indeed, the only port toward which she could steer in her disabled condition.

After great difficulty she reached Halifax Bay on or about December 13, where she remained a week or more. There repairs were made as promptly as possible, after which she proceeded to New York. The weather at Halifax was bitterly cold; inasmuch as it appeared that, when the cargo reached New York and was being discharged on lighters, a large part of the lemons proved to be frozen, the conclusion is irresistible that they froze while the boat was being repaired at Halifax, and it is so found. The libelant states in his brief that it is of little consequence where the freezing occurred, in which event this finding is unnecessary.

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The bill of lading covering the Palermo shipment contained the following clauses:

"1. It is mutually agreed \* \* \* that the company shall not be liable for loss or damage occasioned by \* \* \* frost."

"In addition to the conditions stipulated in the foregoing clauses, especially Nos. 1 and 8, it is mutually agreed that fruit and other cargo liable to be affected by frost or weather conditions, and all perishable goods, are received and carried at the sole risk of the owners thereof, and may be discharged without notice at the ship's convenience, at the sole risk of the owners of the goods from frost or weather or other conditions, and such cargo becoming decayed may be destroyed or otherwise disposed of without notice, before or after arrival without any responsibility being incurred by the company."

The bill of lading under which the Messina shipment was made reads in part as follows:

"It is mutually agreed as follows: First. The ship and carrier shall not be liable for loss and damage occasioned by perils of the sea or other water, \* \* \* breakage of shafts \* \* \* or other accidents of navigation of whatsoever kind, \* \* \* nor for any loss or damage caused by heat, \* \* \* nor for any loss or damage arising from the nature of the goods, \* \* \* nor for any loss or damage caused by the prolongation of the voyage, \* \* \* nor for any loss or damage occasioned by causes beyond his control."

Because of the foregoing statement in libellant's brief, the proof upon the question of when the freezing occurred, which is well summarized in claimant's brief, will not be reviewed. The evidence establishes to the entire satisfaction of the court that the lemons were frozen at Halifax.

The loss occasioned by the lemons shipped at Palermo was the result of a cause excepted in the bill of lading. For such loss the carrier is not responsible, except negligence, of which there is no proof here, be established. *The Glenloch* (D. C.) 226 Fed. 971; *The Baralong*, 172 Fed. 220, 97 C. C. A. 24; *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573.

With respect to the lemons shipped at Messina, it appears that the bill of lading issued to cover them excepted "perils of the sea" and "any loss or damage occasioned by causes beyond his [i. e., the carrier's] control." It may be fairly said that, by reason of the ship being driven out of her course and necessarily being forced to make Halifax, an exceptionally cold port, where the lemons were frozen, the damage resulted from perils of the sea and from causes beyond the carrier's control, which could not have been foreseen or avoided, and which resulted in no way from the carrier's negligence.

The libel is dismissed.

**THE POCAHONTAS.****EAGLE OIL TRANSPORT CO., Limited, v. UNITED STATES,  
and five other cases.**

(District Court, S. D. New York. March 16, 1921.)

**Admiralty** **←43—Proceedings in rem for cause originating while vessel in public service is enforceable when such service ends.**

A vessel may become subject to a lien for collision or breach of obligation, though at the time in the possession and service of the government, and while such lien is not enforceable so long as the vessel remains in the public service, it becomes enforceable when the service terminates, and a subsequent purchaser takes subject thereto.

In Admiralty. Libel by the Eagle Oil Transport Company, Limited, as owner of the British steamship San Tirso, against the United States, as owner of the United States steamship Pocahontas, heard with the following libels: By the Almirante Steamship Corporation, as owner of the steamship Almirante, against the United States, as owner of the steamship Hisko; by the A. A. Wire Company, Inc., as owner of cargo on board the steamship Almirante, against the United States, as owner of the steamship Hisko; by Marcelino E. Conle, trading under the firm name of Marcelino E. Conle & Co., as owner of cargo on board of the steamship Almirante, against the United States, as owner of the steamship Hisko; by Wm. Litzrodt, trading under the firm name and style of Broedermann & Litzrodt, as owner of cargo on board the steamship Almirante, against the United States, as owner of the steamship Hisko, and by the Hain Steamship Company, Limited, as owner of the British steamship Trevanion, against the steamship El Dia (formerly known as the United States steamship Roanoke). On motion in each case to quash process and dismiss for want of jurisdiction. Denied.

Harrington, Bigham & Englar, of New York City, for A. A. Wire Co., Inc.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for Almirante S. S. Corporation, Hain S. S. Co., Limited, and Eagle Oil Transport Co.

Francis G. Caffey, U. S. Atty., of New York City, and James W. Ryan, Asst. U. S. Atty.

MANTON, Circuit Judge. In each of the above cases the United States has filed a suggestion. This is a motion whereby it is prayed that the court quash process issued herein and dismiss the libel, with costs, on the ground that the court is without jurisdiction. The claim is that each vessel is not subject to the jurisdiction of the court, because of the rule as to immunity from suit of a sovereign. It is said, because the subject-matter is not within the jurisdiction of the court, a suit in rem cannot be maintained because a maritime lien does not exist against a public vessel. The cause of suit arose while the vessels were in public service and then were immune from process.

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In well-considered cases in the District Court since, it has been held that a collision or breach of obligation created a lien, but that the lien was unenforceable while the vessel remained in the government's possession; that when such a vessel ceased to be in the government's possession, the lien against it is enforceable and process may be issued. *The Jeanette Skinner* (D. C.) 266 Fed. 396 (Judge Rose); *The Gloria*, (D. C.) 267 Fed. 931 (Judge Mack). The immunity which attaches to a public vessel merely prevents the enforcement of the lien which is created in favor of a libellant if his claim be good.

This rule may seem harsh as against a new owner, but the language of *Justice Brown* in *Tucker v. Alexandroff*, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, is pertinent:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. \* \* \* She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt, may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale." 183 U. S. 438, 22 Sup. Ct. 201, 46 L. Ed. 264.

The new owner must take the vessel subject to whatever lien exists against her, and he must therefore make inquiry as to the past of the ship and the liens thereon.

The objections to the jurisdiction of the court are overruled.

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### THE NEWARK.

(District Court, S. D. New York. March 17, 1921.)

**Admiralty** ¶43—May proceed against vessel for acts while in public service, when such service ends.

A lien for a tort may attach to a vessel while in possession and control of and being operated by the government, and is enforceable on a return of the vessel to private ownership and control.

In Admiralty. Suit by the Standard Oil Company of New Jersey against the Steamboat Newark. On exceptions to suggestions of United States attorney. Exceptions sustained.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter, of White Plains, N. Y., of counsel), for libellant.

Francis G. Caffey, of New York City (James W. Ryan, of counsel), for claimant.

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KNOX, District Judge. While it is true that the Newark, at the time of the commission of the tort alleged against her, was in the possession and control of the United States, and manned and officered by the Navy Department, she is not, now that she has been returned to private ownership, immune from liability for the tort of which she is said to be guilty.

A very similar, if not the precise, point here involved was before the court in *The Gloria* (D. C.) 267 Fed. 929. Judge Learned Hand there held that a lien might accrue against a ship at a time when she was a part of the United States Navy and solely engaged in the transportation of troops, and further that such lien would survive the transfer of the vessel's possession by the United States. To the same effect, in this district, is the case of *The F. J. Luckenbach* (D. C.) 267 Fed. 931, wherein Judge Mack followed the ruling of Judge Hand.

Subsequent to the above mentioned decisions the case of *The Jeanette Skinner* (D. C.) 266 Fed. 396, came before Judge Rose, of the District of Maryland, and he ruled to the same general effect. The judges who sat in the above cases apparently had no doubt that the position assumed by them was supported by *The Siren*, 7 Wall. 152, 19 L. Ed. 129, and so it seems to me. I am not unmindful of what was said by Chief Justice Waite, while on circuit, in *The Fidelity*, 8 Fed. Cas. 1189, No. 4,758; but the sweeping effect of what was there said was, it would seem, very much limited by the Supreme Court in its decisions in *Workmen v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

At all events, two judges sitting in this district have resolved the question adversely to the contention of the government. That fact, standing alone, would be quite sufficient to warrant a similar ruling upon my part, even if I were inclined to disagree with the conclusions of my colleagues. I believe, however that *The Gloria* and *The F. J. Luckenbach* were rightly decided, and I shall follow them. In addition to the foregoing decisions in this district, I understand that in the case of *Eagle Oil Transport, Ltd., v. United States of America*, as Owner of the U. S. Steamship *Pocahontas et al.*, 278 Fed. 214, Judge Manton, sitting in the District Court, handed down on March 16, 1921, a decision in which he holds to this same effect.

Libelant's exceptions to the suggestion of the United States attorney will be sustained.

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### UNITED STATES v. BOOKBINDER.

(District Court, E. D. Pennsylvania. February 11, 1922.)

No. 78 June Sess., 1921.

1. Criminal law — 694—Motion to quash search warrant held proper procedure.

Where accused was indicted for violation of liquor laws, and intoxicating liquors in his possession had been seized by a search warrant, and the admissibility of the seized liquor in evidence in his trial depended on the lawfulness of the seizure, a motion, before the trial, to quash the

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- warrant as unlawful, *held* a proper mode of procedure to determine such preliminary question of admissibility.
2. Searches and seizures ¶7—Defendant entitled to constitutional protection, even though enabling him to escape justice.
- The fact that the effect of according the right to a particular person to be secure from unreasonable searches and seizures under Const. U. S. Amend. 4, may be that he will go unwhipped of justice, cannot determine the court's action.
3. Searches and seizures ¶7—Warrant held properly issued on averment that liquors to be searched for were smuggled.

A search warrant issued on affidavit that liquors were smuggled, under the acts governing seizures of smuggled property, *held* issued on "probable cause," and was not a violation of Const. U. S. Amend. 4; it not being necessary that facts be averred in the affidavit and recited in the warrant which would make out a *prima facie* case against accused, or that the affidavit to those facts be made out by some one whose testimony would be evidentiary.

Prosecution by the United States against Emanuel Bookbinder. On motion to quash search warrant, etc. Motion denied.

T. Henry Walnut, Asst. U. S. Atty., and George W. Coles, U. S. Atty., both of Philadelphia, Pa.

J. Washington Logue, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Some questions were raised respecting the formalities attending the presentation of what we regard to be the substantial question before us. These formalities we will ignore, in order to get directly to this real question. It may be best presented by following the mode of presentation adopted by counsel for defendant. This is to view it from the standpoint of the purpose of counsel for defendant in raising the question.

[1, 2] The defendant is under indictment. It is allowable to anticipate the trial situation as it will or at least may arise. Intoxicating liquors were seized by the authority of the search warrant in question. These liquors are now in the custody of, or under the control of, the district attorney. They will, or at least may, be produced in evidence against the defendant. If the seizure of them was lawful, no objection to the admission of the evidence could be sustained. If, on the other hand, they were seized in violation of the defendant's constitutional rights, the trial court, in upholding these rights, would not permit any evidentiary use to be made of what had thus been unlawfully seized. A consequence is that the court could not determine the course of its action without first finding whether the seizure was lawful or unlawful. The purpose of this motion is to have this preliminary question determined in advance of trial. We see nothing in this which runs counter to any principles of either procedural or substantive law, and we do see in it much practical value. This view persuades us to meet the question now.

It is admitted, as it must be, that this defendant is within the protection of the constitutional principles voiced in the Fourth Amendment to the Constitution of the United States. The right invoked is

the right of every one to be secure in his person and effects against unreasonable searches and seizures. The plain duty of every court is to obey the plain command of the law that this right shall be kept inviolate. The fact, even though it be a fact which stares the court in the face, that the effect of according this right to a particular individual may be that he will go unwhipped of justice, plays no part in determining the action of the court. If exemption from search, and from arrest of his person, and from the seizure of anything of which he is in possession, is his right, it must be accorded to him; and if that right has been violated, the defendant must be saved from the consequences.

[3] This brings us to the main question of whether there has been shown in this case to have been any violation of the rights of this defendant. Property in his possession has been seized. This is nothing, or at least nothing more than a step toward the finding which must be made. No person is exempt from arrest or accompanying searches and seizures. His sole right to protection is against unreasonable searches and seizures. As a means of assuring to him this right of protection, no warrant can lawfully issue, otherwise than in accordance with the provisions of the Fourth Amendment. In the instant case a warrant did issue. The question then narrows itself to the one of whether the warrant issued "upon probable cause."

One of the averments of fact which figure in this cause is that the liquors in question were smuggled into this country in defiance of the laws regulating importations. The warrant which issued and the affidavit which supported it followed the provisions of the acts of Congress governing seizures of smuggled property. Comp. St. § 5769. These acts contemplate that warrants may issue upon the affidavit of one charged with the duty of preventing smuggling, but who has no other personal knowledge of the illegal transaction other than what has come to him upon information and belief. This, backed by an averment that the affiant believes just grounds of suspicion to exist, justifies the issuance of a warrant. The seizure without a warrant by a peace officer who saw a larceny committed, and who arrested and searched the thief in order to make the seizure, could scarcely be called unreasonable. The practice of seizing smuggled goods, which had been followed for many years, and with which our people were very familiar, could likewise scarcely be called unreasonable. We are, however, dealing with the case of the issue of a warrant, and, as it can only issue upon probable cause, we are brought directly back to this point. The law which was followed in this case became a law at the very session of Congress which proposed the first 10 amendments, including, of course, that in question. Act 1789, c. 5, § 24, 1 Stat. 43. It is a fair inference that, in the view of Congress, an affidavit of the kind which was made in this case showed probable cause.

Our conclusion is that the warrant issued in accordance with law and without a violation of any legal rights, constitutional or otherwise, of the defendant. This conclusion is undisturbed by the very plausible argument forcibly presented by counsel for defendant. An acceptance of the views voiced by this argument would mean that facts must

be averred in the affidavit and recited in the warrant which would make out a *prima facie* case against a defendant, and that the affidavit to these facts must be made by some one whose testimony would be evidentiary. We refuse to accept this view, and the refusal we think to be supported by authoritative cases, among which the following may be cited: *Locke v. U. S.*, 7 Cranch, 339, 3 L. Ed. 364; *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Gould v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; *U. S. v. Ray* (D. C.) 275 Fed. 1005; *U. S. v. Rykowski* (D. C.) 267 Fed. 866; *U. S. v. Kelih* (D. C.) 272 Fed. 484; *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; *Silverthorne v. U. S.*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; *Veeder v. U. S.*, 252 Fed. 414, 164 C. C. A. 338; *In re Tri-State Coal & Coke Co.* (D. C.) 253 Fed. 605; *Amos v. U. S.*, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654.

The ruling made is upon a distinction which should be kept clear between a seizure, as here, of smuggled goods and a seizure of liquors believed to be in stock for the purposes of illicit sale. The basic occasion for the seizure is wholly different. One is the fact of smuggling; the other is the fact of the commission of a crime. The seizure in the one case is justified by the fact that the goods were smuggled goods, irrespective of the guilt of the person in whose possession they are found. A close analogue in some respects is a seizure in replevin or attachment proceedings. In other words, the proceeding partakes somewhat of the character of a proceeding in rem. In the other case the seizure is justified only by the guilt of the person in possession. In other words, if this warrant had issued under the laws, the purpose of which is to punish those who make illicit sales of intoxicating liquors, it might well be held, both upon principle and under the authority of the cited cases, which are pertinent, that the warrant in this case issued improvidently. Indeed, the whole argument addressed to us is from this viewpoint. As, however, the seizure was of smuggled goods, neither the argument nor the cases which support it, apply. We could not condemn this seizure without condemning a practice which has been followed and upheld since the formation of our government and holding to be unconstitutional acts of Congress which have been enforced without question of their validity. The fact, if it be the fact, that the person in possession of the smuggled goods is holding them in stock for illicit sale purposes, does not relieve the goods from liability to a seizure to which they would be otherwise liable, nor does his guilt or innocence of the charge give to the goods an immunity which would not otherwise exist.

We are not unmindful of the fact that an indictment is pending against the defendant for a violation of the Volstead Act, nor do we feel inclined to take too technical a view of the real question which is involved. None the less we must face the situation with which we are confronted. This is that the seizure was of smuggled goods. The motion raises the question wholly of the lawfulness of this seizure. It may be that the district attorney has in mind to make use of the possession of what was seized as evidence upon the trial. Whether

or not it can be so used will then be determined. What we are now asked to do is to declare the seizure of smuggled goods to have been unlawful. This is what we decline to do, and the only question before us.

The motion is denied.

### THE BETTY.

(District Court, N. D. New York. February 10, 1922.)

1. Towage ⚡11(10)—Tugs must exhaust all reasonable efforts before abandoning tow.

Tugs are held to a high degree of diligence in endeavoring to save a tow to which they are attached, or which has gone adrift, and the tow cannot be abandoned until all reasonable efforts for its preservation have been exhausted.

2. Towage ⚡11(9)—Tug held negligent in not taking tow to windward shore.

Tug towing canal boats across Oneida Lake held, under the evidence, negligent, when storm came up, in not changing its course directly into the face of the wind, and taking the tow into calm water on the windward shore.

3. Towage ⚡15(2)—Burden on claimant of towing tug to show its fault did not cause injury.

When fault on part of tug, towing canal boats, was shown, the claimant of the tug, to escape liability, has the burden of showing that such fault did not cause injury and damage to the canal boats.

4. Towage ⚡12(1)—Owner of canal boats being towed across lake held at fault for not having sufficient anchors.

Owner of canal boats, wrecked while being towed across Oneida Lake, held at fault in not having sufficient anchors in the tow.

5. Towage ⚡15(3)—Damages divided, where neither party sustains burden of proving his fault did not cause or contribute to injury.

Where both the owner of tow and the owner of the towing tug were at fault, and neither party sustained the burden of showing that his fault did not cause or contribute to the injury and damage from wrecking of the tow, the damages and costs must be divided.

In Admiralty. Libel by James E. Conley against the steam tug Betty. Decree dividing damages and costs.

M. William Bray, of Utica, N. Y. (Thomas C. Burke, of Buffalo, N. Y., of counsel), for libellant.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for claimant.

COOPER, District Judge. The libel in this case was filed by James E. Conley, owner of three canal boats, against the steam tug Betty, for the loss of two of his boats and injury to a third on Oneida Lake, while in the tow of the Betty. On Thursday, September 22, 1921, the libellant's three canal boats, Michael Doran, Robert O'Neil, and H. Guest & Son, loaded with salt and coupled tandem, in the order named, left Mud Lock, on the Barge Canal, near Syracuse, in tow of the Betty on a 300-foot hawser, bound for Waterford. At Three Rivers the Betty picked up another and unloaded boat, the John Lane. This

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boat was placed on the starboard side of the tow, with her headline on the head boat and overlapping the second boat.

The boats reached Brewerton, at the westerly end of Oneida Lake, about 1 o'clock on Thursday afternoon. At this time the wind was blowing about 10 or 15 miles an hour. About four hours later, when there was comparatively no wind, they started from Brewerton, easterly across the lake, toward Sylvan Beach, the entrance to the Barge Canal at the easterly end of Oneida Lake. The wind began coming up from the south, and about 9 or 10 o'clock at night, when about 2 miles out from Sylvan Beach, the captain of the tug blew for the tow to throw off the line. The tow not responding, the Betty threw off the line and came back and lay to the leeward alongside the tow. The tug was headed, not toward Sylvan Beach, but toward Brewerton. The tug did not make any effort to push the tow into Sylvan Beach; the captain of the tug claiming that it was impossible to do so under the conditions existing. Two anchors were thrown out, one belonging to the tow, and one to the tug. These anchors were not sufficient to hold the tow and tug, and they drifted slowly during the next six or seven hours, and about 5 or 6 o'clock the following morning went aground on the beach on the north shore of Oneida Lake. While drifting, the tug had put a siphon into first one, then another, of the loaded boats, and had pumped out at intervals whatever water came into the boats.

The weather continued about the same during all that day, the 23d (Friday), and about noon the pumping ceased. Later in the day the tug took the light boat, the John Lane, with all hands, and went to Sylvan Beach. The three loaded boats were then only slightly damaged. The tug never went back to the stranded tow, but left Saturday morning. Saturday was a calm, fair day. Libellant, on arrival at Sylvan Beach on Friday night, communicated as soon as possible with the state tug at Syracuse, and arranged to have that tug come down and rescue the boats. The state tug arrived Saturday night, too late to do anything that day. Sunday morning the state tug went out to the stranded tow, pumped the water out of the boat in deepest water, and brought it into Sylvan Beach. This boat suffered only slight damage. A severe storm then came up, which prevented the state tug returning to the other two boats. Monday the state tug again went out to the tow, but the other two boats had gone to pieces and were wrecks.

The libellant contends that the tug was at fault, because she threw off the hawser and let the tow go adrift, instead of turning the tow due south into the wind and going to the south shore of the lake, where the water would be relatively calm, and also because, when the tug joined the tow on the lee side, it did not endeavor to push the tow into Sylvan Beach into port, but, on the contrary, let it drift to its fate. The claimant contends that the tow became kinked up and unmanageable through the libellant's fault, thus requiring him to throw off the hawser; that it was impracticable to turn the tow at right angles and seek the south shore; and that he could not push the tow into port by attaching the tug on the lee side. Claimant contends that

the chief negligence is that of the libellant, in not having, as he contends, an anchor or anchors in good condition on each boat, claiming that with additional anchors the tow would have remained fast and weathered the storm. The claimant asserts that the sea was very rough and choppy, and a gale was blowing at the rate of 40 miles an hour. The libellant asserts that the wind was blowing about 10 or 15 miles an hour, and that the sea was not very rough.

The fact that it took the tow, with two anchors attached, nearly all night to drift about 2 miles to the beach on the north shore, and that the boats all survived this storm without material damage during that time, defeats the contention of the claimant as to the severity of the storm. *The Quickstep*, 9 Wall. (76 U. S.) 665, 671, 19 L. Ed. 767. The facts of the case probably are that sufficient wind was blowing and a sufficiently high sea running to cause the tow to be forced a little out of a direct line behind the tug, and thereby to twist the tug a little, so that the wheel occasionally came partly out of the water. This unloaded boat, the *John Lane*, high out of the water on the windward side of the tow, caught the full force of the wind. The effect of this was to force the tow in a northerly direction. The captain of the tug apparently became alarmed at the strain on his tug by the wind's tending to blow the tow in a northerly direction, and, the tow not responding to his whistle signals to throw off the hawser, he himself caused it to be thrown off. The tow, then being adrift in this storm, speedily became kinked up and unmanageable.

[1] Tugs are held to a high degree of diligence in endeavoring to save a tow to which they are attached, or which has gone adrift, and the tow cannot be abandoned until all reasonable efforts for its preservation have been exhausted. *Joseph F. Clinton*, 250 Fed. 977, 979, 163 C. C. A. 227; *Atkinson v. Scully* (D. C.) 246 Fed. 463, 466; *In re Moran* (D. C.) 120 Fed. 556, 564.

[2] The tug is guilty of negligence under the circumstances of this case. Instead of throwing off the hawser and letting the tow go adrift, the tug should have changed its course and gone at right angles, directly into the face of the wind and toward the southerly shore, where calm water was to be found. The libellant shows by competent witnesses that this was the natural and ordinary thing to do, and that it could be done, not only in the state of wind and wave as to which the libellant testifies, but also in the state of wind and wave which the claimant asserts existed at the time. The claimant offers none to the contrary. The record of this case itself establishes that such procedure was possible because, on the following day, with storm conditions nearly the same, this same tug did tow the light boat, *John Lane*, directly in the face of the wind in a southerly direction from the north shore of the lake to *Sylvan Beach*. If it could be done under substantially similar circumstances and for twice the distance on Saturday afternoon, no good reason appears why it could not have been done on Friday night.

[3] There being thus fault on the part of the claimant, the claimant, to escape liability, must affirmatively show that failure to adopt such a course did not in fact cause the injury and damage. *Coleman v. Aiken*,

242 Fed. 239, 243, 155 C. C. A. 79; *The Madison*, 250 Fed. 850, 852, 163 C. C. A. 164. This burden the claimant has not met. No weight is given here to the failure of the tug to go out to the tow Saturday, and bring in one or more of the boats, for the reason that the evidence is too meager to establish any fault on the part of the tug.

[4] As to claimant's contention that the libelant was at fault in not having sufficient anchors in his tow, and that, if he had had sufficient anchors, the tow would have ridden the storm, there is much force. The facts undoubtedly are that the tow had but the one anchor, which was used. Had there been an anchor on each boat, as claimant asserts, more anchors would have been used on the night in question. Moreover, there would have been no occasion to endeavor to obtain an anchor from the captain of the light boat, the *John Lane*, which anchor he said at the time he had in the hold of the boat, but could not get, because the boat was rocking so much in the storm that it was dangerous to go down into the hold.

[5] This was negligence on the part of the libelant. Knowing that he would have to cross the lake, and that storms were likely to arise, knowing it so well that he would not let his wife and children cross the lake on the boat, he should have provided himself with a sufficient number of anchors. The libelant, at fault, like the claimant, has also, like the claimant, failed to show that this fault did not cause or contribute to the injury and damage. The libelant, therefore, is held liable for negligence which contributed to the injury and damage. Neither party, therefore, having borne the burden in this case which was imposed upon him, the damages and costs must be divided. *The Westchester*, 254 Fed. 576, 578, 166 C. C. A. 134.

A decree may be entered accordingly.

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**PIEL BROS. v. DAY, Federal Prohibition Director, et al.**

(District Court, E. D. New York. February 7, 1922.)

1. **States** ⚡4—**Police power has not been delegated to federal government.**  
The police power has never been delegated by the several states to the federal government.
2. **Intoxicating liquors** ⚡2½, *New*, vol. 8A Key-No. Series—**Congress to exercise police power, if necessary, to enforce Prohibition Amendment.**  
If Congress cannot effectively enforce the Eighteenth Amendment to the Constitution, except by the exercise of the police power, it may exert such power.
3. **Intoxicating liquors** ⚡2½, *New*, vol. 8A Key-No. Series—**Congress did not abuse power in prohibiting use of beer as medicine.**  
In view of the experience of the states, indicating the necessity of making prohibition apply generally to all liquors of the given kind in order effectively to prevent their sale for beverage purposes, and of the general opinion in the congressional investigation to determine the medicinal qualities of beer, Congress did not abuse its power to enforce the Prohibition Amendment by enacting Willis-Campbell Act, Nov. 23, 1921, § 2, prohibiting the use of beer as a medicine.

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⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**4. Constitutional Law — 48—Statute upheld, unless clearly unconstitutional.**

Where it is not clearly apparent that a law is unconstitutional, it should be upheld.

In Equity. Suit by Piel Bros. against Ralph A. Day, Federal Prohibition Director for the State of New York, and others. On motion for preliminary injunction. Motion denied.

William M. K. Olcott, of New York City (Nathan Ballin, of New York City, of counsel), for complainant.

Ralph C. Greene, U. S. Atty., of Brooklyn, N. Y. (Frederick L. Kopf, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for defendants Day, Rafferty, Collins, and Blair.

GARVIN, District Judge. This is an action in equity, by which the plaintiff seeks to restrain the various defendants in their respective capacities from enforcing the provisions of the National Prohibition Law (41 Stat. 305) as supplemented by the act of Congress, approved by the President November 23, 1921, known as the Willis-Campbell Act, upon the ground that Congress exceeded its authority, so far as section 2 of the latter act is concerned. The case is before the court on a motion for a preliminary injunction.

Section 2 of the act provides:

"That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void."

The complainant asserts that the enactment is unconstitutional for these reasons:

(1) Because it is destructive of the personal liberty of the physician to prescribe and of the patient to be treated in such manner as the physician, from his knowledge and experience, deems best for the patient.

(2) Because it is an unwarrantable interference and destruction of the right of breweries to co-operate with physicians, patients, and druggists in the manufacture and sale of intoxicating malt liquors for medicinal purposes, a use never prohibited by the Eighteenth Amendment.

(3) Because the attempt of Congress to make such an enactment is not within its powers, as contravening that portion of the federal Constitution which limits to Congress the express powers delegated to it and expressly reserves to the states those powers not delegated.

(4) Because in the delegation of powers, the police power of internal regulation, in respect to the rights of citizens of states, and more particularly in regard to health, has never been a power delegated under the Constitution of the United States to Congress, and is therefore a power clearly reserved to the individual states under the general police power vested in them.

The Eighteenth Amendment to the Constitution provides:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation

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thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

It is now a part of the fundamental law. *Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946.

The National Prohibition Law, by which Congress sought to enforce this amendment, was enacted October 28, 1919, and has been held to be constitutional. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194; *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; *Rhode Island v. Palmer*, supra. Writing for the majority of the court in the last-mentioned case, Mr. Justice Van Devanter said:

"While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1) wherein liquors containing as much as one-half of 1 per cent. of alcohol by volume and fit for use for beverage purposes are treated as within that power."

The question then is narrowed to whether Congress has now gone beyond those "limits" to which the court referred.

[1] Without the Eighteenth Amendment, the Willis-Campbell Act would have been an attempted exercise of police power. That power has never been delegated by the states to the federal government.

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be misunderstood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states, and has never been conceded to the United States." *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, at page 625 (10 L. Ed. 1060).

[2] The authority of this decision is not questioned. If, however, Congress cannot effectively enforce the provisions of the Amendment involved, except by the exercise of police power, it is well settled that it may exert such power.

"But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case*, 188 U. S. 321, 357; *McCray v. United States*, 195 U. S. 27; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 58; *Hoke v. United States*, 227 U. S. 308, 323; *Seven Cases v. United States*, 239 U. S. 510, 515; *United States v. Doremus*, 249 U. S. 86, 93, 94." *Hamilton v. Kentucky Distilleries & Warehouse Company*, supra.

In the case of *Ruppert v. Caffey*, supra, Mr. Justice Brandeis referred to the prevalence of opinion among Legislatures and courts of the several states that a liquor law, to be capable of effective enforcement, must—

"be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fer-

mented, malt or brewed liquors, to all liquors within that general description regardless of alcoholic content; or to such of these liquors as contain a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol."

[3] Thus it would seem that some states have considered it essential to the enforcement of their respective liquor laws to forbid absolutely the use of certain liquors for any purpose. Before the Willis-Campbell Bill was enacted, Congress conducted a careful investigation into the medicinal qualities of beer. Little was then said in its favor as a therapeutic agent. It may be conceded that it has always been considered as a beverage, rather than as a medicine, if any importance attaches to the amount consumed as a beverage as distinguished from the amount required by those who sought its medicinal qualities because of the advice of a physician, or of one who had benefited from its use. It would therefore appear that Congress deemed this legislation imperative to accomplish effective enforcement of the amendment, and at the same time was satisfied that there is little or no value in beer either as a therapeutic agent or as a galactagogue. The latter is disputed—bitterly disputed—by the complainant, which on the hearing of the motion filed numerous affidavits by physicians that beer has value as a medicine and is frequently prescribed under various conditions. If, having given due consideration to claims of such character, Congress has considered the legislation necessary to the effective enforcement of the amendment, it cannot be said that it has abused its power.

The case of *People v. Cole*, 219 N. Y. 98, 113 N. E. 790, L. R. A. 1917C, 816, is asserted by complainant to hold in effect that the state has no more right to deprive the citizen of the inherent right to health and the right to be treated medically, as he deems best and his medical adviser deems best, than Congress. There the defendant was indicted for an alleged violation of the Public Health Law of the state of New York (Consol. Laws, c. 45), in that he assumed to practice medicine, not as an authorized and duly licensed physician, but as a Christian Science healer. The Public Health Law provides that—

"No person shall practice medicine, unless registered and legally authorized prior to September first, eighteen hundred and ninety-one, or unless licensed by the regents and registered under article eight of chapter six hundred and sixty-one of the laws of eighteen hundred and ninety-three and acts amendatory thereto, or unless licensed by the regents and registered as required by this article. \* \* \*" Public Health Law, § 161.

"The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." Public Health Law, § 160, subd. 7.

The statute also provides:

"This article shall not be construed to affect \* \* \* the practice of the religious tenets of any church. \* \* \*" Public Health Law, § 173.

The court held, in referring to the paragraph last quoted:

"Whether the practice of the religious tenets of any church should have been excepted from the general prohibition against the practice of medicine unless the practitioner is registered and authorized so to do, or whether the exception should be continued therein is a question for the Legislature and not for the courts. The purpose of the general statute is to protect citizens and others of the state from being treated in their physical ailments and diseases by persons who have not adequate or proper training, education or qualifications to treat them."

It is clear, therefore, that the case is no authority for the proposition that a citizen has any inalienable right to be treated medically as he deems best. It may be observed in passing, that Judge Faris has held the act to be constitutional in the case of *Falstaff Corporation v. Allen*, 278 Fed. 643, recently decided in the Eastern district of Missouri, although in that case there was no claim of medicinal value.

[4] In any event, where it is not clearly apparent that a law is unconstitutional, it should be upheld. *U. S. v. United Shoe Machinery Co.* (D. C.) 234 Fed. 127; *Interstate, etc., Railway Co. v. Mass*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. In view of the assumption of powers by Congress in the enforcement of the amendment, which have been sustained as valid, it cannot be said that it is manifest beyond a reasonable doubt that the act violates the fundamental law. That must appear, or the law must be upheld.

If these conclusions are correct, the motion for a preliminary injunction must be denied.

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**Ex parte RADIVOEFF.**

(District Court, D. Montana. February 6, 1922.)

No. 326.

1. Aliens ⇐53—Constitutional law ⇐318—Departmental regulations governing deportation proceedings are binding on the government, and compliance is essential to due process.

Departmental rules governing deportation proceedings, in so far as consistent with law, are themselves law, and binding on the government, as well as the aliens, and compliance therewith is essential to the due process of law guaranteed by the Constitution.

2. Aliens ⇐54—Fair hearing denied alien sought to be deported.

An alien, sought to be deported as advocating and teaching the unlawful destruction of property, etc., *held* denied a fair hearing, where the warrant of arrest was issued without probable cause, supported by oath or affirmation, the alien was made a witness against himself, the hearings were quasi secret, rather than open, the alien was not shown the evidence on which the warrant was issued, or given time to secure counsel, as required by department rule 22, and the government refused to produce a former inspector, whose statements were admitted in evidence, for cross-examination, unless the alien would state what he expected to prove and arrange for the inspector's compensation, contrary to rule 24, especially where the inspector at first assumed that the alien was bound to prove himself innocent, though this theory was ostensibly receded from.

**3. Aliens §54—Government witnesses must be produced for cross-examination, regardless of distance or expense.**

In deportation proceedings, verified or unverified statements of inspectors or others are ex parte, and incompetent, if the makers are not produced for cross-examination by the alien, no matter what the distance or expense involved in producing them.

**4. Aliens §54—Department's decision in deportation cases conclusive, when supported by evidence and hearing fair.**

If deportation proceedings are supported by substantial evidence and fairly conducted, the department's decision is conclusive on the courts.

**5. Aliens §54—Deportation proceedings reviewed, where not supported by material evidence or otherwise unfair.**

If deportation proceedings are without the support of substantial and competent evidence, or otherwise unfair, the department's adverse decision is subject to review in the courts, and to be defeated by habeas corpus brought by the alien.

Application by Nicholas Radivoeff for a writ of habeas corpus. Writ granted.

Harlow Pease and Nolan & Donovan, all of Butte, Mont., for petitioner.

John L. Slattery, U. S. Atty., and Ronald Higgins, Asst. U. S. Atty., both of Helena, Mont., for respondent.

BOURQUIN, District Judge. The Department of Labor detains petitioner for deportation, as an alien who advocates and teaches the unlawful destruction of property. He assails the proceedings as unfair to an extent that denied him due process of law. Heard herein, the evidence is that January 19, 1920, the department issued a telegraphic warrant to arrest the alien upon a charge as aforesaid. This warrant was without probable cause, supported by oath or affirmation. That day, with it armed, the department's inspector, Baldwin, arrested the alien. Immediately Baldwin administered an oath to the alien and interrogated him on material matters. He neither showed the evidence on which the warrant issued to the alien, nor waited the presence of counsel then selected by the alien, though the department's rule 22 provides that he shall do both. What this evidence was, and that it was ever shown to the alien, does not definitely appear.

Baldwin then suspended the hearing, some time passed out the service, and some 11 months later the hearing was resumed before Inspector Andrews. The alien had counsel, but Andrews, over his objection, excluded the public. Andrews stated the alien should be sworn, and show cause why he should not be deported, but, on counsel's objection, proceeded to introduce evidence in behalf of the government. Over objection, he presented what he said was a statement by Baldwin, neither dated, signed, nor verified, that Baldwin had purchased pamphlets, which are material matter. Likewise over objection, Andrews presented pamphlets which he said were those referred to in the statement, in an admitted receipt from the alien to Baldwin, and in the testimony of the alien at the hearing before Baldwin. Statement, receipt, and testimony are indefinite, save that the second and third are

that some pamphlets, undefined save some by title, in the third, were sold by the alien to Baldwin. These pamphlets are assumed to be of I. W. W. and Communistic philosophy, and some of them contain scant references indicating approval of sabotage. In endeavor to obviate objection to the pamphlets, Andrews interrogated Bolling, whose testimony, rather confused and conflicting, is that after the hearing began he had purchased some pamphlets, like some introduced as aforesaid, from the alien; that the purchase was made at a hall where met a labor union branch of the I. W. W., of which the alien is secretary.

The importance of the pamphlets and due proof of them is indicated by the Secretary of Labor's decision of February 5, 1920, that against the alien the "charges are sustained by proof that he sold a number of I. W. W. publications in the record, which advocate and teach the unlawful destruction of property." The alien requested that Baldwin be produced for cross-examination. Andrews expressed willingness, provided the alien state in writing what was expected to be proven by Baldwin and arrange for the latter's compensation. This the alien refused. Department rule 24 provides that the alien shall have opportunity to cross-examine those who have testified for the government, and that the conditions aforesaid imposed by Andrews apply to witnesses for the alien for whom he desires subpoenas.

[1] The alien submitted no evidence. That the proceedings were unfair and prejudicial, and denied due process of law to the alien, is clear. Not only general principles of law were violated, but also the department's rules. These latter, in so far as consistent with law, are themselves law, and, be it noted, law for government—for the department—as well as for aliens. In connection with the general law of the land, the rules constitute for aliens in deportation proceedings the due process of law guaranteed by the federal Constitution to all men. The object is obvious, viz. so that the "vast power of the Secretary of Labor, judicial in its nature, capable of infinite abuse and tyranny, little restrained by the constitution, procedure, publicity, responsibilities, and traditions that hedge about a court, and little controlled, save by his honor and conscience" (Tam Chung [D. C.] 223 Fed. 802), shall "be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved." *Kwock Jan Fat v. White*, 253 U. S. 464, 40 Sup. Ct. 566, 64 L. Ed. 1010. All to the end that trials result in justice, with what is of only lesser importance, an appearance of justice.

[2] In addition to the unsupported warrant, the alien a witness against himself, quasi secret rather than open and public hearings, which it is not determined of themselves alone would be fatal to fairness, there is flagrant disregard of the department's rules and of the general law of evidence and procedure. The object of rule 22, to enable the alien to prepare for hearing and therein to have counsel, not partially, but throughout, was defeated, probably in conformity to the secret circular of the time, and set out in the Colyer Case (D. C.) 265 Fed. 46.

So, too, the great test of truth, cross-examination of adversary witnesses, provided by rule 24, was denied the alien. The conditions

precedent imposed by Andrews, by the rule, relate to the alien's witnesses, and not to the government's witnesses. To disclose what the alien expects to prove by cross-examination is subversive of the object of cross-examination, is violative of settled procedure, and is contrary to said rule. In *re Jackson* (D. C.) 263 Fed. 110.

[3] In deportation hearings, if the department resorts to statements, whether or not verified, by inspectors and others, failing to produce the makers of the statements for the alien's cross-examination, it cannot escape the consequences of *ex parte* and incompetent evidence by any plea of distance and expense. Without cross-examination, too often the alien is helpless. *U. S. v. Uhl* (C. C. A.) 266 Fed. 38 is illustrative. Therein the alien was deported upon a charge like that of the instant case, and the only evidence thereto was an affidavit that the alien had been heard to say that if "the strike is not settled" he would "blow up the shops." The alien, examined on oath at the hearing, denied he had said it. The maker of the affidavit, whom the inspector later said was "a private detective hired by the city" of the strike, was not produced nor requested to be produced for cross-examination—"out of town," and the affidavit prevailed over the alien's denial.

The application of settled principles of finality of the department's decisions upon conflicting evidence, certainly strained to the limit, denied the alien the relief of habeas corpus. The frequent great injustice in deportation proceedings in part has been incited by a theory that obsessed the department that it is enough to accuse the alien to justify deportation, if he cannot show cause to the contrary; that is, that the government need not prove him guilty, but, on the contrary, he must prove himself innocent.

This is seen in rule 22, paragraph 5, which provides that, the alien arrested, he shall have a hearing to "show cause" why he should not be deported; the warrant of arrest is likewise. Baldwin so advised the alien, and upon that pretense virtually made him a witness against himself, and Andrews insisted the hearing should so proceed, desisting only upon counsel's vigorous assertion of the alien's rights. But though the theory be ostensibly receded from, who can tell to what extent the obsession secretly affects procedure, consideration, and weight of evidence, and decision—to what degree it prejudices the alien's case? It is the psychology of executive power that would be arbitrary everywhere and responsible nowhere. In justice to the inspectors, they but obeyed instructions of the time, secret instructions, intended to take an unfair advantage of aliens rightfully relying upon public law and rules. Comment is unnecessary. And that injustice aforesaid, doubtless only partly disclosed by many cases in the books, is responsible for the argument advanced that too often it is in relation to controversies between employers and employees, is a recognized strategy in breaking strikes, and that the employers' interests are the occasion of both exercise and abuse of the power of deportation.

In the instant proceedings is evidence indicating a like controversy involving the union or I. W. W. and petitioner. Departmental witnesses, government agents, testify to some association with employers' agents, and one frankly states that in Butte is "unquestionably some

grounds" for labor agitation. It well may be that strike zones afford "good hunting"—where passions aroused incite men to inconsiderate and violent speech, which, if by aliens, may serve as sufficient evidence to uphold a decision of the department for deportation.

[4] But the argument, however potent it might be before the department or Congress that controls the department, is of no avail in court; for the law is that, if the proceedings are supported by substantial evidence and fair, the department's decision is conclusive upon the courts. At the same time every thoughtful person must deplore even a semblance of justification for the argument. In it is obvious evil and danger, that ought to be avoided and can be avoided, but only by public, humane and just administration of the law of deportation.

[5] As a corollary to the rule aforesaid, the law also is that, if the proceedings are without the support of substantial and competent evidence or otherwise unfair, the department's adverse decision is subject to review in the courts, and to be defeated by habeas corpus in release of the alien. That is this case.

Writ granted.

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UNITED STATES v. BATEMAN.

(District Court, S. D. California, N. D. February 6, 1922.)

No. 446.

1. Constitutional law ⇨55—What is a reasonable search is a judicial question.

Whether a search is reasonable or unreasonable, within the meaning of the Fourth Amendment, is a judicial question, and Congress could enact no law declaring reasonable a search which the courts hold to be unreasonable, though it could pass an act prohibiting searches that were unreasonable.

2. Searches and seizures ⇨7—Adoption of Prohibition Amendment considered in determining reasonable search.

In determining what is a reasonable search, under the Fourth Amendment, the courts can consider the Eighteenth Amendment, prohibiting the sale of intoxicating liquor and empowering Congress to provide for its enforcement.

3. Intoxicating liquors ⇨246—Volstead Act impliedly recognizes right to search automobiles.

National Prohibition Act, § 25, prohibiting search warrants to search private dwellings, and section 26, authorizing seizure of automobiles transporting liquor unlawfully, and Act Nov. 23, 1921, § 6, making it a misdemeanor to search a private dwelling, impliedly recognize the right to search automobiles.

4. Intoxicating liquors ⇨249—Officers may, without warrant, stop and search automobiles for liquors.

In view of the impossibility of procuring warrants for the search of automobiles suspected of transporting intoxicating liquors, the officers have a right, without warrant, to stop and search automobiles, and the finding of liquor therein justifies the search.

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⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

L. L. Bateman was charged with violating the National Prohibition Act. On motion of the defendant for the return of property seized without lawful search warrant. Motion denied.

Joseph C. Burke, U. S. Atty., and T. F. Green, Asst. U. S. Atty., of Los Angeles, Cal.

Leo V. Youngworth, of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. The question raised by this motion is whether or not a prohibition enforcement officer can stop an automobile on a public highway and search it for intoxicating liquors, without the consent of the driver of the automobile, and without any warrant for arrest or search. This proposition involves the interpretation of the Fourth, Fifth, and Eighteenth Amendments to the Constitution of the United States. These amendments are of equal force and importance. It is plain that the Eighteenth Amendment cannot be enforced without legislation to enforce it, but as to the Fourth and Fifth Amendments, it does not appear that any legislation is necessary in so far as this question is concerned, except that legislation might be enacted for the purposes of stating under what conditions a search warrant may issue.

The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself, and the courts have often ruled in the enforcement of that amendment. Congress has passed a law extending and making additional conditions upon which a man may be examined; for instance, Congress has legislated that a man may or may not take the witness stand, and no presumption shall arise against such defendant, if he does not take the witness stand. Congress could not pass a law which would in any way compel a witness to give evidence against himself, for the courts would hold such a law unconstitutional.

[1, 2] As to the Fourth Amendment, Congress could pass no law which would have the effect of declaring a search to be reasonable, when in fact in the opinion of the court it was unreasonable. What is an unreasonable search and seizure, as specified in the Fourth Amendment, is a judicial question. In a note to the Revised Statutes (11 Fed. Stat. Ann. 354), the following is stated:

"The question whether a seizure or a search is unreasonable in the language of the Constitution is a judicial and not a legislative question; but in determining whether a seizure is or is not unreasonable, all of the circumstances under which it is made must be looked to."

This is undoubtedly the law. Congress, of course, could prohibit searches that were reasonable, but Congress could not authorize searches that were unreasonable. Congress has acted concerning the issuance of a warrant and by the Act of June 15, 1917, 40 Stat. c. 30, p. 228 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 $\frac{1}{4}$ a-10496 $\frac{1}{4}$ v), has stated the conditions upon which a search warrant may issue. This law, however, has no bearing upon the proposition before the court, except in so far as it specifies how search warrants may be procured. The act itself refers to property which has been

stolen or embezzled in violation of the laws of the United States, or property used as the means of committing a felony.

Congress on a previous occasion had expressly authorized custom officers to search for goods supposed to be in the United States in violation of the custom laws. These laws were in effect at the time of the adoption of the Eighteenth Amendment. The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment. If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure as disclosed in this case. In order, therefore, to enforce the Eighteenth Amendment, it is necessary for us to determine what is an unreasonable search or seizure.

[3] In adopting the Volstead Act (41 Stat. 305), Congress took into consideration the question of the right to search and seize certain conveyances. In section 25 of the Volstead Act, there is this provision:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

Here is an expression of Congress to the effect that in certain instances search warrants shall not be permitted. If Congress had been of the opinion that to search automobiles on a public highway without a search warrant was unreasonable, it certainly would have included, with the prohibition as to dwellings in section 25, a prohibition as to automobiles.

Congress had the matter directly before it when it enacted section 26, which contains the following language:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

It has been held by one court that that authorized the search and seizure of an automobile, transporting liquors, in violation of the law. *U. S. v. Crossen* (D. C.) 264 Fed. 459, 462. In the act of Congress approved November 23, 1921, section 6 provides as follows:

"That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor."

Again, if Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its convictions, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without reasonable cause.

It is my opinion that there is no legislation of Congress upon the subject of searches and seizures of automobiles, except as above specified, and the court must in each individual case determine, as a judicial question, whether or not the search and seizure of an automobile is an unreasonable search or seizure, in view of all the circumstances in the case.

[4] Let us now proceed to consider as a judicial question in this case whether or not it was an unreasonable search or seizure for the officer to have proceeded as he did without a search warrant. The Eighteenth Amendment went into force in January, 1919, and the first section reads as follows:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

There is now and has been ever since this amendment went into effect almost a continuous stream of automobiles from, at, or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case, or satchel, to search for intoxicating liquors, on the ground that that would be a violation of the Fourth and Fifth Amendments to the Constitution. If a suit case or satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such an affidavit cannot be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

Under those circumstances the Eighteenth Amendment would have been stillborn. The act of more than two-thirds of the House of Representatives, more than two-thirds of the United States Senate, in passing such Eighteenth Amendment, and all the states of the Union, with the exception of the two smallest, in approving the Eighteenth Amendment, would have been utterly futile, and would have brought about only chaos and confusion. At the time Congress passed the last act above referred to, automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search warrant. Therefore, if Congress had been of the opinion that it was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures, instead of leaving it to the courts to decide. I think the failure of Congress to act in this matter is a tacit approval

of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched.

Judge Bourquin, in the case of *United States v. Fenton* (D. C.) 268 Fed. 221, places the right to search an automobile upon the ground that, as soon as the liquor is transported in violation of the law, it is forfeited to the United States, and that the United States is then vested with the property and possession thereof; that the transporter has no right in the property, and, therefore, he cannot object to its being used in evidence. In support of that proposition, the following authority is cited: *Ex parte Morrill* (C. C.) 35 Fed. 261, 267.

The opinion of Judge Hand, in the case of *United States v. Welsh* (D. C.) 247 Fed. 239, and the reasoning therein, is directly in point, though the case is not on this particular subject.

It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search.

The motion will be denied.

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In re GILCHRIST CO.

Claim of WILLIAM FILENE'S SONS CO.

(District Court, D. Massachusetts. February 6, 1922.)

No. 19253.

1. Corporations ⇐484(3)—Dry goods company's guaranty of lease of another dry goods company held ultra vires.

Where dry goods company was organized in Massachusetts for the purpose "of buying, selling, jobbing, manufacturing, and dealing in dry goods and general merchandise, and carrying on the business of a department store," its guaranty of the lease of another dry goods company in that state held ultra vires, under Pub. St. Mass. c. 108, § 50, now G. L. Mass. c. 158, § 10, notwithstanding the claim that such guaranty was advantageous, as securing the location of the business of the guaranteed company near the store of the guaranteeing company, as tending to build up a shopping center.

2. Corporations ⇐484(3)—Power of one corporation to guaranty another's lease not affected by fact majority of stock in both held by one person.

As regards the power of one corporation to guaranty the lease of another corporation, the fact that the majority of the stock in both corporations was held by the same person was immaterial.

3. Corporations ⇐372—Charters to be fairly, not liberally, construed.

Corporation charters and agreements of association, since ordinarily they are drawn by interested parties, are to be construed fairly and justly, rather than liberally, as to the extent of powers conferred.

4. Bankruptcy ⇐316(3)—Obligation of guarantor on defaulted lease an absolute one.

Where lessee was in default when claim of the lessor on its guaranty was filed in proceedings against the bankrupt guarantor, the liability of the bankrupt had become absolute.

**5. Corporations ~~6~~416—Continued acquiescence of directors in corporation's guaranty, defectively executed, held to ratify it.**

Though corporation's guaranty was defectively executed, yet if the directors, with knowledge of the circumstances attending its execution, continued to acquiesce in it and failed to object to it, it would be regarded, *intra vires*, as the act of the company.

In Bankruptcy. In the matter of the Gilchrist Company, bankrupt. Claim of the William Filene's Sons Company was allowed by the referee, and bankrupt petitions for review. Referee's order vacated, and claim disallowed.

Sherman L. Whipple, of Boston, Mass., for bankrupt.

• Dunbar, Nutter & McClennen, of Boston, Mass., for creditor.

MORTON, District Judge. [1] This case grows out of a written guaranty by the Gilchrist Company, the bankrupt, to the William Filene's Sons Company, hereinafter called the Filene Company, of a lease executed by the latter to the William S. Butler Company of premises at the southwest corner of Washington and Winter streets, in the city of Boston. All three were Massachusetts corporations engaged in carrying on dry goods department stores. The Butler Company was located on Tremont street, the Gilchrist Company on the northwest corner of Washington and Winter streets, and the Filene Company on the southwest corner of Washington and Winter streets, directly opposite the Gilchrist Company.

The circumstances under which the guaranty was entered into are briefly as follows: William E. Butler was the treasurer and owner of a majority of the stock of the Butler Company. He was also the treasurer of the Gilchrist Company, and during negotiations over the lease became its controlling stockholder. The Filene Company was about to move out of the store occupied by it on the leased premises into a new building that had been erected for it on the northwest corner of Washington and Summer streets, diagonally opposite the old store; and was looking for a tenant for that store. Butler conceived the idea of taking lease of the old Filene store, and moving the Butler Company into it, and selling a better class of goods, and of organizing a new corporation, to be called "Everybody's Store," to go into the Butler store on Tremont street and continue that business, and of combining, to a certain extent, the management of the three stores, while keeping them separate and distinct.

The locality at the corner of Washington, Winter, and Summer streets appears, on the evidence presented, to have been the greatest center of the retail dry goods trade in Boston. The evidence for the claimant is to the effect that Butler thought, and was justified in thinking, that in addition to the advantage which the Gilchrist Company would receive, in common with other retail dry goods stores in the vicinity, from having Butler & Co. move into the old Filene store, there would be special advantages to it in having a friendly, instead of a possibly hostile, competitor, and in the co-operation between the two companies in regard to administrative offices, and to matters of

lighting, heating, advertising, buying goods, and in conducting their business in other ways to greater mutual advantage. I shall refer to this matter later, but I may say at this point that as to some of these things—e. g., advertising and the buying of goods together—it would seem that they could have been done to equal advantage if the Butler Company had remained in Tremont street.

Pursuant to the plan thus outlined, Butler entered into an agreement with the Filene Company for a lease of the store in question. The Filene Company required a guaranty. Butler offered that of the Butler Company (his scheme having contemplated at one time a lease to another company to be formed, which fell through), but it was not satisfactory to the Filene Company. Butler at that time did not control the Gilchrist Company, and his fellow stockholders in it refused to agree to its guaranty of the lease. Butler, in order to remove this obstacle, acquired a majority of the stock in the Gilchrist Company, and then offered its guaranty on the lease, which was accepted. A lease was taken to the Butler Company, and the guaranty was thereupon executed by the Gilchrist Company, though not, it is contended, so as to bind it. The lease and guaranty were both dated May 29, 1912. The Filene Company finished moving out September 2, and the Butler Company took possession under the lease the next day, September 3, 1912. On November 7, 1912, receivers were appointed by this court for the Butler Company, and also for the Gilchrist Company. The receivers of the Butler Company took possession on the day on which they were appointed, and on December 5th elected not to affirm the lease, and so notified the Filene Company. On December 9th the Filene Company entered by leave of court for breach of the conditions of the lease, and repossessed itself of its former estate. It is agreed that the Filene Company made all reasonable and proper efforts to obtain tenants, but was only able to do so at a loss. In March, 1913, an involuntary petition in bankruptcy was filed against the Gilchrist Company. An offer of composition of 50 per cent. was made by it, which was subsequently confirmed. On September 13, 1913, the Filene Company filed a petition for damages under the lease against the Butler Company which was finally allowed by the Supreme Court (*Filene's Sons Co. v. Weed*, 245 U. S. 597, 38 Sup. Ct. 211, 62 L. Ed. 497) for \$205,805.37, and a dividend of 15 per cent. paid thereon. The claim in this case was filed September 27, 1913. After numerous hearings before the referee, it was finally allowed by him for \$205,805.37. No objection is made to the amount. Thereupon the Gilchrist Company filed this petition for a review; and the case is here on the certificate of the referee, with the testimony and exhibits introduced before him.

The principal question is whether the guaranty was *ultra vires* the Gilchrist Company. It is also contended, as already noted, that the guaranty was not executed so as to bind the Gilchrist Company; that the claim is a contingent one, and therefore not provable; and that the execution of the guaranty by Butler as treasurer of the Gilchrist Company was a misuse of that company's credit for Butler's private benefit, with knowledge of or notice to the Filene Company, and therefore voidable by the Gilchrist Company.

A corporation can only do what by its charter, or agreement of association, or by the laws under which it is organized, it is authorized to do. But:

"Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property may be undertaken by the corporation and be within the scope of its corporate powers." *Teele v. Rockport Granite Co.*, 224 Mass. 20, 25, 112 N. E. 497, 498.

The claimant contends that the execution of the guaranty by the Gilchrist Company was reasonably incidental and auxiliary to its business, and therefore within the scope of its powers. No uniform rule has been or can be laid down as to what is or is not incidental or auxiliary. Each case must depend, first, on the nature of the powers granted; and, second, on the facts in the particular case.

The Gilchrist Company was organized under the Public Statutes of Massachusetts for the purpose, as stated in the agreement of association, "of buying, selling, jobbing, manufacturing, and dealing in dry goods and general merchandise and carrying on the business of a department store." Pub. St. c. 106, § 50, provided that—

A "corporation \* \* \* shall not direct its operations or appropriate its funds to any other purpose than that specified in its agreement of association or its charter, as the case may be."

See now General Laws, vol. 2, c. 158, § 10.

This does not forbid the use of its funds or property by a corporation for purposes reasonably incident to those for which it was created; but it does forbid their use for purposes which are not fairly included in the charter or agreement of association.

The Gilchrist Company being a Massachusetts corporation, and the guaranty being a Massachusetts contract to be performed in Massachusetts, the agreement of association and the guaranty must both be construed according to the law of that state. The leading case in that state, and one that is regarded as a leading case by the Supreme Court of the United States, and in other jurisdictions, is the case of *Davis v. Old Colony Railroad*, 131 Mass. 258, 41 Am. Rep. 221. See also *Teele v. Rockport Granite Co.*, supra. It is attempted to distinguish this case from that, but, it seems to me, without success. The Gilchrist Company, as has been said, is a corporation organized to engage in the business of buying, selling, jobbing, manufacturing, and dealing in dry goods and carrying on a department store. What it did in this case was to guarantee to the Filene Company the performance by another corporation, with which it was not in any way connected, of the conditions of a lease to the other corporation by the Filene Company of premises used and occupied by the other corporation—something entirely different from the business that the guarantor was authorized to do, and involving it in a liability of hundreds of thousands of dollars. There can be no comparison between the nature of the liability thus assumed and that incurred in indorsing or guaranteeing, for the purpose of realizing on it, the note of a customer taken in the course of trade, or that which may be assumed in the ordinary course of business to assist a prospective customer in order to secure his

trade. There is nothing, I think, in this case that warrants the application of the rule quoted by the claimant from *Railway Co. v. McCarthy*, 96 U. S. 258, 267 (24 L. Ed. 693), namely:

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

For an illustration of the circumstances to which that rule is applicable, see *Whitney Arms Co. v. Barlow et al.*, 63 N. Y. 62, 20 Am. Rep. 504. It should be noted, as bearing upon the equities, that the question of *ultra vires* was raised at or before the execution of the guaranty, and that the Filene Company was cognizant of it and was apprised of all material facts on which it depends.

The claimant seeks to justify the guaranty on the ground of the closeness of the relations between the Butler Company and the Gilchrist Company, and on the ground that the lease to the Butler Company would be of such advantage to the Gilchrist Company—not directly by reason of its occupancy of a portion of the premises, but as hereinbefore pointed out—that the guaranty should be regarded as fairly incidental and auxiliary to the main business of the corporation, and necessary and expedient to the protection, care, and management of its property. In other words, the argument is that, the purpose being laudable and the contemplated results beneficial, and the two corporations being closely allied, the guaranty should be regarded as within the corporate powers of the Gilchrist Company. But a transaction does not necessarily come within the powers of a corporation because advantageous to it. It was said by Lord Chancellor Cranworth in *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 345, 348, and quoted with approval in *Davis v. Old Colony Railroad*, supra, 131 Mass. 264, 41 Am. Rep. 221:

"That a company incorporated by act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be."

The question, however, whether the purpose to which it is proposed to apply the funds or property of a corporation is beneficial to the corporation, is, from another point of view, an important one. The claimant has, in effect, conceded, as I understand the evidence, that if the guaranty were an accommodation guaranty, it could not recover on it. See *Monarch Co. v. Farmers' Bank*, 105 Ky. 430, 49 S. W. 317, 88 Am. St. Rep. 310; *Humboldt Mining Co. v. American Mfg. Co.*, 62 Fed. 356, 10 C. C. A. 415. Even if the guaranty were within the scope of the powers of the Gilchrist Company, it might still be necessary to show that it was—or at least might reasonably be considered—advantageous to the Gilchrist Company, and that the directors were therefore justified in entering into it.

One department store may, no doubt, engage in transactions with another department store, which are not specifically described in the charter or agreement of association. Such ventures and undertakings as legitimately arise out of the business described in the charter or agreement of association are included within the scope of what may

be done. But the guaranteeing to the lessor of the performance by another corporation of the conditions of a lease to it of premises with which the guarantor has nothing to do, and involving a possible liability dangerously large as compared with the assets of the guarantor, cannot be said, it seems to me, to arise legitimately out of powers granted to carry on a dry goods business. The making of such a guaranty is not fair, either to the minority stockholders of the guarantor or to its creditors. It is not within the scope of the business which the former have invested in, nor within the legitimate risks of the business to which the latter have extended credit.

[2] In this connection it should be observed that using the words "ultra vires" in the sense in which they are used here, namely as meaning that the Gilchrist Company cannot do anything beyond what it is authorized by the agreement of association to do, the fact that major part of the stock of both the Gilchrist Company and of the Butler Company was in the same hands is of no consequence. If ultra vires, the guaranty would be void without regard to the ownership of the stock. It hardly seems necessary to observe that one corporation cannot enter into partnership with another, nor can a corporation do all the things that a natural person or an ordinary partnership similarly situated might do.

I cannot resist the conclusion that to a considerable extent the alleged interest of the Gilchrist Company in having the Butler Company on the opposite corner is fictitious and unsubstantial, and was suggested in an attempt to justify the guaranty. The able and experienced managers of the Gilchrist Company evidently saw no advantage to it in having the Butler Company on the opposite corner at all commensurate with the heavy liability which it assumed by guaranteeing the lease. The Filene Company's new store was diagonally across the street from the leased premises; but that fact did not deter the Filene Company from letting go of its old location. The Gilchrist Company, as before stated, was not at first contemplated as a guarantor; it was only brought in after Butler's first plan had fallen through. He acquired control of the Gilchrist Company for the purpose of having it guarantee the lease, in order to further his rather elaborate schemes of business extension. When the proposal for a guaranty by the Gilchrist Company was broached, doubt of its legality was suggested. Evidently the Filene Company was as anxious as Butler to have the lease and guaranty go through, and both parties endeavored to persuade themselves that it could properly be done. The interest of the Gilchrist Company—as distinct from the interest of Butler who controlled a majority of its stock—seems to have been little regarded and was certainly sacrificed. The case in this respect resembles *In re National Piano Co.*, Kilmer, Claimant (C. C. A.) 261 Fed. 733, in which the court expressed strong disapproval of cases in which the responsibility of a corporation is used for the personal advantage of the person who controls it and of the parties with whom he deals.

The case before me is not like those, for instance, of *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186, and *Kraft v. Brewery Co.*, 219 Ill. 205, 76 N. E. 372, cited by

the claimant, where what was done could perhaps be fairly said to be strictly incidental to the business which the corporations were authorized to do, though even in such cases as those the current of authority does not seem to have been altogether uniform. See *In re Liquor Dealers Supply Co.*, 177 Fed. 197, 101 C. C. A. 367, and *Humboldt Mining Co. v. American Mfg. Co.*, 62 Fed. 356, 10 C. C. A. 415. Nor is it like the case of *Zabriskie v. Cleveland, Columbus & Cincinnati R. R. Co.*, 23 How. 381, 16 L. Ed. 488, and the other cases cited from the Supreme Court by the claimant in that connection, namely *Railway Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117; *Green Bay, etc., R. R. Co. v. Union, etc., Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Jacksonville, etc., Ry. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515, and the case of *Marbury v. Kentucky Land Co.*, 62 Fed. 335, 10 C. C. A. 393, in all of which, either expressly or by reasonable implication, authority was given by charter or statute to do the things objected to. Nor is it to be likened to the case of *American National Bank v. National Wall Paper Co.*, 77 Fed. 85, 23 C. C. A. 33, in which there had been a purchase by a corporation at an execution sale in its favor, and what was complained of had been done by it to enable it to realize on the purchase.

This case seems to me, as I have intimated, more analogous to *Davis v. Old Colony Railroad*, *supra*, than to any of those cited by the claimant. In that case the defendant contracted to guarantee the payment of the expenses of holding "a world's peace jubilee and international musical festival" in the city of Boston. The ground of the guaranty was the increase in the number of passengers and in the amount of business that would result to the railroad from the jubilee and festival. In this case the Gilchrist Company guaranteed the lease on account of the advantages that it was believed would result to it from having the Butler Company located in the leased premises. It can make no difference, it seems to me, that the corporation in this case is a private business corporation, and in that case was a public service corporation. The question in this case, as it was in that, is whether the guaranty was within the powers granted to the corporation. In *First Nat. Bank v. Towner*, 239 Fed. 433, 152 C. C. A. 311 (C. C. A. 6th), on facts somewhat similar to those in this case, it was held that one corporation had no power to guarantee the debts of the other. The leading federal cases are referred to.

[3] Corporations constitute a large part of the business agencies of the country and differ greatly from each other in their powers. The charters and agreements of association under which they are organized and the laws relating to them should be fairly and reasonably construed. There is, it seems to me, no reason why they should be "liberally" construed, if by that is meant something beyond the reasonable intendment of the language used. Under all circumstances they should be justly construed, with due regard in each case to the purpose for which the corporation was created. Ordinarily charters and agreements of association are drawn by interested parties, who may be trusted to look out for themselves, and there is no reason why rules of construction should be modified in their favor. And persons

who deal with a corporation are bound to take notice of its charter powers.

The result is that the Gilchrist Company had no authority to enter into the guaranty, that there is nothing to prevent it from setting up the defense of ultra vires, and that the claim should be disallowed.

This renders it unnecessary to consider the other defenses, though I may remark that, except as stated, I am not particularly impressed by them, and agree in the main with the learned referee.

[4] The Butler Company was in default at the time when the petition in this case was filed by the Filene Company and the liability of the Gilchrist Company, if there was any, had, I think, become absolute.

Butler was no doubt deeply interested in getting the guaranty of the Gilchrist Company, and there is certainly ground for argument that there was a misuse of the Gilchrist Company's credit for his own private advantage. But it is unnecessary to decide this question.

[5] In regard to the questions relating to the execution of the guaranty, I am inclined to the opinion that if it was not executed as it should have been, and if the Filene Company, through its counsel, was chargeable with notice, nevertheless the continued acquiescence of the directors in the guaranty, with knowledge of the circumstances attending its execution, and their failure to object to it, warrant a finding that it should be regarded, if intra vires, as the act of the company.

The order of the referee is vacated, and an order may be entered disallowing the claim.

## GEORGIA RY. & POWER CO. v. RAILROAD COMMISSION OF GEORGIA.

(District Court, N. D. Georgia. January 26, 1922.)

### 1. Public service commissions ⇐23—Action reviewable by federal court only on constitutional grounds.

The action of a public service commission in prescribing rates to be charged by a public utility corporation is reviewable by a federal court only on the question whether it is an invasion of constitutional rights, and such collateral questions as are incidental thereto, and the presumption is in favor of its validity.

### 2. Public service commissions ⇐7—Value of franchise held properly excluded in fixing rates for a public utility.

A franchise for a public utility is granted on the implied condition that it shall be used for the public benefit and at reasonable rates of charge to the public, and in the computation of the value of the property used in the service by a public service commission for the purpose of establishing reasonable rates, which is only a method of enforcing such implied contract, the value of the franchise should not be taken into consideration, as it is neither taken nor impaired, but its use required according to the original contract.

### 3. Public service commissions ⇐7—Valuation of physical property.

In ascertaining the present value of physical property for rate-fixing purposes in a period of changing values, a decided tendency to higher or lower may be recognized and considered.

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**4. Public service commissions ¶7—Past earnings are not an element to be considered in fixing future rates.**

In establishing reasonable rates for a public service corporation, failure to earn a fair return in past years is not a factor to be considered, either by adding the deficiency to capital investment or amortizing it in future rates.

**5. Public service commissions ¶7—Income tax not allowable as an expense.**

In establishing rates for a public service corporation, the federal income tax is not allowable as an expense of the business.

In Equity. Suit by the Georgia Railway & Power Company against the Railroad Commission of Georgia. On motion for preliminary injunction. Denied.

Spalding, MacDougald & Sibley, Colquitt & Conyers, Rosser, Slaton, Phillips & Hopkins, L. C. & J. L. Hopkins, and J. Prince Webster, all of Atlanta, Ga., for plaintiff.

E. J. Reagan, of McDonough, Ga., for defendant.

Before BRYAN, Circuit Judge, and JACK and SIBLEY, District Judges.

SIBLEY, District Judge. By legislative act of February 16, 1856 (Laws Ga. 1855-56, p. 420), Atlanta Gaslight Company was granted a perpetual charter, with a franchise to make and sell gas for lighting purposes, in the city of Atlanta, and to lay its pipes and apparatus in the streets, alleys, and public grounds therein. By Act October 14, 1889 (Laws Ga. 1889, p. 1398), the franchise was extended to the furnishing of gas and electricity for all advantageous uses. No monopoly was granted, but one in fact exists. Many years since, the gas company leased its property and franchises to the Georgia Railway & Power Company, which has since operated them. This company voluntarily established a rate based on \$1 per 1,000 feet, which was used until November 1, 1918, when, on application to the Georgia Railroad Commission, which by law has authority to fix maximum rates for gas and other public utility companies, the rate was raised to \$1.15. A further raise was granted to a base rate of \$1.90 in February, 1921. This rate was reduced to \$1.65, effective June 1, 1921; the reduction being acquiesced in by the companies. After citation to show cause why further reduction should not be made, and after full hearing, an order reducing the rate to \$1.55 was made, effective January 1, 1922. A valuation of the property used was made by the commission, aggregating \$5,250,000; the value of the franchise being excluded, and likewise no allowance made for cost of financing. Estimation of net income was based largely on operations from July 1st to December 1st, under the \$1.65 rate, and the rate fixed as just and reasonable was supposed to yield between 7 and 8 per cent. clear on the investment. An injunction against the enforcement of this order is sought now, before any operation under it, on the ground that it is an unconstitutional invasion of the property of the two companies.

[1] 1. The rate attacked was fixed after full hearing, under laws providing therefor. The clear and comprehensive opinion of the Rail-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

road Commission recognizes as the applicable principles of law rules which we think are substantially correct, and it evinces a full and conscientious consideration of the evidence. Due process of law has been afforded. The real question is whether the rate so fixed is confiscatory—takes the use of private property for a public purpose without just compensation. As to that we express an independent judgment upon the case presented here, instead of reviewing the judgment of the Railroad Commission for error of law or fact, and the presumption is in favor of the action of the commission.

"We do not sit as a general appellate board of revision for all rates and taxes. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one." *San Diego Co. v. Jasper*, 189 U. S. 439, 446, 23 Sup. Ct. 571, 47 L. Ed. 892.

That question depends here on the value of the private property taken for use, and the compensation probably to be afforded by the rate fixed, as compared with the net returns received in the locality by other investments of capital of comparable security and permanency.

[2] 2. In estimating the value of the property whose use is taken, the commission excluded from consideration the value of the franchises of the gas company, we think correctly. That the charter is a contract upon sufficient consideration, that the franchises granted under it are private property, vendible and taxable as such, cannot be disputed. That they may not be taken from the owners for public purposes, or used adversely to the owners for such purposes, without just compensation, will not be denied. But the fixing of a just and reasonable charge to be made by a public service corporation is neither the taking from it of these franchises, nor the use of them, in the sense of the Constitution. Business which from its nature or from circumstances of monopoly is of public concern is undertaken with the implication that charges made the public therein shall be reasonable. Private property devoted thereto becomes affected with a public interest. Public regulation of the charges is but the enforcement of the duty to make only reasonable charges. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. It may be said that in a franchise granted to do such a business is implied a covenant that the charges shall be just and reasonable, as it has been said that all grants of public franchises are upon the implied condition that they shall be used for the public good, and if they are not used or are misused they may be revoked. *New York Electric Lines Co., v. Empire Subway Co.*, 235 U. S. 179, 35 Sup. Ct. 72, 59 L. Ed. 184, L. R. A. 1918E, 874, Ann. Cas. 1915A, 906.

As pointed out in *Munn v. Illinois*, this implication has existed from the earliest times, and did not first arise on the passage of regulatory legislation. The fixing of reasonable rates, where unreasonable ones have been charged, does not take the company's franchise nor impair it, but permits and requires its use according to its true original terms. If higher rates have been charged, and profits made greater than the investment should naturally and ordinarily earn, so far from the

franchise having acquired thereby any greater value, it has simply been abused. Regulation is no more than a form of sovereign visitatorial power. It does not deprive the owner of his franchise, nor take it or its use from him, but directs it to its proper and only legal use, to wit, the service of the public and the earning for its owners of just and reasonable returns. While used in the public service, like the other property devoted thereto, the franchise is not, like the other property, taken from other service of the owner. It is the public's own contribution to the business, whatever its value therein, and not a thing that either party to the charter could justly think was to become a charge on the public in the fixing of reasonable rates. Otherwise, the more liberal and valuable the franchise granted by the public, the greater would be the burden of rates the public would have to bear.

The absurdity of so regarding it becomes further evident in attempting to value it in rate fixing; for, if it has a value, as is usually stated, because it enables its possessor to earn larger returns than can be attributed to a fair return upon his physical and other intangible property, its value being the capitalization of this excess, a rate could never be reduced. To reduce it would be necessarily to decrease and impair the value of the franchise, because its earning power had been reduced. The owner of a public franchise, for which the grantee paid nothing, except what he invested in the business established under it, is not entitled to have the value of the franchise included in the estimate of his property taken for public use in fixing the reasonable rate to be charged under the franchise. If the franchise were purchased by a payment to the public other than in the investments in the business, such payment, of course, would be an additional investment to be regarded. Nor is the fact that the franchise is taxed as property material. Neither the fact nor the amount of taxation is of any consequence to the owner, because the tax paid is allowed as an expense of business and passed on to the customer.

As being to the contrary of this conclusion two cases having authority are cited—*Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, and *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382. The other cases cited depend upon the former of these, or are a part of the litigation dealt with in the latter. In the *Monongahela Case* the United States sought to condemn a system of locks and dams of the company, which had been lawfully erected under a franchise to take tolls on the transportation upon the Monongahela river, without paying anything for the franchise, which was confessedly valuable beyond the value of the physical property. Against the contention that the franchise was not taken, but only the property, the court said (148 U. S. 343, 13 Sup. Ct. 633, 37 L. Ed. 463):

"But this franchise goes with the property, and the navigation company, which owns it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the fran-

chise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

The distinction between putting the owner of the franchise completely out of the business of using it, and the requiring him by regulation to use it according to its true terms, hardly needs pointing out. This case establishes that a franchise, when taken from the owner, is property that must be compensated for, but does not establish that it is taken when rates are properly regulated.

In the Consolidated Gas Co. Case several companies were consolidated under legislation which expressly recognized as part of the property contributed to the consolidation the value of the several franchises, specifically put at over \$7,000,000, and which permitted this value to be represented by capital stock to that amount, which was issued and sold to the public and traded in for 20 years. The public, through its representative, the Legislature, having thus dealt, under these circumstances it was held that this \$7,000,000 of value must be included in the property on which a reasonable return was to be allowed, as otherwise this stock could have no income, a result evidently unjust. The court refused to permit any subsequent increase in the value of the franchise to be allowed, which ruling is equivalent to a declaration that franchise value is ordinarily not to be considered, for all values that are involved, it is well settled, must be allowed as of the time of making the rate. The court (212 U. S. on page 48, 29 Sup. Ct. 198 [53 L. Ed. 382]) was careful to say that the decision of the case was based upon its own peculiar facts, and not to be taken as a precedent in the valuation of franchises generally. The lower court, in further dealing with the case, trenchantly asserted the proposition that under ordinary circumstances franchise value should not be estimated in rate making. *Consolidated Gas Co., v. Newton* (D. C.) 267 Fed. 231, 240. We conclude that complainants are deprived of no constitutional right because their simple franchise to do business, which is all their charter gives them, even if it be perpetual as claimed, has not been valued as property whose use is taken from them.

3. The claim is made that the commission's allowance of \$441,629 over and above physical property values as "going concern value" was insufficient, and that \$500,000 ought to be added as cost of original financing. We recognize that the cost of financing a modern enterprise is commonly considered a part of the organization expense and chargeable as a capital investment. It is equally true that, when this company was organized, such outlays were more often treated as expense and retired from profits. What expense was actually incurred here, or whether it was carried as investment or retired by charging rates to cover it as expense, we do not know. We do not think it appears that in refusing to recognize this supposed investment, or in fixing the "going concern value," which of necessity is at last a matter of opinion, at a less sum than was claimed and sworn to, the commission violated any constitutional right of the complainants. The same is

true as to their conclusion upon the questions of fact as to proper depreciation and working capital allowance.

[3] 4. In ascertaining the present value of physical properties, though correct rules were announced by the commission, we do not think they were exactly followed. We agree that in a period of changing values a decided tendency to higher or lower may be judiciously noticed and considered, as was done in *Lincoln Gas Co. v. Lincoln*, 250 U. S. at page 268, 39 Sup. Ct. 454, 63 L. Ed. 968, and that a slavish adherence to cost of reproduction, less depreciation, is not required. Rates are not fixed every day, but are designed to have some degree of permanency, and the probabilities of the immediate future, if fairly evident, are part of the situation dealt with. The commission did not allow the appreciation claimed on the investment since 1914, nor did it deduct from the investments of 1919 and 1920, which were nearly \$1,000,000, their admitted reproduction loss, but it did allow the appreciation in market price of real estate. On the whole, averaging results, and remembering that values are at last matters of opinion, upon which witnesses and that of ourselves may be no better than that expressed by the commission, we think no constitutional wrong clearly appears.

[4] 5. Losses, or more properly failure to earn 8 per cent. net return on the values since fixed by the commission, are claimed during the years 1917, 1918, 1919, and 1920. During part of this time operations were under the rate voluntarily established by the company; during the rest, under raised rates allowed by the Commission. The claim that the failure to earn a reasonable return, if established, should now be either allowed as capital investment or amortized under this or future rates we cannot allow. To concede this as a right would be to guarantee income, and would raise a correlative duty to account for earnings beyond what were reasonable in the past. No limit could be placed to the period of the inquiry, nor could justice really be done by it to the individual stockholders or consumers actually concerned, for these are constantly changing. A rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that no legal right exists to have disappointments or surprises in results balanced.

6. We find on the whole that it does not clearly appear that a fair return will not be afforded by the rate fixed upon the investment of the complainants. Taking as a basis of reasoning, as did the commission, the experience of the five months, July, August, September, October, and November, during which the \$1.65 rate was effective, and excluding June, because its receipts may have been swollen from collections from the \$1.90 rate through the prepaid meters, we note a regular increase of consumption of about 10,000 M's feet of gas each month. This was due either to increased consumption because the rate had been lowered, or else to the longer nights and colder weather.

If the first cause was operative, it will likely operate further under the new rate. If the latter was, it will operate to make consumption in December, January, and February each equal to that of November. Giving all the chances to the complainants, and putting December as equal only to November, and supposing that a recession will occur in the spring to July's consumption, we find a consumption through December of 621,164 M's feet for six months, or a total of 1,242,328 M's feet for twelve months.

Again, comparing the net profits of the five months, they rise regularly from \$34,283.56 in July to \$47,697.67 in November. Part of this increase may be due to increased efficiency, consequent on increased production; but most likely it is mostly due to the decreasing price of raw materials and of some labor shown in the record. We might fairly assume that the net profit of the last month is the fair index for the future; but let us, as in the case of consumption, add to the profit shown for the five months a profit equal to that of November as representing December, and we have \$251,509.66 for this six months, or \$503,019.32 for twelve months.

[5] But we disagree with the commission in allowing the federal income tax as an expense of business. It is laid with substantial uniformity on all persons and businesses, certainly on all comparable to this. It is assessed on the net profit of business after it is done, and payable the following year. The rate of it has often not been fixed until late in the year affected. The acts laying the tax expressly declare it not to be allowable as an expense of business for the purpose of the tax. It is that part of the profit realized which is demanded by the government in return for its manifold services and protection. Though in some businesses the tax has been added to the price and passed to the consumer, this has not always been done. In banking and other money-lending businesses, usury laws were not relaxed because of the income tax. Usurious interest is not legalized, because the excess is to be paid over as income tax. Holders of government securities above the exempted amounts at so low a rate of return as  $4\frac{1}{4}$  per cent. must pay the tax out of it. To permit law-controlled businesses to pass this tax to the customer, except as it may come to be reflected in generally higher returns obtained by invested capital would be to subvert the policy of the law that imposes it, and, instead of placing them on an equal footing with other investments of capital of similar security and permanency, would be to give them an advantage. It appearing that a net sum of \$45,364.00 was distributed as normal federal income tax over the months dealt with above in the accounting of operating expenses and taxes, the above profits estimated for a year should be increased by that sum, making \$548,383.32 as the aggregate result.

This, however, being figured for a \$1.65 rate, must have 10 cents per M on the estimated consumption of 1,242,328 M's of gas, or \$124,232.80 deducted, giving \$424,150.52 as the probable income per year under the new rate, with no allowance made for increased consumption or reduced cost of production that seem quite probable. This income yields 8 per cent. on \$5,381,818, a value in excess of that found

by the commission; a yield of 7 per cent. on \$6,059,150, and 6 per cent. on \$7,069,176. So low a rate of return as 6 per cent. was upheld in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, when conditions were more stable than now. We, think, even were there considerable error in fixing values by the commission, that the rate would not appear to be clearly confiscatory, and subject to injunction before a trial of it.

The preliminary injunction should be refused.

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**CENTRAL CONSUMERS' CO. v. JAMES, U. S. Marshal.**

(District Court, W. D. Kentucky. January 18, 1922.)

**Intoxicating liquors** ⇐248—**Affidavit held insufficient to authorize issuance of search warrant.**

The affidavit of a prohibition agent that he obtained from the premises of the manufacturer samples of a liquid purporting to be a cereal beverage, that such samples were analyzed and found to contain one-half of 1 per cent. or more of alcohol, without stating by whom the analysis was made or producing the testimony of such person, *held* not to set forth "facts," required by Act June 15, 1917, tit. 11, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496½e), and by National Prohibition Act, tit. 2, § 25, to authorize the issuance of a search warrant and the seizure thereunder of a large amount and variety of property from the plant of the manufacturer.

Petition of the General Consumers' Company against E. H. James, United States Marshal, for restoration of property. Petition granted.

Alfred Selligman and Arthur B. Bensinger, both of Louisville, Ky., for claimant.

W. V. Gregory, U. S. Dist. Atty., of Louisville, Ky., for the marshal.

WALTER EVANS, District Judge. The plaintiff has asked for the restoration to it of the very large amount and variety of property which the defendant, acting in his official capacity, seized under a search warrant issued and placed in his hands by J. A. Craft, the United States commissioner here. The United States district attorney has moved to dismiss the claimant's petition, and thereby has been raised several important questions of law; no objection being made to the form of the proceeding.

On January 5, 1922, F. L. Hansbrough, federal prohibition agent (hereinafter called the agent), presented to the commissioner an application for a search warrant, and in its support presented two affidavits of his own and another of Henry Hunold. The first of the affidavits was contained in the verified application presented to the commissioner, wherein it was stated that on October 27, 1921, the claimant then operated and had since continued to operate an establishment, consisting of all the buildings, plant, machinery, and supplies described in the application. He further stated that—

"Based upon the statements contained in the affidavit of Henry Hunold, hereto attached and made a part hereof, deponent has reasonable cause to believe and verily believes, and therefore makes complaint on oath and says, that the herein referred to establishment has been and was, on or about the said 27th day of October, 1921, and is now being, operated in violation of Title II, sections 3 and 25, of the National Prohibition Act, and that there is contained therein intoxicating liquors and raw materials, and other property, including, among other things, cases, kegs, bottles, containers, vats, hops, malt, rice, syrup, sugar, mash, beer, coolers, and other materials being used and intended to be used in the manufacture and sale of intoxicating liquor fit for use for beverage purposes, containing one-half of 1 per centum or more of alcohol by volume, in violation of the said National Prohibition Act."

The affidavit of Henry Hunold is as follows:

"Affiant, Henry Hunold, first being duly sworn, states that he is a citizen and resident of Jefferson county, Kentucky, and that on or about October 10, 1921, he purchased from the Central Consumers' Company, of Louisville, Ky., one drum containing about two dozen bottles of beer, for which he paid the said Central Consumers' Company \$23, and that said beer is fit for use for beverage purposes."

If nothing more had been shown to the commissioner, no ground for the search warrant could have been seen. This being obvious, the agent made another and separate affidavit before the commissioner, in which, after setting forth practically the same facts as those appearing in the application for the search warrant in respect to the character and number of items of the petitioner's very extensive plant and its large and numerous contents, he says:

"That on or about October 12, 1921, the deponent, in the discharge of his duties as such agent, entered the bottling house of the hereinbefore described establishment, and then and there obtained from the pasteurizing tank samples of liquid purporting to be cereal beverage; that on or about October 18, 1921, he obtained from a drum containing eight dozen bottles in the saloon of Henry Hunold, 524 West Walnut street, Louisville, Kentucky, samples of beer which had been purchased by the said Henry Hunold from the Central Consumers' Company, Inc., as appears more fully from the affidavit of Henry Hunold, hereto attached and made a part hereof; that on or about October 27, 1921, he obtained from drums not labeled in the bottling house of the Central Consumers' Company samples of liquid purporting to be cereal beverage; and that said samples obtained as aforesaid were tested and analyzed, and found to be intoxicating liquor fit for use for beverage purposes, and containing one-half of 1 per centum or more of alcohol by volume, and were then and there manufactured, sold, held, and possessed in violation of title II, sections 3 and 25, of the National Prohibition Act."

Section 5 of title II (41 Stat. 309) authorized an analysis of those samples. The most important phase of the owner's application for the restoration of all the property seized under the search warrant turns upon the sufficiency of the affidavits as a whole as a basis of the right to a search warrant. That question must be determined by the provisions of title II, sections 3 and 25, of the National Prohibition Act, which so far as now important, are as follows:

"Sec. 3. No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

"Sec. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of public law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order."

As will be seen, section 25 is made to embrace certain provisions of title XI of public law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917. Those provisions, so far as applicable, are as follows:

"Sec. 2. A search warrant may be issued under this title upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed.

"Sec. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

40 Stats., 228, 230 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼b-10496¼e).

These statutory provisions show that search warrants are to be issued only where property was stolen or embezzled, or where property was used as a means of committing a felony, or when the property or paper is controlled or possessed in violation of section 22 of that statute (section 10212i), which section refers to unlawful dealings with foreign nations. It thus appears that the statute of 1917 very plainly requires—

(1) That a search warrant shall not be issued, except upon probable cause, supported by affidavit.

(2) That the commissioner, before issuing the search warrant, must examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing with their signatures thereto; and,

(3) The affidavits or depositions must set forth the facts tending to establish the grounds for the application, or probable cause for believing that they exist.

In endeavoring to meet these requirements, the agent in this instance in his application asserted that he believed and had cause to believe that the Central Consumers' Company was operating its plant in violation of sections 3 and 25 of title II of the National Prohibition Act. The first of these sections, as we have seen, makes it unlawful to manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized by the act.

The second of them, namely, section 25, makes it unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violation of title II, or which has been so used, and provides that no property right shall exist in such property. "Intoxicating liquors" are such as contain one-half of 1 per cent. or more of alcohol, and the agent's application for a search warrant had in view that condition. He tells of the obtaining by himself in October of certain samples from the pasteurizing tank on the premises of the Central Consumers' Company, and also tells of his obtaining samples of some beer bought from that company by Henry Hunold, also in October, 1921, and says, further, that the beer Hunold bought was fit for use for beverage purposes. The affidavit of Hunold supports this latter statement.

While the offenses involved in the charges made by the agent are in no sense felonies, the Prohibition Act makes it necessary, when asking for a search warrant, to make as clear a showing of facts as if sections 3 and 25 created felonies, instead of acts punishable only as misdemeanors or as nuisances, to be abated by litigation, or as destructive of the title to property when it is used as forbidden in those sections. See sections 3, 4, 21, 22, 25, and 29 of title II of the act. In this situation, and coming back to the affidavits presented to the commissioner when the application for the search warrant was made, we must ascertain whether those affidavits state "facts," instead of inferences, and whether the statute (40 Stat. 228) was complied with, as is required by section 25 of the Prohibition Act.

While the agent states his belief that the law had been violated, and while Hunold tells of his purchase and that the beer he bought was fit for beverage purposes, neither of them shows how much or how little alcohol the samples contained, though the agent reaches the conclusion that it was more than one-half of 1 per cent. The agent's affidavit tells about all the samples, and says they were analyzed and found to contain one-half of 1 per cent. alcohol or more; but he does not say that he in person analyzed them, or either of them, or that he could, as an expert, intelligently have done so, or that they were analyzed in his presence, or that the person who analyzed them was in Louisville, or was in any manner known to the agent or to the commissioner, or that even the name of the analyzer was known to the agent. Certainly it is not shown that the latter could not have been examined before the commissioner or his affidavit obtained. If any of these matters could have been stated or shown in the agent's affi-

davits or application, it is fair to say that that would have been done when the search warrant was asked for. Nor did the commissioner inquire into them.

Under these circumstances, and in view of the importance of what was being done, the presumption seems clear that no such "facts" were available for a statement in the application or affidavits. Therefore the question arises whether the agent and the commissioner alike did not, in this instance, act upon mere inference or hearsay, and not upon a showing of "facts," as demanded by the statute, in the important exigency which was to be met in the manner required alike by the law and by the rights of the owner of the property thereunder. In short, was there an adequate showing of the "facts" to the commissioner, or was there only the hearsay information which the agent had obtained in some unmentioned way and accepted as true?

In considering this question we must keep in mind alike the provisions of the Eighteenth Amendment as a part of the supreme law of the land and those of the National Prohibition Act passed for its enforcement. These laws bear alike upon the United States and the individual citizen—a corporation being one of the latter. *Silverthorne v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319. A prohibition agent is an officer whose good faith is always presumed, and while the commissioner is neither a judge nor a court, he is an officer of the latter (*Todd v. United States*, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982), and must be careful to conform strictly to all legal requirements. Both of these officers must be guided by the law, and must carefully conform to its requirements in respect to the issuance of search warrants, which authorize, not only an entrance upon a citizen's property, but a seizure of it for the purpose, among others, of making it evidence against the owner. Evidence obtained through a lawfully issued search warrant is admissible against the owner; but, if not so obtained and issued, the property seized under it must be returned to the owner.

In this instance the return of property to a very large amount is sought, and the application must be granted, unless the search warrant was obtained upon such showing of facts as is made necessary by the statutory provisions we have inserted. We have very carefully considered the authorities available in connection with the affidavits, and have reached the conclusion that the seizure of the property sought to be returned was not made pursuant to law, that the necessary "facts" were not presented to the commissioner, and consequently that his action was not supported by lawful authority. This conclusion seems clearly demanded by cases like *Veeder v. United States*, 252 Fed. 414, 418, 420, 164 C. C. A. 338; *United States v. Ray & Schultz* (D. C.) 275 Fed. 1004, 1006; *Berry et al. v. United States* (C. C. A.) 275 Fed. 680, 681; *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; *United States v. Kraus* (D. C.) 270 Fed. 578; *United States v. Kelih* (D. C.) 272 Fed. 484; *United States v. Mitchell*, etc. (D. C.) 274 Fed. 128; *Hughes v. Falvey and others*, 50 App. D. C. 213, 269 Fed. 865; *United States v. Friedberg* (D. C.) 233 Fed. 313-318.

The district attorney relies upon the case of *In re Rosenwasser Bros.* (D. C.) 254 Fed. 173, as requiring a different conclusion. With this contention we cannot agree, in view of the authorities just cited and others that might well have been put on the list.

Much has been said about the large and, indeed, the excessive amount of property seized, and certainly the facts in that connection are striking; but while *Hughes v. Falvey*, 50 App. D. C. 213, 269 Fed. 866, and *Francis Drug Co. v. Potter* (D. C.) 275 Fed. 615, are suggestive, we do not think it is necessary to give further consideration to this phase of the argument.

The samples taken by the agent from claimant's premises were not seized under the search warrant, and do not concern us in this proceeding; but the Central Consumers' Company is entitled to have returned to it all the property of every character seized or taken possession of, under the search warrant.

A decree accordingly will be prepared and entered.

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### TUDOR v. RAUDABAUGH et ux.

(District Court, D. Montana. January 18, 1922.)

No. 815.

1. Vendor and purchaser ⇨37(6)—Misrepresentation, that vendor is financially able to furnish water perpetually, is material.

Where the vendor of land in an arid country agreed to furnish water perpetually, the value of the contract was mainly the covenant for the water, and a misrepresentation that the vendor was financially solvent, and able to perform its covenant to that effect, was material.

2. Vendor and purchaser ⇨119—Delay in seeking rescission, pending bankruptcy proceeding against vendor, held not laches.

Where the purchasers of land with perpetual water right discovered the falsity of the vendor's representation it was financially able to perform its covenant to furnish the water perpetually only a short time before the vendor's bankruptcy, the failure to rescind pending the bankruptcy proceedings, during which time it was hoped some disposition of the property would be made whereby the water contract could be performed, was not such laches as barred the purchaser's right to rescind.

3. Vendor and purchaser ⇨119—Delay in rescinding, to be laches, must injure the other party.

Laches of a buyer is not mere delay in rescinding, but is delay which injures the other party.

4. Vendor and purchaser ⇨114—Acceptance of defective performance of water contract held not to waive rescission.

The fact that the purchasers of land with a perpetual water right accepted for several years an imperfect performance of an agreement to furnish the water, but without intent to waive their rights, and to give time in which to remove the cause of failure, is not a waiver of their right to rescind for nonperformance.

5. Vendor and purchaser ⇨337—Purchasers can rescind for nonperformance of portion of contract and have lien for payments.

Purchasers of land in an arid country with a perpetual water right are not bound to accept the land alone, and recoup in damages, whether or

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⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

not there is a party responsible in damages before the court, but are entitled in equity to a rescission, and to a lien on the land for the amount of payments already made by them.

**6. Vendor and purchaser ⇐117—Purchasers' offer to surrender possession on return of payments is sufficient.**

Purchasers, who have gone into possession under their contract, do not lose their right to rescind for breach of the vendor's contract to furnish water because they remain in possession; it being sufficient that they offer to surrender possession on return of the payments already made by them.

**At Law.** Action by Henry D. Tudor, as trustee, against Joshua R. Raudabaugh and wife. On trial before court. Judgment rendered for defendants.

Philip S. Brown, of Missoula, Mont., for plaintiff.

Russell, Madeen & Clarke, of Missoula, Mont., for defendants.

**BOURQUIN, District Judge.** This action, commenced in March, 1920, is in ejectment, an equitable defense interposed, and of the aftermath of the First, etc., Bank v. Irrigation Co. (D. C.) 251 Fed. 320. Tried to the court, the evidence is without material conflict, and the controversy virtually dwindles to the issue of laches, defeating rescission.

It appears that in 1913, in the Bitter Root valley, the irrigation company was engaged in a very extensive development and sale of irrigated orchard lands. Its agents, "lecturers," screen pictures, and literature were of the typical "Wallingford" character, and spread far afield. All were artistic, alluring, forceful, and compelling to a degree that even now, the bubble burst, to view and read is to excite a well-nigh irresistible impulse to hasten thence and purchase. In that year, in Ohio, defendants entered into a contract with the irrigation company to purchase 40 acres of the land and a definite supply of water for irrigation, perpetually delivered (the land and water of this action), at the price of \$12,500, in installments, to December, 1918, and \$1.25 per acre per annum; conveyance upon last installment paid. The contract was induced by the irrigation company's willfully false representations, of which need be noted only that the company was solvent and of resources guaranteeing perpetual performance of the aforesaid covenant for water service.

In 1914 defendants entered upon the land, and yet continue in possession. Of the purchase price they paid \$2,275, the last in January, 1915, and failed to pay the installments of December, 1915, and thereafter. From the beginning and continuously thereafter there was material failure to deliver the water of the covenant, to defendants' substantial damage, and of which they complained. The evidence satisfactorily proves this, even though defendants are inexperienced in irrigation and estimate of water flow, and their testimony indefinite.

In January, 1916, in this court, the irrigation company was adjudicated a voluntary bankrupt, the trust deed antedating this contract was put in foreclosure, and a receiver of all property subject to said deed, and which included this land and contract, was appointed. He

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was also trustee in the bankruptcy proceedings. The cleavage between his dual official characters, possessions, duties, activities, and accounts was not clear, and was settled in final accountings. It does not appear that the receiver did anything in respect to this contract, other than to defectively perform the covenant for water as aforesaid.

The situation was involved and complicated, the law was not clear, and the status and relative rights of all interested parties were doubtful. In 1918 occurred the trust deed foreclosure sale, and Boiset purchased. In October of that year, upon deed to him, he transferred the lands and contracts to plaintiff, and the waters and irrigation system to the Ravalli Water Company, then incorporated, with capitalization of \$100,000.

Plaintiff holds in trust, to sell lands and water, enforce contracts, and to distribute proceeds. There is a remote possibility the water company will receive some of these proceeds, and it is obligated to maintain and operate the irrigation system. This system is extensive, some 70 miles long, servient to some 20,000 acres of land, formerly the irrigation company's, of construction involving expensive operation, in decay, and to necessarily renew, to render economical, will cost \$1,000,000 to \$1,250,000, or \$50 to \$60 per acre of lands dominant to it.

The water company neither has nor can procure the resources to perpetually maintain and operate the system, and has not, will not, and cannot perform the covenant for water service, save defectively to a material extent. So apparent is this that the vendees of these lands have organized an "irrigation district" to issue bonds, and, by some process, secure, maintain, and operate the system. The land of defendants' contract without perpetual water supply is of about \$15 per acre in value, and with such supply, about \$75 per acre.

In the fall of 1915 defendants discovered the falsity of the irrigation company's representations, and in 1919 offered to abandon the premises on return of payments by them made. More of the general situation and of the terms of the trust deed and the contracts, of which defendants' is one, may be gathered from the aforesaid report of the decision in the foreclosure suit. In view of the premises, it is believed defendants have not waived nor inexcusably delayed rescission, and are entitled to the relief sought.

[1] The fraud is obvious. In the arid country, of a land and water contract, the water is the more important. The value of the contract is mainly the covenant to perpetually supply water for irrigation, and so depends upon the responsibility of the covenantor. False representations in respect to this responsibility are material, and, relied upon, constitute fraud.

[2] From defendants' discovery of the fraud, in the fall of 1915, to the bankruptcy, foreclosure, and receivership proceedings in January, 1916, is too short an interval to constitute culpable delay. During these proceedings, and until October, 1918, the court's officer was in charge of the irrigation company's properties. It was expected that these proceedings would eventuate in a purchaser who would perform the covenants of the contracts in respect to delivery of water.

By privity of both contracts and estates he would stand in the shoes of the irrigation company, and by both obligated to perform these covenants, that not only run with the irrigation system and the lands, but are attached to them. Whether or not in this interval defendants might have rescinded and secured relief, their failure to do so, their standing inactive by, as did all others, including the court's officer, awaiting events and fulfillment of the expectation, is believed excusable.

Boisot purchased and immediately segregated the legal title to lands and contracts from the legal title to waters and irrigation system. He transferred both. Not a party to the suit, Boisot's responsibility need not be inquired of, nor to what extent the law of covenants continues his liability. It suffices that his transferees are a trustee of assets to be transferred, and a water company unable to perform the covenants.

[3] This becoming apparent in 1919, when it did fail to perform, the expectation aforesaid disappointed by the event, defendants' offer to rescind, then first made, was in time. Promptness to rescind is not a matter of time alone, but of circumstances, of which time is but one. Laches is not delay, but delay that injures the other party. Plaintiff has not been injured, but defendants have. They lost their bargain, time, and labor, and their hopes of an attractive and profitable home, of ease in age, and of a valuable inheritance to their posterity.

[4] That defendants continued to accept defective performance of the covenant does not constitute waiver of the right to rescind. It was without intent to waive, and to give time in which to remove the cause of failure, and to assure full and permanent performance in the future. Rescission is also warranted for failure in the main of the consideration for defendants' promise to pay.

[5] The contract is continuing and executory. Defendants are not bound to accept an undesirable fragment of the consideration, and recoup in damages, whether or not there is a party responsible in damages before the court. Equity awards rescission.

[6] That defendants remain in possession is not a bar to rescission. It is enough that they offered to restore what they received, upon return of what they had given. That is the local law, whether or not it is otherwise at common law, affected by the feudal principle.

Neither party seeks accounting of rents, profits, use, and occupation, or damages, and use of the money paid offsets use of the land received. Complete justice between the parties before the court can be done without the presence of the Ravalli Water Company, neither invoking its absence, though its rights, if any, will be unaffected by the decree. Defendants are entitled to a lien and its foreclosure upon the land and water, to the extent of payments by them made.

Decree accordingly.

**WEBER v. CHICAGO & N. W. RY. CO.**

(District Court, D. Wyoming. January 17, 1922.)

No. 2861.

**Master and servant — 354—Compensation for injuries held bar to recovery against wrongdoer.**

The Workmen's Compensation Act of Wyoming (Comp. St. Wyo. 1920, § 4317) makes the remedy thereby given exclusive as between employer and employé, and section 4323 provides that, where an employé is injured under circumstances creating a liability for damages in some third party, and there is no legal liability attaching to the employer, the employé shall be left to his remedy at law against such third party, and no compensation shall be payable under the act. *Held*, that the widow of an employé, killed while in an employment within the act, who was awarded and accepted compensation thereunder, could not retain it and also maintain an action for the death against a third party.

At Law. Action by May L. Weber, administratrix, against the Chicago & Northwestern Railway Company. On demurrer to affirmative defense pleaded in answer. Demurrer overruled, and petition dismissed without prejudice.

John Dillon and G. J. Christie, both of Lander, Wyo., for plaintiff. P. B. Coolidge, of Lander, Wyo., Wymer Dressler and Robert D. Neely, both of Omaha, Neb., and Paul S. Topping, of Nebraska City, Neb., for defendant.

**KENNEDY**, District Judge. This is an action in which plaintiff, as administratrix of the estate of Arthur P. Weber, deceased, sues the defendant for damages on account of the alleged negligence of the defendant in causing the death of plaintiff's intestate at a railroad crossing in the town of Lander, in this state and district.

The answer filed by defendant is in the form of a general denial and a special affirmative defense, by which it appears that plaintiff's intestate, when he met his death, was in the employ of a feed and auto company in the town aforesaid, which employment was governed by the Workmen's Compensation Act of Wyoming; that this employer reported the accident under the act as required; that the state court, under the provisions of the Compensation Act, thereafter upon a hearing before it adjudicated the award to the plaintiff herein, as the surviving widow of the deceased, in the sum of \$2,000, as well as an award of \$300 to her as guardian of the minor son of the plaintiff and the deceased employé; that thereafter the plaintiff was paid the said sums out of the fund created and held under the department of the state of Wyoming having charge of the Workmen's Compensation Act, which compensation the plaintiff accepted and received for her use and benefit; that by reason of the aforesaid facts the plaintiff is barred and precluded from maintaining this action against the defendant.

To this affirmative defense set forth in the answer the plaintiff demurred, and the hearing upon the demurrer brings up the point here

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under discussion, as to whether or not the defense interposed by defendant constitutes on its face a bar to the recovery sought by plaintiff. The decision of the court requires a construction of portions of the so-called Workmen's Compensation Act of this state. Three sections appear to the court to be the only portion of the act necessary for review here. Briefly stated, without quoting the sections verbatim, they provide as follows:

Section 4316 of the Wyoming Compiled Statutes of 1920 provides for the payment of compensation to persons injured in extrahazardous employments as defined by the act, or the dependent families of such as may die as the result of injuries, except where the injury is due solely to the culpable negligence of the injured employé. Section 4317 by its provisions makes the act exclusive, compulsory, and obligatory upon all employers and employés coming within its provisions. Section 4323 provides that, where the employé coming under the provisions of the act receives an injury under circumstances creating a liability in some third party to pay the damages, and there is no legal liability attaching to the employer, in such a case the employé shall be left to his remedy at law against such third party and no compensation shall be payable under the act.

The point in the case is: Considering the fact that the plaintiff has moved under the Compensation Act to receive benefits thereunder and has received those benefits, can she in addition thereto prosecute in the courts an action against the third party alleged to have negligently caused the death of the deceased? It is earnestly contended by counsel for the plaintiff that the Compensation Act is a form of insurance established by law to cover injuries to employés sustained in the course of their employment, regulating by certain set rules the relationship and responsibility as between employer and employé touching such injuries, and is independent of or in addition to any legal rights against third parties. It is contended by the defendant that under the act, if compensation be accepted, it relieves any third party from any liability growing out of the injury or death of the employé.

Modern legislation in most of the states has brought about laws of the character under discussion, but upon this particular point they are greatly at variance, not only in their provisions, but as well in their construction by the several state courts. The Supreme Court of the state of Wyoming has passed upon the law once, in which its constitutionality was sustained in *Zancanelli v. Coal & Coke Co.*, 25 Wyo. 542, 173 Pac. 981, but that court has not been called upon for a construction of any of the particular sections of the act.

The original English act, from which we adopted the idea, as well as practically the form, of this class of legislation, provided that the injured party or his legal representative might in a case of this character have the alternative right to proceed under the act or against the third party. In some states, notably West Virginia, the use of the act, even where no third party is involved, is optional. In Kentucky it would seem that the court has adopted a rather liberal construction of the law, holding that, in the event the party has proceeded under

the Compensation Act and also under a suit against the third party, the adjustment of the damages and awards will be taken care of by the courts. In the state of Washington it has been held by the Supreme Court of that state, and affirmed by the United States Supreme Court, that the act of that state is exclusive (except in certain incidents not affecting the point here) in settling the rights between employer and employé in case of injury or death, which consideration automatically relieves third parties from liability. A discussion of these various rules may be found in copious notes or the opinions found in the following books: L. R. A. 1916A, 100; Id. 29; Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112, L. R. A. 1917F, 1048; L. R. A. 1917D, 100; Book v. City of Henderson, 176 Ky. 785, 197 S. W. 449; Bohan v. Milwaukee, L. S. & W. Ry. Co., 58 Wis. 30, 15 N. W. 803; Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 36 Sup. Ct. 223, 60 L. Ed. 467.

I do not find, however, that any of these acts upon the point involved contain the exact provisions of the Wyoming act. It is true that the Wyoming act makes its provisions the exclusive remedy as between employer and employé coming within the classes covered. It does not, however, provide an alternative right in so many words. In Nebraska the act of that state has been construed so as to entitle the employer to be subrogated in the event of payment of compensation to the rights of the injured employé or his personal representatives, against the third party. *Otis Elevator Co. v. Miller*, 240 Fed. 376, 156 C. C. A. 302.

In this case the pleadings show upon their face that the plaintiff's intestate was an employé of an auto company at the time of the accident, performing his duty as such employé, and the employment was within the scope of the act as covering an extrahazardous occupation, as therein enumerated. In the opinion of the court, therefore, the adjudication of the compensation by the state court under the act was entirely proper, and in any event was such an adjudication as would bind this court. It appears, however, that the exception in the case of the injury or death being caused by the negligence of a third party, as set forth in section 4323 of the statute, is peculiarly limited. Two clauses of this section particularly affect the rights of the plaintiff in this case, to wit: First, where there is a legal liability in some third person, and there is no legal liability attaching to the employer, which element of no legal liability of employer in this case may be assumed by the court as proven, in that there is no affirmative showing of the employer's liability, and it may therefore be disregarded; and, second, that the employé shall be left to his remedy at law against the third party, and compensation shall not be payable under the provisions of the act. The last clause appears to this court to be the deciding point in the case. If the plaintiff has a legal remedy at law against the third party, she cannot receive compensation under the act.

But the fact affirmatively appears that she has received this compensation. While it may not be conversely true that she, by accepting compensation under the act, has foreclosed her right to prosecute her

claim against the third party, it must be true that, in the event she recovered damages against the third party, she could not retain the compensation under the act; else the provision that she could not receive such compensation would be held for naught, which was manifestly not the intention of the Legislature in adopting the particular phraseology. In other words, she cannot receive both damages and compensation. She is within the act as to compensation if she desires to be, and in this case has brought herself within its provisions; but she cannot retain this compensation and also receive damages from the third party. It might be that in the event a suit were instituted against the third party, and it were decided by the courts that the third party was not legally liable, the plaintiff would still have her remedy under the act for compensation. If she cannot, however, receive compensation under the act and also receive damages against a third party, the only reasonable rule which this court can figure out to cover a case with this point involved would be that the party injured, or his legal representatives, must first have adjudicated the rights accruing upon the legal liability of the third party, which adjudication, by the recovery of damages against the third party, would foreclose her against any compensation under the act. If that adjudication were adverse, and no damages were recovered, she would still have her rights under the Compensation Act. If the holding were otherwise, and in the event the plaintiff were successful in this suit, and recovered damage, which damage was less than the compensation received under the act, and the plaintiff could not be afterward compelled to return the compensation to the state on account of financial irresponsibility, she would be receiving compensation not allowed by the act.

Under these circumstances, I feel that the demurrer must be overruled, which allows the affirmative defense of the defendant to stand as a bar to the action of plaintiff in this case, and the petition must therefore be dismissed, at plaintiff's costs. It may be provided, however, in the order, that such dismissal is without prejudice, so as not to penalize plaintiff unduly in any right which she may be advised that she has, as set out in her petition here, so that, in the event she returns the compensation received under the act to the state department from which it came, and makes a sufficient showing to the effect that she was not sufficiently advised as to her rights in the premises when she accepted compensation under the act, that she may again file her action for damages against the defendant.

As to whether or not in the event she were unsuccessful in her new action against the defendant in being awarded damages on account of its legal liability, she could then pursue her remedy for compensation, having already once pursued it and returned the award, is not necessary for this court to decide, as it would involve a matter to be passed upon by the State Court in again awarding or refusing to award such compensation.

**UNITED STATES ex rel. KASPARIAN v. HUGHES, Immigration Comm'r.**

(District Court, E. D. Pennsylvania. January 17, 1922.)

No. 2441.

1. Aliens ~~§~~53—"Knowingly" distributing seditious literature imports knowledge of its character.

To authorize the deportation of an alien as unlawfully in the United States, in violation of the provision of Act June 5, 1920, which excludes aliens "who knowingly circulate, distribute, \* \* \* any written or printed matter advising, advocating or teaching the overthrow by force or violence of the government of the United States or of all forms of law," it must appear that the alien had knowledge of the contents or character of the literature distributed by him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Knowingly.]

2. Aliens ~~§~~54—Order of deportation, based on erroneous construction of statute, invalid.

An alien held for deportation is entitled to discharge on habeas corpus, where the record shows that there was an entire absence of essential evidence to warrant deportation, and that the order was based on an erroneous construction of the statute.

Habeas Corpus. Petition by the United States, on the relation of Vahan Kasparian, against James L. Hughes, Commissioner of Immigration. Writ granted.

Fred J. Shoyer, of Philadelphia, Pa., for relator.

John Robert Jones, Asst. U. S. Atty., and George W. Coles, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The relator, an alien, 19 years of age, born in Armenia, Turkey, landed at the port of New York in May, 1920. In the latter part of April, 1921, about 11 o'clock at night, he was observed in company with another Armenian, Pilbosian, in the neighborhood of Fifty-Second and Walnut streets, Philadelphia, distributing circulars, some of which were headed "May Day. Red Labor Day," and the others "May Day of Revolution." The two men were arrested by a policeman, and charged, under the Pennsylvania Act of June 26, 1919 (P. L. 639; Pa. St. 1920, §§ 8040, 8041), with sedition. The act, as far as it applies to the present case, defines and punishes sedition as follows:

"Be it enacted, etc., that the words 'sedition,' as used in this act \* \* \* shall also include: \* \* \*

"(g) The sale, gift, or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers, or teaches sedition as hereinbefore defined. \* \* \*

"Section 2. Sedition, as defined in section 1 of this act, shall be a felony, and any person convicted thereof shall be sentenced to a fine of not less than \$100 and not more than \$10,000, and to imprisonment not exceeding twenty years, either or both, in the discretion of the court."

He was tried and found guilty. While confined at Moyamensing Prison, a warrant of arrest, issued by the immigration officials of the

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Department of Labor, was served upon him, and a hearing had upon the charge that—

"he knowingly had in his possession for the purpose of circulation or distribution printed matter advising the overthrow by force or violence of the government of the United States or of all forms of law."

Upon the recommendation of the Commissioner of Immigration, the Acting Secretary of Labor issued an order of deportation upon the ground that from proofs submitted to him, after due hearing before the immigrant inspector, he had become satisfied that the alien was in the United States in violation of the Act of October 16, 1918, as amended by the Act of June 5, 1920, to wit:

"That he writes, publishes or causes to be written or published or knowingly circulates, distributes, prints or displays or knowingly causes to be circulated, distributed, printed, published or displayed or knowingly had in his possession for the purpose of circulating, distributing, publishing or displaying written or printed matter, advising, advocating or teaching the overthrow by force or violence of the Government of the United States or of all forms of law."

From the evidence at the hearing, it appears that the relator was employed as a coffee man in a restaurant at Fifteenth and Chestnut streets, and, upon the night in question, he was with Pilbosian, distributing circulars which clearly by their terms advise, advocate, and teach the overthrow by force or violence of the government of the United States. The relator, who was examined through a Turkish interpreter, stated that when he was with Pilbosian that night a man gave them the papers to be distributed, paying them \$3 for their services, and promising that, when they got through distributing them all, he would give them more money, and that the papers were grocery advertisements. The relator admitted the distribution of the circulars, and stated that he had been distributing them two or three minutes when he was arrested. He stated that he could not read any of the circulars, and that he could not read or write English. The officer who arrested him was the only other witness examined, and he testified merely to seeing the papers distributed and taking some of them from the relator's possession.

In the petition for the writ the relator alleges that at the time of his arrest he was unable to read, write, or fully understand the English language, and that he was unaware of the contents of the circulars distributed; that he was at no time prior to his arrest or subsequent thereto connected or associated in any manner with any so-called "Red" organizations or associations for the spread of seditious or anarchistic doctrine or propaganda. The Act of October 16, 1918, 40 Stat. 1012, as amended by the Act of June 5, 1920, 41 Stat. 1008, authorizes the exclusion and expulsion from the United States of—

"(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching: \* \* \* (1) The overthrow by force or violence of the government of the United States or of all forms of law."

It is contended on behalf of the relator that the order of deportation was issued in pursuance of a hearing at which the evidence adduced did not establish knowledge on the part of the respondent of the unlawful nature of the contents of the circulars he was distributing, and that the only evidence upon that subject was that of the relator himself, who through an interpreter testified that he could not read or write English, and that he did not know the contents of the circulars.

[1] It will be observed that the act of assembly of Pennsylvania under which he was prosecuted and convicted makes the act of distributing documents teaching sedition a felony, without the necessity of proof of knowledge of the seditious nature of the contents, while the act of Congress of June 5, 1920, excludes from admission those who knowingly circulate, knowingly cause to be circulated, or knowingly have in their possession for the purpose of circulation the prohibited matter. It is contended on the part of the government that the offense was complete when the relator knowingly circulated and distributed, whether or not he knew that the contents of the circulars distributed were of a seditious nature, and this thought seems to have been in the minds of the administrative officers in their construction of the law.

In the memorandum of the Commissioner General for the Acting Secretary of Labor of July 26, 1921, offered in evidence upon the hearing on habeas corpus, it is stated:

"It will be noted that there is nothing in the charge which sets forth that the aliens found distributing such literature shall know the nature of these papers, but that it is merely necessary that they shall knowingly distribute same. The charge in the warrant has been sustained in each case."

And in the memorandum for the Acting Secretary of August 6, 1921, it is stated:

"The act makes the mere knowingly having in his possession prohibited literature, this with a view to its distribution, etc., mandatory (or seeming mandatory) cause for deportation of an alien, and it is not essential that the alien have knowledge of the contents of that literature. The act may be regarded (and is) far-reaching and drastic in this respect, and, it is my understanding, was intended to be so; otherwise, its purpose would be easily capable of defeat by merely advancing a claim of lack of knowledge of the nature of the literature.

"If the letter of the law is to be observed there will, of course, be no difficulty in arriving at a decision in the cases. If, on the other hand, recognition is to be given to the probable (on the record) lack of guilty intent on the part of the aliens a rather vexatious question will be raised, as the authority of the department to read into the statute something which is not there and which would be out of harmony with its express language is not apparent."

It is apparent that it was upon this theory of the meaning of the statute the order of deportation was based. While Congress, in execution of its power to expel from the United States any alien considered undesirable, could include within the undesirable classes those who distribute seditious literature without knowledge of its character, it is clear that the officials of the department misinterpreted the mean-

ing of the statute. That statutes creating an offense "knowingly" committed import knowledge as to all the essential ingredients of the offense is an undoubted and well-recognized rule of construction and a reasonable one. If the mere distribution without further knowledge were sufficient, the word "knowingly" would be superfluous, as one could not well distribute circulars without knowledge that he was distributing them.

A charge in an indictment of unlawfully, willfully, and knowingly depositing and causing to be deposited in the post office for mailing and delivery a book declared to be unmailable because of its indecent character was held in the case of *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727, to mean that the defendant deposited in the mails a book which he knew to be indecent. The case followed *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606, in which the same statute was under consideration, and it was held (161 U. S. 33, 16 Sup. Ct. 435, 40 L. Ed. 606) that the words "unlawfully, willfully, and knowingly," which apply to an act or thing done in connection with the statute under consideration, "could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it."

In order to have ground for deportation, it was necessary that the Department of Labor should be satisfied, not only that the relator distributed the seditious circulars, but that he knew the contents to be of a seditious character. If it had been shown that the relator could at the time of his arrest read the English language, there would have been evidence on which to base a conclusion that he knowingly committed the act charged. Any evidence, however slight, would have been sufficient. The only evidence upon the subject was derived from the statement of the alien himself. The Secretary of Labor was at liberty to disbelieve the testimony of the respondent, but that would leave the case with the mere naked fact of distribution, together with the additional fact that the relator was an Armenian, whose statement it was necessary to take through a Turkish interpreter.

[2] Taking the record as a whole, there was entire absence of evidence of knowledge, and that is conceded in the memoranda furnished to the Secretary by the government officials. It is well established that, in reviewing departmental action under a statute of this nature, the finding of the department is binding upon the court, if there is any evidence, however slight, and unless there is an abuse of discretion, or the proceedings are not fairly conducted, the court is without jurisdiction to interfere. *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; *Turner v. Williams*, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

This is not a case in which the court is passing upon the cogency of the evidence, in determining whether the evidence upon the subject of knowledge would have moved this court to the conclusions at which the Department arrived. The record shows there was concededly no

evidence that the relator knowingly committed the acts charged, and that the conclusion of the department was based upon an erroneous construction of the statute.

It is therefore ordered that the relator be discharged.

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**UNITED STATES v. SLATER et al.**

(District Court, E. D. Pennsylvania. January 16, 1922.)

No. 165.

1. Conspiracy  $\S$  33—To defeat purpose of Prohibition Act is one to "defraud" the United States.

"Defraud," as used in Criminal Code,  $\S$  37 (Comp. St.  $\S$  10201), making conspiracy to defraud the United States a criminal offense, is not limited to depredations on property rights, but is broad enough to include any which interferes with or hampers the United States in the successful prosecution of any policy established by law, and a conspiracy to defeat the purpose of the National Prohibition Act, to prevent the sale of liquor for beverage purposes, is within such provision of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Defraud.]

2. Conspiracy  $\S$  43 (6)—Indictment held not demurrable.

That some of the defendants charged in an indictment for conspiracy to violate the National Prohibition Act, as shown by the averments were the intended purchasers of the liquor, which purchase is not in itself an offense, held not to render the indictment demurrable as to such defendants, where the ultimate purpose of the conspiracy as charged, to which such defendants were parties, was to effect the unlawful sale.

Criminal prosecutions by the United States against Albert F. Slater and others on several indictments. On demurrers and motions to quash indictments. Demurrers overruled, and motions denied.

T. Henry Walnut, Asst. U. S. Atty., and George W. Coles, U. S. Atty., both of Philadelphia, Pa.

Joseph K. Willing and Robert J. Sterrett, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. There are several indictments. The questions raised were all argued together. They will in consequence all be discussed in one opinion.

An outline of the fact theory in support of these indictments is that there was a criminal conspiracy to violate the laws of the United States aimed at the suppression of all traffic in intoxicating liquors for beverage purposes. The success of the conspiracy was dependent upon an unbroken chain of co-operating links. An essential link at one end was the purchasing consumer; at the other was the equally necessary source of supply. Intermediately was the transporter. The chain was constructed out of these links by the dealer who forged the links into a chain. The consumer was concerned with the source of supply. No one, unless driven to recklessness by a craze for alcoholic

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stimulants, or led by the crassest folly, would risk his life by drinking the poison illicit dealers sell. There was a supply less open to this risk in the stock of liquors provided for other than beverage purposes. This, however, could be reached only through the state agents, who could release it by granting permits. It thus became necessary to bring them, or some of them, into the conspiracy. As soon as they were found, the other links were at hand. The conspiracy thus formed embraced two of the defendants, who were to get the liquor out of bond, others, who were to transport it, the consumers, who were to get it, and the dealer, under whose supervision and direction all were to operate.

The first quest which confronted the draftsman of the indictments was to find a law which made such a conspiracy unlawful. He found it in section 37 of the Criminal Code (Comp. St. § 10201). This makes all conspiracies to do either of two things a crime. One is to commit or have committed an offense against the laws of the United States; the other is to defraud the United States. Here at once a choice was presented to the pleader. He might charge the conspiracy to have the one objective or the other, or he might, without violating the rule against duplicity, charge the same conspiracy in one count to be of the one kind, and in a second count to be of the other. Whatever course the pleader followed, the general frame of the indictment and of each count would be the same. In outline it would first charge the substantive offense of conspiracy as a conspiracy to do one of the forbidden things. This would be followed by a description of the conspiracy, unfolding the unlawful scheme and its purposes. This would necessarily be historical in treatment, assigning the several defendants to their respective positions, and describing the part each was to play as links in the chain which had been forged.

Inasmuch, however, as a conspiracy even to do a forbidden thing would not be a criminal offense, unless something was done by one or more of the conspirators in furtherance of its purposes, the pleader was required to set forth what was thus done as the overt acts which made the crime complete. It is, to some extent, a diverting interpolation, but a thought obtrudes itself at this point. Procedural law is an important part of our system of laws. There are doctrines of the law relating to it, out of which spring rules of pleading which at least promote the orderly trial of cases. It is well for a pleader to observe all these rules, but there is a temptation presented to those who know them to give them more prominence and a greater value than their real importance warrants. It is easy to raise procedural questions of such difficulty of solution as to submerge the substantive law, the application of which procedural law was designed to promote.

We should not lose sight of the truth that because of this R. S. § 1025 (Comp. St. § 1691), commands the courts to ignore all defects in the form of indictments, unless the departure from the correct form of pleading works an injustice to the defendant. With this injunction in mind, let us give our attention to the criticisms directed against the several indictments under consideration.

1. One is based upon distinctions which belong to the science of

metaphysics, and to the domain of the necessary laws of thought, rather than to the very practical concern of the administration of legal justice. The distinctions made invite us to an inquiry into the nature of what are commonly called facts. The very interesting, as well as well-phrased and well-expressed, argument addressed to us dwells upon the distinction between facts and conclusions of fact. It is the same distinction expressed in the phrases "evidentiary facts" and "ultimate facts" or "ultimate fact findings." The basic distinction is that between fact and truth. We do not deny the soundness of the distinction, nor do we wish to be thought to undervalue its importance as an aid to clear thinking. The words which make up our language, however, and which are used to express thought outside of the schools and for all the common purposes of life, including the framing of indictments, sometimes ignore, or at least do not clearly bring out, the distinction. To say that a man is tall or short is doubtless to express a judgment based upon a comparison. None the less it is a fact known to all that some men are short and some tall.

What really happens is that a truth, which is the subject of a judgment, may be first behind an argument, next incorporated into a theory, and finally, by general acquiescence, be accepted as a fact. Whatever is thus generally accepted as a fact becomes, for all the common purposes of life, a fact. It may be stated as a psychological fact that in this proneness of the human mind to accept as a fact whatever is thus commonly accepted as truth lies the danger to be apprehended from persistent pernicious propaganda. We will not stop to inquire what justification, if any, there may be for criticism of the verbiage of these indictments, contenting ourselves with the observation that this criticism is directed, not against the charging clauses, but against that part which deals wholly with the description of the conspiracy and its purposes, and the share which each of the defendants had therein, and the overt act averments. This leads to an inquiry into the proper functions of these parts of the indictments, and to the second ground of complaint made of them.

2. This second ground of complaint is that the indictments leave the defendants in ignorance of what the real charge is which is made against them. This is a complaint of substance. The proper function of the charging clause is to set forth the charge. There is no fault found with this. It is direct, and defendants knew the charge to be a violation of section 37 of the Criminal Code. It is specific in that it is not open to the objection held to be well made in *United States v. Beiner* (D. C.) 275 Fed. 704.

The objection is that what it is which the defendants did which the United States charges to be an unlawful conspiracy is not set forth, so that the defendants can know what the real charge is which they are called upon to meet. If the indictment is in truth open to this complaint, it should be held bad on demurrer. We do not find, however, that it is. The substantial charge is that there was a conspiracy to withdraw liquor from bond, and transport it after it had thus been withdrawn, to sell it for beverage purposes, in defiance of the established policy of the law that this should not be done. The part as-

signed to each defendant in this conspiracy is set forth, and what was done by some of the defendants in furtherance of the conspiracy is set out with particularity. Nothing more than this is required, and we are at a loss to understand how more or fuller information could have been very well given. The verbiage employed might have been for the better or the worse, different from what it is, but the information meant to be given is to be found there. Should, however, a bill of particulars be demanded, the demand will have consideration.

[1] 3. As already noted, a conspiracy is not criminal, under section 37, unless it is a conspiracy to do one of two things. The first set forth is clear enough. The second may not, at first glance, be so clear. Is the second broader than the first, or alike specific? A cursory reading of it might well give the impression that it is specific, and its meaning the purpose of unlawfully depriving the United States of money or other property to which it is entitled. One would expect to find that to do anything which the law forbids had been made a crime. Indeed, it would be a misdemeanor at common law. It may well be, however, that every fraud which might be committed against the United States had not been made a crime in itself. None the less a conspiracy to thus defraud is made an offense by section 37. It thus becomes necessary to inquire what acts, other than specific crimes, it is further made a crime to conspire to do; in other words, what is meant by defrauding the United States? The word "fraud" has so many applied meanings, as used, that it does not lend itself to definition. Its meaning in this act of Congress has, however, been found. It is not limited to the thought of the deprivation of property by the acts of wile or deceit, or to depredations upon property rights, but is broad enough to include any act which interferes with or hampers the United States in the successful prosecution of any policy established by law. *U. S. v. Stone et al.* (D. C.) 135 Fed. 392.

It is possible, for illustration, that the United States might have prescribed through acts of Congress a system and regulations for the care of intoxicating liquors in bond and their withdrawal for lawful purposes, and have forbidden their withdrawal otherwise, and appointed agents to carry out and enforce these regulations, and yet not have made dereliction of duty on the part of these agents a crime. To enter into a conspiracy with these agents to have them violate their duty is, however, made an offense under section 37, because this would be a conspiracy to defraud the United States, notwithstanding the fact that the United States lost thereby not a dollar in revenue or otherwise. This complaint is closely related to the next one in one respect.

4. The National Prohibition Act (41 Stat. 305) fairly bristles with things forbidden and with things thereby made criminal acts. To charge defendants with a conspiracy to commit an offense against the laws of the United States, without designating it otherwise than by violating this statute, has been held in the case first cited to be bad on demurrer. The offense (among the many possible) must be set forth. A charge, however, of conspiracy to defraud the United States by doing a specific thing which this act forbids cannot be successfully

met by a demurrer, and, as already found, the object of the conspiracy may be properly characterized in one count as the commission of a crime, and in another count as a purpose to defraud.

[2] 5. It has already been pointed out that the theory of the prosecution includes the purpose to have a purchaser for the liquor illicitly to be withdrawn from bond, transported, and sold. Every sale, illicit or lawful, necessarily implies a purchaser. We have not been referred to any law which makes it a crime to participate in an illegal sale as the purchaser. The aim of the Eighteenth Amendment, and of all laws passed for its enforcement, is directed against the traffic in intoxicating liquors, not against their use. There was an obvious reason for this distinction being made clear. In practical effect, ordinarily, of course, the enforcement of the law results in a prevention of use as well as sale. This is, however, in theory, at least, an incidental and accidental result or consequence. From all that can be gathered from any one of these indictments (except one averment), some of these defendants have been guilty of no other act than the purchase of illicit liquor.

It is strenuously urged upon us, on behalf of some of these defendants, that this is the real fact, of which no one connected with the cases entertains a doubt. It is as vigorously asserted that such a purchase is neither made a crime nor prohibited by law, and that all the prohibitions are directed against the seller. We are not called upon now to decide whether, if the trial fact be, as the argument assumes, a case will have been made out against these defendants; all we do decide is that the argument overlooks the explicit averment mentioned that all the defendants (including those who purchased) were parties to the conspiracy to have the forbidden things done. It is, of course, among the possibilities of the trial of the case that this averment cannot be made good by proof, or indeed that these defendants did not so conspire; but we cannot make this fact finding now.

6. Much of what has already been said has a bearing upon the motions to quash which have also been made. These motions are based upon the assertions that a *prima facie* case was not made out against all, or perhaps any, of the defendants, either before the commissioner or the grand jury. This assertion is in turn based upon the testimony given before the commissioner and the list of witnesses whose names are indorsed upon the indictment, and what is known of what their testimony could be. This court has announced its settled purpose, not merely to secure to defendants their right to a fair trial, but also their other right not to be subjected to the disgrace and expense involved in a public trial on the charge of crime until after a United States commissioner or a grand jury had found there was justification for such trial, or this court had itself allowed the charge to be preferred by information or otherwise. We do not, however, feel called upon, and ordinarily will refuse, to act as an appellate court to review this preliminary finding, by inquiring into the evidence upon which it was based.

Both a United States commissioner and a grand jury have certified to us their judgment that the defendants may properly be put

on trial, and nothing has been shown to induce us to interfere with these findings. The law provides a way to test the question of a prima facie case. It is the right of the defendants to submit themselves to custody and sue out a writ of habeas corpus. There is nothing gained by a review of all the incidents of a preliminary hearing, or of the evidence before a grand jury, and many objections to the introduction of any such practice.

The motion to quash is denied, and the demurrer overruled, with judgment of respondeat ouster.

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**LOCAL NO. 7 OF BRICKLAYERS', MASONS' AND PLASTERERS' INTERNATIONAL UNION OF AMERICA et al. v. BOWEN et al.**

(District Court, S. D. Texas, at Houston. January 11, 1922.)

No. 159.

1. Courts ⇐328(4)—In class suits, aggregate interests, if sufficient, give federal courts jurisdiction.

Where a suit is a class or representative suit, the aggregate interests of the class, and not the several interests of individuals, constitute the matter in dispute, and, if sufficient in amount, gives the federal court jurisdiction.

2. Courts ⇐328(3)—In injunction suits, value of right to be protected determines amount.

In injunction suits, it is not the sum recoverable for the injury sustained, but the value of the right to be protected, that determines the amount in controversy.

3. Courts ⇐308—Though unions could not furnish diversity of citizenship, the individuals made parties could.

In a class suit for injunction by a local against a national trade union, in which the requisite diversity of citizenship existed between the individuals made parties, objection that the unions were not legal entities, and so could not furnish diversity of citizenship, was of no avail.

4. Courts ⇐345—Attacking jurisdiction of federal court after voluntary answer not available.

In a suit for injunction by a local against a national trade union, where defendants have voluntarily answered, the jurisdiction of the federal court cannot be attacked on the ground that the case does not involve property, within the meaning of Judicial Code, § 57 (Comp. St. § 1039), so as to sustain venue of the federal court on the process issued.

5. Trade unions ⇐4—Court relieves from executive board's unauthorized action in expelling member.

Where the attempted action of the executive board of a trade union in expelling a member was without official sanction, and its judgment and acts pursuant thereto are not the action of the union, parties aggrieved may apply to courts, without taking steps within the union for relief.

6. Trade unions ⇐4—Judgment of suspension of members by executive board, acting in spirit of reprisal, held void.

While there is authority for the proposition that members of an executive board, who have been defamed, are disqualified by a direct interest in the subject-matter of the controversy to try the defamatory charge, and that their judgment in such a proceeding would be void, such proposition is not declared thus broadly here; but it is held that where

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the members of the board are involved in the inquiry, and it further appears that the inquiry was entered upon by the board in a spirit of reprisal, rather than judicial fairness, the judgment is void.

In Equity. Application for temporary injunction by Local No. 7 of the Bricklayers', Masons' and Plasterers' International Union of America and others against Wm. J. Bowen and others. Injunction allowed.

Thomas M. Kennerly and McDonald Meachum, both of Houston, Tex., for complainants.

Edward H. Bailey and Thomas H. Ball, both of Houston, Tex., for defendants.

HUTCHESON, District Judge. This is an application for a temporary injunction, filed by Local No. 7 of Texas of the Bricklayers', Masons' and Plasterers' International Union of America and Samuel E. Williams, for himself individually and as a member of said Local No. 7 of Texas of the Bricklayers', Masons' and Plasterers' International Union, consisting of individuals too numerous to mention by name, and Andrew S. McBride, Wm. A. Pudifin, Al De Dains, J. M. Hughes, W. D. Hayes, W. E. Sittler, W. L. Cowell, and Alf Pearson, each for himself individually and as members of said Local No. 7, against the Bricklayers', Masons' and Plasterers' International Union of America, and Wm. J. Bowen, Thos. R. Preece, and Wm. Dobson, president, first vice president, and secretary of the Bricklayers', Masons', and Plasterers' International Union of America, constituting the executive board of said union, and against them in their official capacities and as individuals, to restrain the said persons from putting into effect a sentence or judgment issued by the said executive board, suspending the complainants herein from membership in the Bricklayers', Masons' and Plasterers' International Union of America; the prayer also containing enlarged requests for relief, so as to obtain for the complainants full relief from the judgment complained of herein.

The temporary restraining order was issued without notice upon the grounds stated in the order, and the matter was set for hearing. The defendants answered to the bill and to the application for temporary injunction, and the matter having been set down for a day certain for the hearing on said application for temporary injunction, a hearing was had in chambers on the bill, answer, and affidavits.

The jurisdiction of this court to entertain the bill and prayer of complainants is opposed by the defendants on the ground (1) that this court is without jurisdiction in the cause for the want of the requisite jurisdictional amount; (2) for the want of proper parties plaintiff and proper parties defendant, since Local No. 7 and the International Union are not legal entities, and cannot sue and be sued as such, and, further, that the requisite diversity of citizenship does not exist, since the defendant International Union is not a legal entity, and has no such citizenship status as to furnish the requisite diversity of citizenship. I think it clear that none of the positions of the defendants in these matters is well taken.

[1] 1. As to the lack of jurisdictional amount, it is clear that complainants' suit is a class or representative suit, and it is well settled that

in such suits the aggregate interests of the whole class, and not the several interests of each individual, constitute the matter in dispute. *Carpenter v. Knollwood* (D. C.) 198 Fed. 298; *Herbert v. Rainey* (C. C.) 54 Fed. 252.

[2] Further, it is the settled rule that the amount in controversy in injunction suits is not the sum which the plaintiff might recover in a suit for the damage already sustained, but the amount or value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. *Board of Trade of the City of Chicago v. Cella Commission Co.*, 145 Fed. 29, 76 C. C. A. 28; *N., C. & St. L. Ry. v. McConnell* (C. C.) 82 Fed. 65; 11 Cyc. 878; *Railway v. Kuteman*, 54 Fed. 552, 4 C. C. A. 503.

[3] Nor is there any greater merit in the contention that the suit must fail because of the want of the requisite diversity of citizenship, since, while it is true that the International Union as such has no such citizenship as would sustain jurisdiction, the members of the executive board have all been served and have duly answered, and their citizenship is sufficient to give this court jurisdiction.

[4] The defendants also attack the jurisdiction on the ground that the case does not involve property within the meaning of section 819 of *Barnes' Federal Code* (Comp. St. § 1039), so as to sustain the venue of this court on the process which was issued. If there was ever any merit in this contention, the same is no longer available to the defendants, since they have voluntarily answered in this cause, and it is therefore my opinion that this court has jurisdiction to entertain the bill and grant the complainants the relief prayed for, if upon the showing made on the hearing for temporary injunction they appear entitled to it.

[5] The defendants assert in limine that the bill is without equity, because it is apparent from the face of the bill, to which is attached the constitution and rules of order of the Bricklayers', Masons' and Plasterers' International Union of America, and the constitution, by-laws, and rules of order of Local No. 7, that this is a controversy between the members and constituent units of a voluntary association of persons, and that of such controversies courts generally will take no cognizance, allowing them to be settled in accordance with their own rules and agreements, and especially will courts not take cognizance thereof until after the parties to them have exhausted all of the remedies furnished by the rules of the association. They assert:

That the association is a voluntary one; that the plaintiffs, in applying for a charter in the International Union, all signed the following application and agreement:

"We, the undersigned, residents of Houston, Texas, believing the Bricklayers', Masons' and Plasterers' International Union to be well calculated to improve our intellectual and social condition and promote our industrial well-being and advancement, respectfully petition the Bricklayers', Masons' and Plasterers' International Union to grant us a charter to open a new union, to be located in the city of Houston, county of Harris, and state of Texas. We pledge ourselves individually and collectively to be governed by the constitution, rules and usages of the Bricklayers', Masons' and Plasterers' International Union."

That among the rules of said order it is provided that all judicial and executive authority of the International Union shall be vested in the

executive board; that provision is made in said rules for appeal from the acts of the executive board, and that it is further provided that no member shall commence or cause to be commenced, or aid any person, member, or local union in commencing any action against any local union or the International Union in any court of law or equity until all of the remedies provided by the constitution shall be exhausted, and providing in substance that any member so bringing such action shall subject himself to conviction and expulsion.

The record of what was done in the matters of which complaint is here made shows that upon the complaint of Charles L. Wilde against Subordinate Union No. 7 of the State of Texas, alleging in substance that said union had violated subdivision 3, section 8, article 5, which prohibits the sending out of circulars, etc., pertaining to the official acts of the local, or business affairs or laws of the International Union, and that said union had also violated section 5, article 15, of the constitution by receiving and countenancing an appeal for financial assistance, a referee was appointed under subdivision 4, section 8, article 5, a hearing was had as therein provided, and thereafter the executive board, after considering the report of the referee and the transcript of the hearing accompanying same, did enter the judgment of suspension complained of, and did thereafter proceed to create a new local, as provided in section 1, article 12; the judgment of suspension being as follows:

"The executive board of the Bricklayers', Masons' and Plasterers' International Union of America, duly convened in meeting this 10th day of October, 1921, began the hearing and consideration of the charges against Union No. 7 of Texas. The stenographer's minutes of the trial of said Union No. 7 of Texas were read, together with the findings of the referee, Brother George T. Thornton, thereon. After fully considering said charges and said evidence, the executive board approved the findings of the referee, and found and ordered as follows:

"In the matter of charges against Union No. 7 of Texas the executive board finds the defendant guilty as charged.

"On motion duly made and carried the following penalty was imposed by the executive board: That the aforesaid Union No. 7 be and it is hereby suspended as a subordinate union of the B. M. and P. I. U. of A., pending final action of the International Union in convention assembled.

"The executive board orders the secretary to notify and demand of said Union No. 7 of Texas to immediately surrender and turn over to the secretary of this International Union, the charter, seal, and all books, papers, and property of this International Union in its possession or under its control."

In due time, as required by the rules, the parties affected did lodge their appeal with the executive board, which appeal, instead of being referred to an executive officer, as required by subdivision 4, section 8, article 5, the same was by the executive board referred to the International Union at its next meeting in the state of Massachusetts in October, 1922.

I am strongly of the opinion that the field of judicial interference with the actions of voluntary, nonpublic bodies, as to controversies between their members as to the method and manner in which the rights of membership may be maintained and continued, is, and should be, a very narrow one, and that its boundaries should be maintained with the utmost care, so that only upon the clearest kind of showing, either that the Constitution and rules are violated by the decisions of the tribunals

set up by them, or that the remedies provided by the parties in their agreements for appeal from or the review of the decisions of their own constituted tribunals are nonexistent or unreasonable, should the courts permit their jurisdiction to be invoked, and it is in that spirit that I approach the inquiries:

(1) Is the matter complained of in this case one which has been conducted to judgment in accordance with the constitution and by-laws of the order? and, if so:

(2) Are the complainants, by the rules and constitution of the order, and the procedure extended to them under it, furnished an adequate appeal from that ruling, which they have not yet availed themselves of?

A negative answer to the first question will make an answer to the second question unnecessary, for, if the act of the executive board here complained of is void for want of authority or jurisdiction, the aggrieved parties may at once apply to the courts for relief, since such acts are in law viewed, not as the acts of the union itself, within the meaning of its rules and by-laws, but as the acts of the officers as individuals to whom the rules and by-laws of the union have no more application than if a stranger to the union was endeavoring, by force and violence, to interfere with these complainants in the enjoyment of the rights accorded to them as members of it, just as, though a suit may not be maintained against the state or its officers, when they are acting within the authority of a valid law, it is universally recognized that an injunction will lie against a state officer, when he is acting without warrant or authority of such law.

The principle here stated as to voluntary associations like this in suit is announced in *People ex rel. Keefe v. Woman's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401, where the court says:

"But the weight of authority seems to be in favor of the position that the obligation to take the appeal allowed by the laws of the society does not exist when the judgment is void for want of jurisdiction."

The answer to the first, as well as to the second, inquiry must be found in the constitution and rules of order of the International Union, as reviewed and adopted by the convention which met at Cleveland in October, 1920, which constitution was adopted after the decision of the Supreme Court of New York in the case of *Bricklayers', Plasterers' and Stone Masons' Union v. Wm. J. Bowen*, reported in 183 N. Y. Supp. 855, presumably to supply the want of authority in the executive board then pointed out. It remains to determine if the 1920 amendment has accomplished this purpose. In that case it is said, of article 15 of the constitution of 1918:

"The constitution and rules governing the relations of these parties provide an elaborate and well-conceived scheme, called the code of procedure, for the trial of charges against members by members, against local unions by members, and against local unions by sister locals. These provisions do not, however, either in terms or by reasonable intendment, furnish a procedure for the investigation of charges by the International Union or its officers against a local, its officers, or members."

I agree with this construction of the constitution of 1918, and find that the constitution of 1920 has not undertaken to adapt that code of procedure to disciplinary trials by the executive board, but, on the con-

trary, the same article 15 is re-enacted with slight changes under the title "Code of Procedure for Subordinate Unions Only." The real effort to avoid the force of that opinion was made in article 5 of the constitution, by striking out section 9 of that article, and by amending section 8, which is entitled "Duties of the Executive Board," by changing subdivision 3 as already existing, and by adding an entirely new subdivision 4, which subdivision attempts to confer disciplinary authority on the executive board and provide for its exercise in all matters affecting breaches by locals, officers, etc., of the laws of the International Union, or its rules and orders, or the rules and orders of the executive board.

Subdivision 3 of section 8 of article 5 of the 1918 constitution briefly prohibited vilifying circulars, and circulars pertaining to the business affairs of the International Union or a subordinate union, and specifically provided the penalty therefor as follows:

"Every subordinate branch or member convicted of such violation shall be fined \$100 and shall stand suspended without further notice until the fine is paid."

The same section of the constitution of 1920 added to the offense denounced by that section, "giving out of interviews for public consumption," and appealing for or accepting financial aid or assistance; but, unlike the 1918 constitution, it did not provide a penalty for so doing. It merely provided a suspension pending trial and determination of the offense, as provided for in the same section of the constitution.

Subdivision 4, as added in the 1920 constitution, provided for notice to the president or local affected of the charge, for answer, and for a hearing, either before the executive board or any member of it denominated by the president, or any member of the union appointed as referee by the president, the testimony to be taken by a stenographer and transcribed. If the hearing is before the executive board, an immediate decision shall be rendered and the penalty imposed. If before a referee, the executive board shall consider his report, and, if the accused is found guilty, shall impose a penalty. An appeal is provided, which is to be referred immediately to any officer of the International Union other than the executive board, who shall immediately review the same and render his decision thereon, which shall be final and binding, subject only to the action of the next convention. Subdivision 4 further provides in substance that the executive board shall have entire control over all judicial business of the International Union when not in session, and all questions relating to the laws of the International Union, or subordinate lodges; but said board shall in no case render a decision until both parties shall have had a full and complete opportunity to answer all charges made and refute all evidence submitted, and its decision shall be final, unless reversed by the International Union in convention assembled, and be respected and obeyed accordingly.

It will be seen that, while subdivision 3 provides for suspension pending trial, neither in this subdivision nor elsewhere in this section 8 is any penalty declared or fixed to be imposed after trial, and unless either other portions of the constitution declare the penalty here imposed, or

the board elsewhere in this constitution has authority to declare and fix, as well as to impose, the penalty conferred upon it, the judgment here complained of is void and without any force whatever, for it is fundamental that it is not enough for a statute to forbid the doing of an act; it must also provide the penalty to be assessed upon conviction.

The only other relevant portions of the constitution are article 1, declaring the general powers of the Union, and section 2 of article 17, entitled "Code of Crimes and Penalties." That neither of these support the judgment is at once apparent upon inspection. Article 1, section 3, provides as follows:

"The powers of this union shall be executive, legislative and judicial. The government and superintendence of subordinate unions shall be vested in this union as the supreme head of all unions in its jurisdiction."

#### Section 4 provides:

"All legislative powers shall be reserved to this union duly convened in session, and shall extend to any case of legislation not delegated to or reserved for subordinate unions."

#### Section 5:

"All the executive and judiciary powers of this union, when not in session, shall be vested in the executive officers, the president, first vice president, and secretary."

Section 2 of article 17, contains a list of crimes, and fixes penalties therefor; but in this list there is no reference to the matters made the occasion for the judgment which is the subject of complaint here.

It follows, then, that the attempted action of the executive board is without official sanction, or color of sanction; that their judgment, and the acts done under the authority of and pursuant to that judgment, are not the acts of the union, and must be held to be the acts of intermeddlers and void; and that complainants, as citizens of a great Republic, which affords the protection of its courts against arbitrary and despotic actions to those entitled to it, whether rich or poor, union or nonunion, may therefore now apply to the court for relief against the wrongs and aggressions which they have suffered, from the illegal action of the defendants, without being obligated to take any steps within the union to relieve themselves from these undoubted wrongs.

In this view it is perhaps unnecessary to at all discuss the second question, whether the complainants have been afforded an adequate appeal; but it may not be amiss to say that I think it equally clear that the reference by the executive board of the appeal of complainants to the International Union was equally unlawful and without authority, and that by denying to the complainants the immediate relief which the constitution afforded them of a trial before an executive officer, the executive board has prevented them from exhausting their rights within the association, if in law they should have first exhausted them, and cannot now be heard to say that complainants' suit here is premature. It is as plain as language can make it that, as far as disciplinary matters are concerned, no direct appeal was provided to the convention, but that, since all powers were vested in the union in convention assembled, it was expected, not by way of appeal, but by way of general visitation,

the International Union would supervise and correct, if necessary, any acts of the executive board of a disciplinary character performed during adjournment, and, in order to give a speedy right of trial, the ten days' appeal to an executive officer was provided.

[8] There is another aspect of this case which is sufficient to support the view here announced that the judgment of the executive board is a nullity—the want of judicial fairness which characterized these whole proceedings. It is a fundamental principle that no judicial or quasi judicial hearing is valid, where the maxim “audi alteram partem” is ignored, and it is therefore of the essence of a valid judgment that the body which pronounces it shall be unbiased, shall have no interest whatever in the outcome of the issue, and shall not have in any manner prejudged or predetermined it.

There is authority for the position that the very nature of this controversy, involving as it did a proceeding to discipline complainants on account of protests made by them against the salaries of the executive board, a criticism of their conduct, and a movement to secure a referendum election, by which new officers could be elected, rendered the executive board disqualified, as a matter of law, to sit in judgment, and made their judgment a nullity. for, as was said in the case of *Bricklayers', Plasterers' and Stone Masons' Union v. Bowen et al.*, 183 N. Y. Supp. 855:

“The law insures to every member of such an association a fair trial, not only in accordance with the constitution and by-laws of the association, but also with the demands of fair play, which, in the final analysis, is the spirit of the law of the land.”

In *Wilcox v. Royal Arcanum*, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806. in which Wilcox was tried and expelled by the executive officers for having issued defamatory circulars regarding them, the court held the judgment void, and said:

“It is shocking to one's sense of fair play that the persons defamed should be selected to try the defamatory charge, and it is sufficient for the purposes of this case to hold that they are disqualified by a direct interest in the subject-matter of the controversy.”

It is not necessary, however, for me to announce the doctrine thus broadly, because it is apparent, from the facts in this case, that the cause of complainants here, defendants in the proceeding in the matter of the complaint of *Charles L. Wilde v. Subordinate Union No. 7*, was prejudiced against them, and that the inquiry was entered upon by the board in a spirit of reprisal, rather than one of judicial fairness, as appears from the following portions of the letter of William Dobson, secretary of the executive board, and one of the judges who pronounced the judgment complained of here. This letter is attached to and made a part of the affidavit of William Devine, filed in this cause by the complainants:

“Our laws that we made at the Cleveland convention make it somewhat slow for us, but you can rest assured, Brother Devine, that in the end No. 7 will be fully dealt with.”

And the concluding paragraph:

"With best wishes, and assuring you that it is the intention of the executive board to deal out the letter of the law to these men, who are introducing disruptive things within our institution, and that there will be no let-up on our part until this has been fully accomplished, in so far as their membership and their association with us is concerned."

The judgment and the proceedings of the executive board in the matter of the complaint of Charles L. Wilde against Subordinate Union No. 7 of the Bricklayers', Masons' and Plasterers' International Union being, for the reasons heretofore stated, of no effect, it follows that their action in attempting to institute a new local is also void, and without force and effect, and complainants may have a temporary injunction protecting them in their rights secured to them under the constitution and laws of the order, just as though the complaint of Charles L. Wilde against Local No. 7 had never been filed or determined.

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JOHNSON et al. v. LIT BROS., Inc.

(District Court, E. D. Pennsylvania. December 14, 1921.)

1. Patents ~~6~~—328—For improvements in union garments held void for lack of invention.

The Johnson patents, No. 973,200, No. 1,281,019, and No. 1,298,346, for improvements in union garments, held invalid for lack of invention.

2. Patents ~~6~~—36—More commercial success not evidence of invention.

Mere commercial success is never a test of invention nor even evidence of its presence, but the recognition by those who deal commercially in what is patented of the claim of the patentee to exclusive ownership has evidential value.

3. Patents ~~6~~—327—On question of validity court, if possible, should follow prior decisions.

On the question of validity of a patent a District Court, if able in good conscience to accept them, should follow prior decisions by courts in other circuits or districts, whether of higher or equal authority, to avoid creating a situation in which for the time being the same thing would be lawful in one district and unlawful in another.

In Equity. Suit by Horace G. Johnson and Henry S. Cooper against Lit Bros., Inc. Decree for defendant.

Charles N. Butler and Maurice B. Saul, both of Philadelphia, Pa., for plaintiffs.

Edwin F. Samuels, of Baltimore, Md., George P. Dike, of Boston, Mass., and Francis B. Bracken, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The ultimate finding is made that letters patent respectively Nos. 973,200, 1,281,019, and 1,298,346, issued to Horace G. Johnson October 18, 1910, October 8, 1918, and March 25, 1919, for improvements in union garments, are invalid for want of invention.

[2] The kind of subject-matter to which these patents relate and the nature of the claims gave no promise other than of a big D and

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little d, and a prime and double prime type of argument, and the reading of the claims upon a variety of garments. There was small expectation that such an argument could be made entertaining or even invite attention. Notwithstanding this handicap, it is a high, although deserved, tribute to counsel on both sides that they have made the argument alike helpful and one to which it was a pleasure to listen. Indeed, the argument for the plaintiff was so plausible and forceful as to command attention. It was short, if at all, only in convincing power. Unless, however, we have taken a mistaken view of the legal merits of the case, the task imposed upon counsel of now getting a favorable judgment from a trial court is a hopeless one, because there has already been a finding of invalidity, which this court should follow. Aside from the considerations hereafter stated, which have led us to the conclusion reached, the subject-matter of this claimed invention and the fully occupied field of this special art would each predispose the mind to refuse to find invention. Commercial success is often spoken of as a test (at least in doubtful cases) of invention. It is strongly urged in this case. At the most it can never be more than merely evidence of the presence of invention. None, as before often observed, can ever be sure how much success is due to the arts of the salesman and how much to the inventive merits of what is sold. More than this, mere commercial success is never a test of invention nor even evidence of its presence. The thing that counts is recognition by those who deal commercially in what is patented of the claim of the patentee to exclusive ownership. This has evidential value, precisely as what is asked and what offered in commercial dealings is evidence of commercial value. When the art under consideration is the art of the designer of garments, large sales by no means argue invention. It would be easy for any one to see novelty in feminine apparel, for without at least the pretense and show of novelty few sales would ever be made, but it would require more than the eagle eye to see utility in much of that which is displayed to the public. A fortune awaits the one who knows what it is which determines the demand for special styles in such garments, but failure is sure for him who thinks that inventive merit commands it. If patents were granted for special designs in garments, patentable merit might be found in many of them, for the most that commonly can be said for any make of garment is that it is the special make of the designer. We have time and again remarked that when a person has designed or made anything, or has created a special market for anything, or has discovered a new commercial field to be exploited, there is a proneness to bring forward a very aggressive claim to exclusive proprietorship. The impulse to so do, as also before many times remarked, is so general that it must have its base in a common sense of justice. Because of this there is strong popular support for patent, copyright, and trade-mark laws. The feeling of ownership, however, far outruns these laws. The patent laws have a wholly different base and rest solely upon the policy of the law to promote the progress of science and the useful arts. One kind of merit is just as deserving as another. They may differ but only in degree. One is rewarded with a

monopoly, and the other is not, solely because, for a reason hereafter noted, it is practicable to reward the one, and not the other. The real right of special designs or special makes is the right to protection against, not competition, but unfair competition. The protection which the patent laws, through the remedies given, afford, is just as different from the right of protection against unfair competition as two things can be. The two things are indeed almost, if not quite, opposites. The patent laws give the exclusive right to make, use, or vend the patented thing, no matter how unlike the infringing thing may be made to appear. Unfair competition condemns the making and vending only of what has a fraudulent deceptive resemblance to another make. It does not condemn the making or vending of what is in function and substantial character the same thing if deceptive likeness be absent. Notwithstanding this oppositeness, the two rights are, with strange frequency, confused. It is easy to find unfair competition when one maker puts upon the market the special make of another, for which a special demand has been created. It is not easy to find invention in every mere special make of garment which differs in design from other makes. So far as we have been able to discover, this is what and all the plaintiff has.

The general kind of garments to which these patents relate were in vogue at a time "to which the memory of man runneth not to the contrary," because such garments go back to the time of "broad-fall" breeches. The patents, because of this, relate to improved forms and necessarily to what are really special makes of garments. The patents have already been found to be invalid both in the Second circuit and in the Eastern district of Wisconsin, having been so declared in the case of *Johnson et al. v. Lambert*, 234 Fed. 886, 148 C. C. A. 484, and the unreported case of *Johnson & Cooper v. Browning, King & Co*.

[3] The opinions of Judges Mayer and Geiger have made any further discussion by us of no moment. We content ourselves, in consequence, with a statement of the general considerations involved. The consideration which may be first named is that we should follow the rulings made. It has been urged upon us that neither of these rulings is authoritative, nor the two more so. This is true only in a very narrow sense. The refusal to follow them means that for the time being the same patent is valid in one district or circuit, but not in others. If courts of the United States administering the same law declare one thing to be lawful in one district and unlawful in another, a situation is created which should be avoided, if possible. Trial courts may easily avoid it (unless conditions are exceptional) by accepting whatever ruling is made, if able, in good conscience, to accept it. Good conscience demands intellectual integrity on the part of judges. Whenever a trial judge cannot accept a ruling (which does not authoritatively control him) made by another court, although of co-ordinate jurisdiction, he cannot, of course, follow it, but, whenever he can accept it, he should do so, and the fact that, if the question had first come before him, he would have ruled otherwise, weighs little. Every consideration, including the wisdom of leaving to appellate courts to reconsider questions determined by other courts in sister districts, commands this.

We are able to accept, and do accept, the finding of invalidity made, and the finding of this court might well rest upon the cited cases alone, which, until overruled by an appellate court, should be followed by this court.

One form of garment known to the trade was of the type of closed crotch union suit with a slit extending (from a point in the line of the backbone of the wearer and well up toward the shoulders) downward to end near the closed crotch. This slit was closed (when not needed) by its edges being extended into overlapping flaps. When the opening was needed, it was brought about by the material of each edge of the slit being drawn away from what we have called the backbone line, by which the opening was made as wide as desired and large enough to serve all purposes of its use. The inevitable effect was to shorten the vertical dimension of the opening slit. This was thought to be a defect in the plan of the garment because it brought discomfort to the wearer. The obvious mode of relief was to provide more slack in the vertical length of the slit. The patentee secured it by ending the slit not at and in the center of the closed crotch, but below it and to one side. This prompted placing it down one leg under the thigh, and the patentee so positioned the end of the slit in the right leg. So far as we can see, he might just as well have selected the other leg. This is all we can find in patentee's major patent. The thought of doing this might well be characterized as "clever" or even "ingenious," as that word is used with more or less inaccuracy in common speech, or any other commending adjective might be applied to it. Was it, however, invention entitling the patentee to the reward of a monopoly which would compel by law the six or more million people who the patentee says wanted to wear a garment of that kind to buy of him or go without?

This record shows that there were numerous variations (including this patentee's with the others) in the make of these garments. Some closed the slit by wide margins or edges on each side; some by a wider left-side margin overlapping the slit toward the right with no right-side margin or widened edge; some having this overlapping flap of one form and some of another; some fastening it in one way and some another; some fasteners were made removable and some permanent; some ended the slit in the seam of the trouser leg; some at varying distances to the right side of the leg; some began the slit opening in line with the backbone, and some started it at varying distances to the right or left; some made the right-hand edge of the overlap a straight line; some a curve, and some put one or more angles in it; some put fasteners at the upper right-hand corner of the flap of the same kind as the fastener at the lower point, and some had them different. The variations were almost without number. Did each one display invention? The strongest practical obstacle to holding that they did is the experience of each in the Patent Office. When the patentee filed his second application (or one of his applications), he admits there were 20 (defendant counts 26) interferences declared. We understand the Patent Office, after holding them under advisement for seven or eight years, allowed every one of them. These were not all the patents, but

only those granted in one batch. The patent laws must be given a working construction. What is the practical result of allowing monopolies of each special make? What is a haberdasher or seamstress to do who is pestered by infringement warnings from this army of patentees? We can readily believe that each of these special makes had a merit of its own. It must, however, be evident that this is not the kind of merit which is rewarded with a monopoly. Skill, knowledge, resourcefulness, capacity, and all good qualities are deserving of praise, and for that matter of reward. They get their reward. Every man owes something to his profession, trade, or avocation. He owes it because he is the beneficiary of other contributors. He cannot be rewarded, however, with a monopoly unless he has invented something. The distinction is not only real, but is made by the law for a very practical reason. Inventors are few; skilled designers, artisans, mechanics, and workmen are many. The few may be given monopolies, whether very deserving or not; the many cannot be granted monopolies no matter how meritorious their craftsmanship. An all sufficient argument against the validity of these patents is afforded by the fact that there is not sufficient standing room in this art for all who have overcrowded it with demands for the right to monopolize it.

We have been referred to the case of *Globe Knitting Works v. Segal*, 248 Fed. 495, 160 C. C. A. 505, as an authoritative support for these patents. If the ruling there made applies, these patents are without doubt valid. Does the ruling there made direct the ruling to be here made? We do not so read that case. The ruling of the trial court in that case was clearly based upon a finding of invalidity because, in the view of that court, all the patentee had there done was to substitute one material for another. It is true a finding of invalidity was side-stepped as unnecessary to be made because the defendant, not having used the same material as the patentee, was not an infringer. The Court of Appeals found that the patentee had done more than merely exchange the material of the prior art for another kind of material. It followed that the finding of infringement should be reversed. We see nothing in that ruling to affect the ruling to be made in the instant case.

The bill filed is accordingly dismissed, with costs, for want of equity. The plaintiff, having no valid patents, has no exclusive property upon which the defendant could be trespassing and no equity upon which to base its prayers for relief.

**PENROSE v. SKINNER, Collector of Internal Revenue.**

(District Court, D. Colorado. August 22, 1921.)

No. 7016.

1. Internal revenue ⇐38—Finding of fact by former Commissioner in assessing income tax should be regarded as final.

No authority has been vested in the Commissioner of Internal Revenue to overrule and reverse the action of his predecessor in office, and where a former Commissioner heard and determined a question of fact necessary to enable him to act intelligently in determining the amount of plaintiff's net income on which he would be required to make a levy and assessment, and his finding on that issue has not been impeached, it should be regarded as final.

2. Internal revenue ⇐38—Decision of former Commissioner not conclusive, when question involved was different.

Where the only question of fact under consideration on plaintiff's application to a former Commissioner of Internal Revenue for remission of an income tax assessed against him was whether he was within the class of persons entitled to deduct losses sustained in buying and selling stocks and securities, the Commissioner's decision is not conclusive on the present Commissioner, where it now appears that plaintiff did not during the tax period sustain any such losses as those claimed.

3. Internal revenue ⇐38—Tax paid not recoverable, when taxpayer not entitled to deductions claimed, whether assessment made or not.

Where a taxpayer's income tax return was false, in that he had not sustained the losses deducted therein, the tax subsequently collected on the amount of such deductions was justly exacted, whether an assessment had or had not been made, and could not be recovered, there being no implied promise for its return.

4. Internal revenue ⇐38—Limitation of actions to collect taxes inapplicable in suit to recover taxes already paid.

Act Feb. 24, 1919, § 250d (Comp. St. Ann. Supp. 1919, § 6336¼tt), providing that no suit or proceeding for the collection of any income tax shall be begun after the expiration of five years from the date when the return was due or was made, has no application in an action to recover back a tax paid under protest.

At Law. Action by Spencer Penrose against Mark A. Skinner, Collector of Internal Revenue for the District of Colorado. On motion by plaintiff for judgment on the pleadings. Motion overruled.

Hamlin & Rothrock, of Colorado Springs, Colo., for plaintiff.

J. Foster Symes, U. S. Dist. Atty., of Denver, Colo., for defendant.

LEWIS, District Judge. This is an action of indebitatus assumpsit to recover \$12,538.77 paid under protest by plaintiff to defendant. The amount was made up of \$12,056.51 exacted from the plaintiff under the Act of October 3, 1913 (38 Stat. 166), as additional income tax for the year 1913, and the remainder, \$482.26, was interest on that sum.

The questions now presented arise on plaintiff's motion for judgment in his favor on the conceded facts which appear in the pleadings. Those facts, gathered from the complaint, exhibits thereto, and admissions in the answer, are these: Within the time required by the Act,

⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and on February 21, 1914, plaintiff made to the collector his individual return of his income for the year 1913, upon which was assessed a tax of \$1,919.83, which the plaintiff paid. The net income on which the first assessment was made was obtained by deducting from the gross a large amount as losses sustained and "incurred in trade" on account of corporate stocks held by plaintiff, some of which were represented as worthless and others as worth far less than cost. After investigation these losses were all disallowed as deductions by the commissioner, and the second assessment upon the full amount claimed and disallowed as losses was made and put upon the August, 1915, list for collection, making an additional tax of \$12,056.51.

On demand for payment plaintiff presented to the commissioner his application and proof for remission of the second assessment. The commissioner granted a hearing and the point at issue was, whether the facts presented by the plaintiff brought him within the class of persons whose occupation permitted them, under treasury rulings, to claim the deduction as "losses actually sustained during the year, incurred in trade"; i. e., whether plaintiff was a licensed broker or member of a stock exchange engaged in buying and selling securities for himself and others. Plaintiff adduced proof to establish that he was in the class, and prevailed; so that in March, 1916, his application was sustained and the second assessment entirely remitted by Commissioner Osborn. In December, 1918, Commissioner Roper reassessed the amount claimed as losses and again plaintiff made application and presented proof for remission of this assessment, on the same ground and for the same reasons as the ones heard by Commissioner Osborn, but Commissioner Roper denied the application, his reason therefor being that plaintiff was "neither a licensed broker nor a member of any stock exchange engaged in buying and selling securities for others as well as yourself," as set forth in his letter of July 17, 1919, to wit:

Treasury Department.

Washington, July 17, 1919.

Mr. Spencer Penrose, Colorado Springs, Colo.—Sir: Reference is made to your claim for the abatement of \$12,056.51 additional individual income tax for the year 1913.

The basis of the claim is that this assessment was made upon the erroneous disallowance by this office of certain losses sustained by you in trade during the year 1913.

The records of this office show that you filed individual income tax return for 1913, upon which you were assessed a total income tax of \$1,919.83; that subsequently you were assessed an additional tax of \$12,056.51, based upon the report of a revenue agent, recommending the disallowance of \$269,280.95 taken by you as a deduction on account of a loss in dealing in securities. This additional statement is shown on the August, 1915, list, page 2, line 22. In a claim executed September 25, 1915, you requested the abatement of this additional assessment, basing your claim upon the statement that the same was made upon the erroneous disallowance of a deduction on account of losses sustained by you in trade. March 11, 1916, this claim was allowed in full and the assessment on the August, 1915, list abated. Subsequently, a reassessment of \$12,056.51 additional income tax for 1913 was made and appears on the December, 1918, list, page 2, line 22.

It appears from the revenue agent's report and it is admitted by you that during the year 1913, you were neither a licensed broker nor a member of any stock exchange engaged in buying and selling securities for others as well as yourself.

This Bureau has ruled, and now holds, that losses sustained in dealing in securities by one other than a licensed broker or a member of a stock exchange, is not a loss sustained in trade or business, under the Act of October 3, 1913, and therefore not an allowable deduction from income.

The assessment of \$12,068.51 additional income tax for 1913, having been properly made, your claim for the abatement thereof is accordingly hereby rejected.

Respectfully,

[Signed] Daniel C. Roper, Commissioner.

On August 4, 1919, plaintiff paid the tax with interest under protest, and thereafter, on March 30, 1921, brought this action.

On the foregoing facts the plaintiff contends (a) that the ruling of Commissioner Osborn in March, 1916, remitting the assessment was final and conclusive, and that the subsequent act of Commissioner Roper in making a reassessment was void, and (b) the reassessment, not having been made within the statutory time, is void.

[1] If it were necessary to pass upon the first proposition noted above I would, in the light of present investigation, decide the question with the plaintiff. No authority has been vested in a Commissioner to overrule and reverse the action of his predecessor in office. Commissioner Osborn, acting under his authority, heard and determined a question of fact necessary to enable him to act intelligently in ascertaining and determining the amount of plaintiff's net income on which he would be required to make the levy and assessment, and his finding on that issue not having been impeached by the answer should, under every principle and rule of law, be regarded here as final. *U. S. v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792; *U. S. v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908; *Western Express Co. v. U. S.*, 141 Fed. 28, 72 C. C. A. 516; *Logan County v. U. S.*, 169 U. S. 255, 18 Sup. Ct. 361, 42 L. Ed. 737; *Burfenning v. Ry. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574; *Ex parte Larowe*, Fed. Cas. No. 8,093; *Ex parte Simpson*, Fed. Cas. No. 12,878; *Dugan v. U. S.*, 34 Ct. Cl. 458; *Corning & Co. v. U. S.*, 34 Ct. Cl. 271; *City of Louisville v. U. S.*, 31 Ct. Cl. 1; *Stotesbury v. U. S.*, 23 Ct. Cl. 285; *Sybrandt v. U. S.*, 19 Ct. Cl. 461. In the *Sybrandt* Case it is held that the law imposes on the Commissioner the duty of deciding whether a tax has been erroneously or illegally assessed, and the courts cannot review the evidence and say that it did not support the finding. In *Bank v. U. S.*, 15 Ct. Cl. 225, it is said:

"There is no doubt that an allowance by the Commissioner may be impeached anywhere for fraud, for that avoids all contracts into which it enters as against the party defrauded; or for want of jurisdiction; or for a mistake apparent upon the certificate of allowance; or generally for such other irregularities in the proceedings as would avoid an award made by arbitrators so far as the proceedings are similar; but not for what might seem to others to be a mere mistake of judgment in the weighing and giving force and effect to evidence."

And on the second proposition above noted I would hold against the contention of the plaintiff, if it were now necessary to definitely rule upon it. *National Bank of Commerce v. Allen*, 223 Fed. 472, 139 C. C. A. 20; *National Bank v. Gill*, 218 Fed. 600, 134 C. C. A. 358. The language of the statute construed in those cases is identical with that

found in the statute here under consideration in respect to the question raised.

[2] But in my judgment, if both propositions were determined in favor of plaintiff that would not dispose of his motion for judgment; for the answer sets up facts in defense that do not appear to have been investigated, considered and determined at the hearing before Commissioner Osborn. It runs thus:

"And for a further answer defendant alleges that in making his return for income taxes for the year 1913 plaintiff understated the amount of his net income by overstating and making claim for losses claimed to have been sustained in trade and business during the year 1913. That in his return plaintiff claimed a loss in trade in the sum of \$269,380.95, which claimed loss in trade, and no part thereof, was sustained by plaintiff during the year 1913. Defendant alleges that the pretended losses in trade were claimed by plaintiff to have been sustained by depreciation in the capital stock of the United States Sugar & Land Company and the Ray Consolidated Copper Company.

"That as to the United States Sugar & Land Company defendant alleges that on March 1st, 1913, said corporation was insolvent and its capital stock, both preferred and common, was valueless, having no market or real value, and that if plaintiff ever sustained any loss on account of investments in the capital stock of the United States Sugar & Land Company, such loss was sustained prior to March 1st, 1913, and was not a proper deduction from plaintiff's gross income for the year 1913. That as to the capital stock of the Ray Consolidated Copper Company, defendant alleges that plaintiff's pretended loss was false, and that plaintiff sustained no loss whatever in trade in the capital stock of the said the Ray Consolidated Copper Company."

[3] The facts thus pleaded might be said in a broad sense to have been embodied by plaintiff in his return, but it does not appear that they were in issue before the commissioner at the hearing. The proof presented by plaintiff at that time discloses that the one question of fact under consideration was, whether he came within the class of persons entitled to claim the losses under the ruling theretofore made by the department and noted above. It was assumed that they had been sustained and incurred within the tax year, as claimed by the plaintiff in his return. The answer in effect alleges that the return was false in that respect; and if false, the deductions claimed should not have been made, and the tax which the plaintiff now seeks to recover was justly exacted from him regardless of whether an assessment had or had not been made. In *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840, it is said in response to the contention that an assessment levied for internal revenue was illegal and void (22 Wall. 638, 22 L. Ed. 840):

"Mere irregularities may be passed over without remark, as the suit is an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex aequo et bono* is bound to refund the amount which they paid. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfill that obligation, but the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law."

The Act of October 3, 1913, requires that every citizen having the necessary net income shall pay the tax annually, and if the deductions

claimed in the return were not allowable as losses sustained and incurred within the tax year, it was the duty of the plaintiff under the Act to pay the amount which he now sues to recover. If it had not been paid it might have been recovered by an action against him, even though the reassessment made by Commissioner Roper was a void act on his part, *U. S. v. Chamberlin*, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204; and if recoverable against him in an action brought for that purpose there can be here, of course, no implied promise for its return.

[4] The period of limitation fixed in section 250 (d) of the Act of February 24, 1919 (40 Stat. 1083 [Comp. St. Ann. Supp. 1919, § 6336½tt]), has no application here because this is not a suit or proceeding for the collection of the tax.

The plaintiff's motion for judgment in his favor on the pleadings must be overruled.

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### In re WILL V. CONNELL CO.

(District Court, N. D. Alabama, S. D. October 15, 1921.)

No. 18085.

**1. Bankruptcy ⚡303(3)—Evidence held not to show that claimants had notice of bankrupt's insolvency when purchasing goods.**

In a trustee's proceeding before referee in bankruptcy to set aside a transaction as a voidable preference, evidence *held* to show that the claimants had no notice, or knowledge of any facts sufficient to put them on notice, that the bankrupt was insolvent when the goods were delivered to them.

**2. Bankruptcy ⚡303(1)—Trustee, to have transaction declared a preference, must prove bankrupt knew of his insolvency and that claimants had notice thereof.**

In a trustee's proceeding before a referee to avoid a sale as a preference, the trustee assumed the burden of showing, not only that the bankrupt knew of his insolvency, but that the claimants, alleged to be the recipients of preferences, had notice or knowledge of bankrupt's insolvency when the goods were delivered.

**3. Bankruptcy ⚡303(3)—Evidence held not to show that claimants acquired more property by purchase than sufficient to satisfy their respective acceptances.**

Evidence *held* insufficient to show that the claimants acquired more property on the face of their purchase from the bankrupt than was sufficient to satisfy their respective acceptances.

**4. Sales ⚡210—Finding that no article was separated from the mass was erroneous, where goods were placed in warehouse and certificates issued to buyers.**

Where bankrupt sold goods to claimants and had them transferred to a warehouse, and uniform warehouse receipts drawn under Acts Ala. 1915, p. 661 et seq., delivered to claimants, a referee's finding that claimants had bought no specific article, and that none was separated from the mass of property, so as to pass title, was error, particularly in view of Acts Ala. 1915, p. 666, § 23, relating to warehousemen mingling fungible goods.

**5. Bankruptcy §165(3)—Buyers, taking goods under lawful trade acceptances, paying for them, they being delivered through a warehouse by receipts, was not a voidable preference.**

Where claimants, buyers, executed lawful acceptances approximately 30 days before delivery of the goods, payable to the bankrupt's order, and subsequent to the receipt of the money and prior to bankruptcy, the bankrupt delivered the goods due through a warehouse and warehouse receipts, the bankrupt's creditors enjoyed the fruits of the money, and the trustee cannot seize such goods as a voidable preference.

In Bankruptcy. In the matter of the Will V. Connell Company, a corporation, bankrupt. On petition by the Central Grocery Company and others for a review of an order and decree by the referee, declaring a voidable preference. Order annulled and set aside, and claimants, the petitioners here, will by proper decree be granted their just relief.

Wood & Pritchard and Thomas J. Judge, all of Birmingham, Ala., for claimants.

Rudolph & Smith, of Birmingham, Ala., for trustee.

CLAYTON, District Judge. This matter is before me on the petition of the Central Grocery Company and others for review of the findings and decree and order of the referee made on September 10, 1921.

[1] The referee held that:

"2. With notice of then insolvency, of the bankrupt; and if such purchase were allowed to stand, he would thereby receive a voidable preference; and further

"3. Having attempted to make such purchase, with notice of such insolvency, the transaction in each instance was fraudulent and void as against the trustee in bankruptcy, for the reason, among others, that the claimant acquired more property on the face of the transaction than was sufficient to satisfy the respective acceptances, for which the claim is made that the goods were to be in payment."

He based these conclusions upon the theory that the petitioners had notice of the insolvency of the bankrupt, and therefore to allow their claims would be to give validity to a voidable preference, and that the claims of the petitioners are fraudulent and void as against the trustee in bankruptcy because, as he concludes, with notice of such insolvency "the transaction" in the instance of each claimant "was fraudulent and void."

A careful study of the evidence convinces me that the claimants had no notice or any knowledge of any facts sufficient to put them on notice that the bankrupt was insolvent when the goods were delivered to them. The testimony convinces me that the bankrupt himself did not know or believe he was insolvent at the time the goods, the subject-matter of the litigation, were delivered to these claimants. See pages 21, 22, 23, 24, 25, and 35 of the record of the testimony.

[2] Moreover, the trustee assumed the burden of going further than this, for it was incumbent upon him to show, not only that the bankrupt knew of his insolvency, but to prove that the claimants, alleged

to be recipients of preferences, had notice or knowledge of the bankrupt's insolvency at the time the goods were delivered to them. To me it seems clear that the bankrupt did not realize his insolvency, and that no notice of his insolvent condition was ever brought home to the claimants, these petitioners. See the testimony of Rose Schillicci, pages 3 and 4 of the record. The other claimants testified substantially as Schillicci did. Each of them denied having any notice of the bankrupt's insolvency until the petition in bankruptcy was filed. It may be added that the trustee offered no evidence that any of the claimants had notice of the bankrupt's insolvency, and also it is to be said that the trustee failed to show that the bankrupt himself knew of the insolvency at the time the goods in question were delivered.

The testimony shows that each of the claimants were small retail grocers whose entire time was taken up with the operation of their stores. The bankrupt was a wholesale grocer and broker, having large well-stocked storehouses in the wholesale district of Birmingham. The retail grocery stores of claimants were located, one at Bessemer, one at Brighton, one at Pratt City, and one at Ensley, all small towns some miles distant from the bankrupt's place of business. The bankrupt as wholesale grocer was selling goods to retailers. This relationship, however, could not have put the retailer on inquiry as to the financial condition of the wholesaler, especially in view of the fact that the goods were sold at open market prices. It is not pretended that any of the flour or lard was ever sold to any one of the claimants for less than the prevailing open market prices. The testimony is convincing that all of the goods were sold at the prevailing prices.

[3] A careful consideration of the evidence convinces me that the claimants did not acquire more property on the face of the transaction than was sufficient to satisfy their respective acceptances. However material or immaterial may have been this finding or observation of the referee, it is not supported by the evidence. I find the transactions of each claimant with the Will V. Connell Company to have been fair, open, and honest. Each transaction was had in the due course of business. No fraud, actual or constructive, whatever was perpetrated by any one of the claimants.

I am clearly of the opinion, from the evidence, that the referee erred in his second and third findings of facts and his conclusions thereon. *Tumlin v. Bryan*, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *Roseman v. Coppard*, 228 Fed. 114, 142 C. C. A. 520. Both of these cases were decided by the United States Circuit Court of Appeals for the Fifth Circuit.

[4] The other question in the case is the conclusion of the referee upon the undisputed evidence in the case. The referee found:

"1. That no one of the claimants made purchase of any specific article, and no specific article was separated from the mass of the property so as to give the claimants title thereto."

I have no doubt that he erred in this conclusion. The evidence touching this point consisted of warehouse receipts made out to each of the claimants, describing with particularity the amount of flour and lard claimed by each of the petitioners in these proceedings. The re-

ceipt in each case was issued by the Harris Transfer & Warehouse Company of Birmingham and accepted by the claimants prior to the bankruptcy. These receipts are in regular form, "uniform warehouse receipts," drawn in compliance with the provision of the act "to make uniform the law of warehouse receipts," etc. Acts of Alabama 1915, p. 661 et seq. The receipt in each case is signed by the warehouse company by its agent and also by the claimant. Each claimant's particular property is described in his receipt.

The evidence showed that during the month of January, or 30 days or more prior to the bankruptcy, each of the claimants executed separate trade acceptances due approximately 60 days after date, to cover the purchases of flour and lard made by the claimants, the petitioners, from the bankrupt. These trade acceptances were immediately discounted by the Birmingham Trust & Savings Bank, the bank with which the bankrupt did business, and the cash was then placed to the credit of the bankrupt. The money thus obtained by the bankrupt was used by it in the due and regular conduct of its business. About 30 days after the bankrupt had obtained the money upon the trade acceptances, the bankrupt "phoned" each of the respective claimants that it expected a large shipment from the "Hazel Milling Company" upon consignment, and that their flour was in its warehouse, and that the bankrupt needed its warehouse space and desired claimants to remove their flour at once. The claimants' stores were small and some miles distant from the bankrupt's store, and it was not convenient for them to take the flour at once; thereupon, at the suggestion of the bankrupt, the bankrupt caused all and each of the claimants' flour to be hauled to the public warehouse of the Harris Company, and there stored separately in the name of each of the respective claimants, causing uniform warehouse receipts to be issued to each claimant, describing thereon the specific property stored in the warehouse. These receipts were at once delivered to the claimants. There was no fraud, collusion, or bad faith between the warehouse company and the bankrupt, or between the warehouse company and any of the claimants. On this hearing it was not asserted that there was any fraud in fact. However, the referee concluded that "no specific article was separated from the mass of the property, so as to give the claimant title thereto."

Upon the evidence in this case I am forced to conclude that this finding of the referee was erroneous, and not based upon any evidence or facts. The evidence shows that the flour and lard described in the respective receipts was delivered to the public warehouse, and there stored and held for the purchasers who had previously paid for such goods. To each claimant a separate uniform warehouse receipt was issued, describing his specific property. These facts constituted a completed sale and delivery of the goods to each claimant. It is not true that the purchasers were unable to identify their specific property, for the facts show that some of the claimants did go to the warehouse, present their receipts, and withdraw from the warehouse part of the flour as it was needed by them in their retail business, prior to the bankruptcy of the Will V. Connell Company, the bankrupt here.

The bankrupt had no right, legal or equitable, to disturb the claim-

ants in the enjoyment of the merchandise it had sold and delivered to them; especially so in view of the fact that the bankrupt had collected all of the purchase price for the goods prior to their delivery. It cannot be maintained that the trustee has any greater right in this case than the bankrupt had. The rights of the trustee are as those of a judgment creditor only as of the bankrupt. As I have said, these goods were sold, delivered, and the money collected therefor some days prior to the bankruptcy; and all of the dealings and transactions had by and between the claimants and the bankrupt and the claimants and the warehouse storage company were regular, and without any taint of or even suspicion of fraud. Upon the day these claimants' merchandise was delivered to them at the warehouse there was no judgment creditor to complain, and no other one occupying such position. The bankrupt had no control over the flour and lard after it was delivered to the warehouse company. The claimants had no control over it until the warehouse receipts were presented, storage charges paid, and delivery demanded. Manifestly, therefore, it was immaterial as to how the goods were stored by the warehouse company in its warehouse. The company was compelled to deliver to each respective claimant the specific flour and lard called for in each individual receipt upon demand. This is elementary common law.

However, the goods in the present case were fungible goods, and as to such the Alabama act provides that:

"23. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole." Acts of Alabama 1915, p. 666.

In construing a similar section of the statutes of Iowa, Judge Wade of the District Court said:

"Under Code Supp. Iowa 1913, § 3138a23, a warehouseman may mingle grain or products covered by outstanding warehouse receipts with other grain or products of like grade, whether owned by the warehouseman or third parties, and it will not constitute conversion or confusion of goods."

This case was affirmed by the Circuit Court of Appeals. *Central State Bank v. McFarlin*, 257 Fed. 535, 168 C. C. A. 519. The court said (257 Fed. 537, 168 C. C. A. 521) that:

"The certificates cover wheat and products. Appellant bank claims that this was legal under the Iowa statutes, and we shall assume, without deciding, that this is so. No specific proportion between wheat and products is mentioned. Under the statutes of Iowa the warehouseman had the right to mingle the wheat and products thus belonging to the bank with other wheat and products of like grade, whether belonging to the warehouseman or to third parties. This did not constitute conversion, nor confusion of goods."

See *Macy v. Roedenbeck*, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12.

In the absence of such a statute it is to be observed that under general law when the bankrupt (the vendor), pursuant to an agreement with the claimants (the vendees), delivered the goods previously sold to claimants at the Harris Transfer & Warehouse Company, and caused warehouse receipts to be issued therefor in the name of each of the

claimants (the vendees), and when said warehouse receipts were accepted pursuant to said agreement by the claimants, these acts constituted a completed sale and delivery of such goods. The law is stated in 35 Cyc. 191, 193, in the following language:

"As a general rule, in the absence of a contrary agreement, the seller is not bound to send or carry the goods to the buyer; but he fulfills the obligations by leaving or placing them at the buyer's disposal, so that he may remove them without lawful obstruction, especially if manual delivery is impracticable, because of the bulk of the articles, in which case it is sufficient if the goods are pointed out to the buyer or he is told to take them away, or the goods being at a distance from the place of sale, the buyer is told to go and take them. And when goods are manufactured by the buyer, it is a sufficient delivery if when completed they are set apart and placed at the disposal or subject to the orders of the buyer. But the goods must be so placed that the buyer has access to them for the purpose of taking possession.

"It is not necessary that the exact quantity should be segregated to constitute such selection and delivery, but mere selection and segregation will not operate as delivery if in fact the conduct of the parties is such that no intent of the seller to surrender dominion can be inferred. If the buyer is present and then and there agreed that he is entitled to take away from the common mass the quantity sold, weight and measure are not essential to a valid delivery. And when specific articles are sold if they are marked as purchased by the buyer and set aside for him this is such an appropriation as will constitute a delivery.

"Ordinarily a delivery of goods by the seller to the carrier designated to the purchaser or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser, is a delivery to the purchaser, the carrier becoming the agent or bailee of the buyer."

I am clearly of the opinion from the evidence in this case and from the terms of the warehouse receipts themselves that the warehouse company, when the goods described in the respective receipts were received by them, immediately became both the agent and bailee of the claimants, and therefore, as a matter of law, this consummated a perfected sale and delivery of the goods to the respective claimants.

[5] Now, taking another view of the case, there is no doubt from the evidence that the bankrupt estate was not in any way depleted by the transaction had with these claimants and sought to be impeached by the trustee. The claimants executed lawful acceptances approximately 30 days before the delivery of the goods in question, payable to the order of the bankrupt. Such trade acceptances, operating in the same way as here, were dealt with in the case of *In re Grocers' Baking Co.*, 266 Fed. 905, where the District Court said:

"If not attended with fraud or bad faith, a mortgage to secure future advances, though not so expressed on its face, is valid, as between the parties, and as against subsequent purchasers and incumbrancers as well, so far at least in regard to advances made before the equities of subsequent purchasers or incumbrancers attach."

On appeal this case was affirmed, and specific reference made to the opinion from which the above quotation is taken. The trade acceptances secured by the mortgage in the preceding quotation were for goods to be delivered in the future, and here, as in the *Grocers' Baking Co. Case*, all the goods due claimants under the trade acceptances in question were delivered to them prior to the bankruptcy, and there-

fore prior to the accrual of equities of subsequent purchasers or incumbrancers.

Here the bankrupt discounted the claimants' trade acceptances exactly as was done in *Re Grocers' Baking Co.* It received in return for the acceptances their full face value, and used the money thus obtained in the proper and ordinary course of its business. Subsequent to the receipt of the money, and prior to the bankruptcy, the bankrupt delivered to the claimants the goods due under and by virtue of the terms of the trade acceptances. The bankrupt received full pay for the merchandise now claimed by these petitioners. All the creditors of the bankrupt estate enjoyed the fruits of their money put into the bankrupt estate. And again it was held in *Re Grocers' Baking Co.*, *supra*, that:

"To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting of the bankrupt's property for the benefit of the creditor and a consequent diminution of bankrupt's estate." *Continental & Com. T. & S. Bank v. Chi. Title Co.*, 229 U. S. 435, 445, 33 Sup. Ct. 889, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624, 628.

The petitioners paid for the goods they now claim prior to the bankruptcy, and the goods were delivered to their bailee, the warehouse company, prior to the bankruptcy. The trustee is without right to interfere with the claimants in the enjoyment of their property thus lawfully acquired. The effort of the trustee to impeach the transactions in the present case cannot be countenanced by a court of equity. He had no better right to interfere with the claimants' goods stored in a public warehouse than he would have had to recover from the claimants the goods in question, had they been delivered to them and placed in their own storehouses.

Accordingly, the order and decree of the referee, made on September 10, 1921, will be annulled and set aside, and the claimants, the petitioners here, will by proper decree be given their just relief.

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### THE ROGDAI.

(District Court, N. D. California, First Division. May 25, 1920.)

No. 16824.

1. Constitutional law § 68(1)—Court may not pass on rights of factions of foreign government to recognition, where State Department has recognized one.

A court of admiralty held without jurisdiction to determine the right to a vessel, admittedly the property of the Russian nation, as between the so-called Russian Socialist Federal Soviet Republic, claiming to be the Russian government, but which has not been recognized by the United States, and the Russian government as represented by its duly accredited ambassador, received and still recognized as such by the United States government, and who is in actual possession of the vessel.

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**2. International law ¶10—Jurisdiction may be questioned by foreign representative.**

A suggestion that the court should not take jurisdiction of a cause because it involves questions of national policy, within the province of the political department, may be received from the duly accredited representative of a foreign country, though it should properly come from the appropriate executive department of our own government.

In Admiralty. Suit by the Russian Socialist Federal Soviet Republic, and Ludwig C. A. K. Martens, as its representative, against the steamer Rogdai. On motion to discharge attachment. Granted.

See, also, 279 Fed. 130.

Austin Lewis and R. M. Royce, both of San Francisco, Cal., for libelants.

Ambrose Gherini, Nathan H. Frank, and Irving H. Frank, all of San Francisco, Cal., for Russian Government, etc.

DIETRICH, District Judge. This is an action in rem, brought against and to secure the possession of the Rogdai (or Rogday), a steamer lying in San Francisco Bay, state of California. By the bill it is represented that the libelant "Russian Socialist Federal Soviet Republic" is a sovereign nation, and that it is the owner of the vessel, and that the other libelant, Ludwig C. A. K. Martens, is its agent and representative in the United States, duly authorized to act in its behalf. Process of attachment issued, by virtue of which the steamer was seized and is now held in custody by the marshal. The "Russian Government" and Boris Bakhmeteff, appearing specially, move for an order dissolving the writ of attachment. The motion is supported by "suggestion," signed by Boris Bakhmeteff, and under the seal of the Russian Embassy at Washington, accompanied by a certificate duly executed by the Department of State of the United States, on April 6, 1920, certifying that Boris Bakhmeteff was formally received by the President as the duly accredited Ambassador Extraordinary and Plenipotentiary of Russia to the United States, on July 5, 1917, and that he has continuously since that date been recognized as such by the government of the United States, and further that the government has not received or recognized Ludwig C. A. K. Martens in any representative capacity, "nor has the so-called Russian Socialist Federal Soviet Republic been recognized in any way by the government of the United States."

By the "suggestion" it is shown that the Rogdai is a "Russian naval transport under the command of Mili Gordener, a lieutenant commander in the Russian navy," that she was purchased for Russia in the United States on July 20, 1917, that thereafter under an agreement with the ambassador she was used by the United States government in prosecuting the war with Germany, and that on the 6th day of October, 1919, with the written consent of the Secretary of State of the United States, she was again taken over by the Russian Embassy at Washington, and was in its possession and under its control at the time of her seizure by the marshal. No counter showing is

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made by the libelants, except in so far as the averments in the libel to the effect that the "Russian Socialist Federal Soviet Republic" is Russia, or the Russian government, may be considered as such.

[1] It will be noted that fundamentally there is no controversy touching the real ownership of the transport; she belongs to Russia; no adverse claim, either public or private, is involved. By Russia, of course, I do not refer to any particular political group or organization, but to the national entity or sovereignty. It follows that the issue is reduced to the simple question whether the Russian nation is represented by Ludwig C. A. K. Martens and the organization back of him or by Boris Bakhmeteff and the group for which he speaks. Plainly, consideration of such an issue upon the merits would of necessity draw us into the realm of international diplomacy; and it is equally plain that no useful purpose could be subserved by such an investigation. If the court assumes the right to make an original inquiry, it logically follows that it must exercise its own independent judgment upon the facts thus disclosed and reach an independent conclusion. In that view it might recognize Martens, while Washington recognizes Bakhmeteff. To state the proposition is to discredit it. True, the Russian sovereignty may speak through different representatives, and it may have business agents as well as diplomatic agents; but all must derive their authority from a single source. The national will must be expressed through a single political organization; two conflicting "governments" cannot function at the same time. By the same token, discordant voices cannot express the sovereign will of the American nation. Either the executive or the judiciary must be supreme in a given sphere.

The question at issue is one of state; it involves international relations, and is primarily for the State Department. If, as contended by libelants, it be granted that a revolution has taken place in Russia, and that the Soviet Republic is in actual control, the question when, if at all, such de facto government shall be recognized, is a political one. It involves considerations of national policy, which are not justiciable, and touching it the voice of the Chief Executive is the voice, not of a branch of the government, but of the national sovereignty, equally binding upon all departments. Accordingly it must be held that the courts are powerless to grant the relief which the libelants seek. It is to be reiterated that we are not here concerned with the claim of a third party, either public or private, to the property in controversy, nor have we a case where the Department of State has failed to act, or where it is sought only to protect a party in actual possession. The case is one where the court is asked to take property conceded to be that of the Russian nation from the actual possession of those whom the State Department unmistakably recognizes as the accredited agents of the Russian government, and turn it over to other persons whom that department has declined to recognize as having any official standing whatsoever.

[2] In assuming the correctness of the facts exhibited by the "suggestion" of the Russian Embassy and the certificate of the Secretary of State, I have not been unmindful of the objection interposed

by libelants to the reception and consideration of these documents. The competency of the certificate as proof of the facts therein set forth is hardly open to question, and I have already held the facts to be material. The objections to the "suggestion" are overruled with less confidence. I am inclined to the view that logically the representations made in the "suggestion" should come through the appropriate executive channels of the American government. As we have seen, the gist of the objection to the suit, and particularly to the attachment process, is that the controlling questions involved affect national policies, touching which the authority of the State Department is supreme. But if, in so far as such policies are concerned, the courts are to defer to such authority, they should be advised of the executive will directly and from an authoritative source, and such source the foreign government may call into activity through appropriate diplomatic channels. *The Florence H.* (D. C.) 248 Fed. 1012, 1017. But the procedure here followed is not without precedent, and in view of the fact that the attitude of the State Department is unmistakably shown, though not approving of the practice, I have thought it proper under the circumstances to receive and give credit to the "suggestion." Whether the statements of fact made therein are or are not conclusive is a question which need not be decided, for libelants have tendered nothing in rebuttal.

In the main the judicial decisions cited in the briefs for both parties are obviously distinguishable, but for convenience of possible reference those thought to be most nearly in point are here noted: *The Luigi* (D. C.) 230 Fed. 495; *The Johnson Lighterage Co.* (D. C.) No. 24, 231 Fed. 365; *The Attualita*, 238 Fed. 909, 152 C. C. A. 43; *The Florence H.* (D. C.) 248 Fed. 1012; *The Roseric* (D. C.) 254 Fed. 154; *The Adriatic*, 258 Fed. 902, 169 C. C. A. 622; *Agency of Con. Car & F. Co. v. Am. Car Co.* (D. C.) 253 Fed. 155; *Id.*, 258 Fed. 368, 169 C. C. A. 379, 6 A. L. R. 1182; *The Conception*, 6 Fed. Cas. No. 360; *King of Spain v. Oliver*, Fed. Cas. No. 7,814, 2 Wash. C. C. 429; *Christensen v. Rogday*, No. 16,797, this court;<sup>1</sup> *The Gagara*, [1919] Prob. Div. 95; *The Dora*, [1919] Prob. Div. 105, 88 L. J. P. [1919] 101, 107; *The Exchange v. McFaddon*, 11 U. S. (7 Cranch) 116, 3 L. Ed. 287; *Thorington v. Smith*, 75 U. S. (8 Wall.) 1, 19 L. Ed. 361; *The Sapphire*, 78 U. S. (11 Wall.) 167, 20 L. Ed. 127; *The Davis*, 77 U. S. (10 Wall.) 15, 19 L. Ed. 875; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

The motion is allowed, and an order will be entered discharging the attachment.

<sup>1</sup> 279 Fed. 130.

**CHICAGO, M. & ST. P. RY. CO. v. KENDALL, Governor, et al.,  
and eight other cases.**

(District Court, S. D. Iowa, Central Division. October 28, 1921.)

Nos. 4157-4163, 4166, 4168.

1. **Constitutional law**  $\S$  229(3)—**Taxation**  $\S$  37—**Intentional assessment of different classes of property at different percentages of value held contrary to state law and federal Constitution.**

Code Iowa 1897,  $\S$  1336, and Code Supp. Iowa 1913,  $\S$  1305, requiring all property, with certain exceptions, to be valued for taxation at its actual value, prohibits inequality of treatment, and intentional, deliberate assessment of different classes of property at different percentages of the actual value constitutes unlawful discrimination, forbidden by the law, and hence by the federal Constitution.

2. **Courts**  $\S$  282(3)—**Federal court may enjoin intentional assessment of different classes of property at different percentages of value.**

As the intentional deliberate assessment of different classes of property at different percentages of actual value, contrary to Code Iowa 1897,  $\S$  1336, and Code Supp. Iowa 1913,  $\S$  1305, is contrary to the national Constitution, it may be enjoined by a federal court.

3. **Taxation**  $\S$  498—**Evidence held to show actual value of farm lands greater than assessed value.**

In a suit by railway companies to enjoin the assessment of their property at a greater percentage of its actual value than farm lands, evidence held to show that farm lands in Iowa, assessed at an average value of \$76.77 an acre, has an average actual value of not less than \$125 an acre.

4. **Taxation**  $\S$  498—**Temporary injunction against unequal assessments granted only to extent convincingly established.**

Temporary injunctions will be granted, restraining the assessment of railroad property at a greater percentage of its actual value than other property, only to the extent that the evidence clearly and convincingly establishes the discrimination.

In Equity. Suits by the Chicago, Milwaukee & St. Paul Railway Company, by the Chicago & Northwestern Railway Company, by the Chicago, Rock Island & Pacific Railway Company, by the Wabash Railway Company, by the Minneapolis & St. Louis Railway Company, by the Chicago, Burlington & Quincy Railway Company, and by the Atchison, Topeka, & Santa Fé Railway Company against Nathan E. Kendall, Governor, and others; by the Dubuque & Sioux City Railway Company against George A. Burke, Auditor, and others; and by the Ft. Dodge, Des Moines & Southern Railway Company against Nathan E. Kendall, Governor, and others. On applications for temporary injunctions. Injunctions granted, to the extent stated in the opinion.

John N. Hughes, of Des Moines, Iowa, for plaintiff.

Ben J. Gibson, Atty. Gen., for defendants.

Before STONE, Circuit Judge, and WADE and MUNGER, District Judges.

PER CURIAM. The jurisdiction of the court is settled by decisions of the United States Supreme Court, some of which are: Ray-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

mond v. Chicago Traction Company, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Home T. & T. Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510; Greene v. L. & I. R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Greene v. L. & N. R. R. Co., 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97; Union Pacific R. Co. v. Weld County, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110.

[1, 2] The laws of Iowa require that railway property, farm lands, and all other property (with exceptions not here important) be valued for tax assessment at "actual value." Section 1305, Iowa Code Supplement 1913, and section 1336, Iowa Code 1897. This prohibits inequality of treatment. Intentional, deliberate assessment of different classes of the above property at different percentages of "actual value" results in the prohibited inequality of treatment, constitutes unlawful discrimination, is forbidden by the Iowa law, and therefore by the national Constitution, and can be prevented by the court.

The judges sitting are not in entire accord as to the proper bases to be used in arriving at actual values in these cases, but they are in complete agreement as to certain results. It is therefore thought unnecessary to set out the various processes of reasoning which have led to these conclusions, but necessary only to announce the results. In arriving thereat, every advantage, where the evidence was doubtful, every reasonable presumption has been determined in favor of the defendants.

[3] While no useful purpose could be served, in these hearings on temporary orders, in discussing the evidence, which is considerable in volume and complex in its nature, it is thought not out of place to state the following, among many important elements revealed by the evidence: Land values for the whole state for taxation in 1921, as adjusted by the Executive Council, are some \$4,000,000 less than for previous years. There is no question but that land values in 1921 are lower than in 1920 and 1919, but we are all agreed that the actual market value of farm lands in Iowa is much in excess of \$76.66 per acre, the amount fixed as its actual value for taxation purposes, as adjusted by the Executive Council.

The evidence in these cases embraces a statement of all recorded deeds given of Iowa land from January 1, 1920, to August 1, 1921 (except quitclaim deeds and deeds reciting a consideration only of \$1 or of love and affection), and these deeds are from 97 of the 99 counties of the state, and include 33,686 transfers, covering 4,281,247 acres of land, and state the aggregate consideration of \$919,001,673, or an average sale price of \$214.66 per acre. The United States census report for 1920 shows the average value of all farm lands in Iowa to be \$227 per acre. There was corroborative evidence of value of over \$200 per acre in affidavits from competent witnesses in practically every county of the state. On the other hand, there were affidavits from competent witnesses in many counties that the lands were not worth more than the assessed value; but the evidence is very convincing that Iowa lands are worth considerably more than \$76.77 per acre. The amount of this excess is not agreed upon, but we all agree that the

average actual value of farm lands for 1921 cannot be less than \$125 per acre. Therefore the value fixed for taxation purposes does not exceed three-fifths of the actual market value.

We are all agreed that the value of the railway property for 1921, as fixed by the Executive Council, is much in excess of three-fifths of its value. The exact degree of this excess can be more accurately determined upon final hearing. For many years, extending back into pre-war times, the Executive Council has fixed the same value each year upon the railway property involved herein. This year such value on all railways of the state, including those under consideration herein, was increased by the Executive Council over \$37,000,000. No one will seriously contend that the actual value of railways, measured by any standard, has increased in 1921 from 1920, or 1919, or 1918, or 1917. It is a matter of common knowledge that the future of the railways of the country is this year gravely uncertain, and that in 1921, with the rate problem, the wage problem, and shortage of freight and passenger business, the value of railways is at a low level.

Actual railway values increase and decrease from year to year, as do the values of other property, depending upon times and conditions. In cases of the complainants Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Chicago, Rock Island & Pacific Railway Company, Minneapolis & St. Louis Railway Company, Dubuque & Sioux City Railway Company (Illinois Central Railway Company), and Ft. Dodge, Des Moines & Southern Railway Company, the evidence is convincing that the Executive Council intentionally and knowingly discriminated against each of such complainants, and in favor of farm lands, in fixing the assessed valuation of the property of such complainants, and that such discrimination has continued for years. They have therefore each made out a case requiring the issuance of a temporary injunctive order.

[4] Each of said complainants claims a much greater reduction than we have thought proper. While there is evidence tending to show that each of them may, on full and final hearing, be entitled to relief in a measure beyond that here accorded, we deem it highly proper, in these temporary orders, to restrict that relief to the measure which the evidence clearly and convincingly establishes. Such measure is, as to each of the just named complainants, except the Dubuque & Sioux City Railway Company (Illinois Central Railway Company), a reduction of the assessment made by the Executive Council to a value equal to 90 per cent. of the value assessed against each of them for the taxing year of 1920. As to the Dubuque & Sioux City Railway Company (Illinois Central Railway Company), a reduction will be made to a value equal to the value assessed against that property for the taxing year of 1920. The evidence fails to establish the right of the complainants Atchison, Topeka & Santa Fé Railway Company and the Wabash Railway Company to the relief now sought.

Order will be entered herein in accordance with the above determination, under proper conditions and bonds.

GRISCHY v. GALVIN.

(District Court, S. D. Ohio, W. D. December 20, 1921.)

No. 2997.

**Courts — 347—Conformity statute held not to invalidate rule of federal court.**

The conformity statute, Rev. St. § 914 (Comp. St. § 1537), requiring the federal courts to conform "as near as may be" to the state practice in actions at law, does not require exact conformity in all respects, and is to be read in the light of section 918 (Comp. St. § 1544), which authorizes the District Courts to make rules to regulate their own practice, and a rule of a District Court requiring every answer to admit or deny specifically each material allegation of the petition, is valid and enforceable, though the state statute permits a general denial.

At Law. Action by Oscar P. Grischy against John Galvin, administrator. On motion to strike off answer. Granted.

Elmer W. Grischy, George Dornette, and Howard N. Ragland, all of Cincinnati, Ohio, for plaintiff.

Frank H. Kunkel and Maurice L. Galvin, both of Cincinnati, Ohio, for defendant.

PECK, District Judge. On motion to strike answer from the files. The ground of the motion is that the answer does not comply with paragraph 5 of rule 8 of this court, promulgated November 16, 1901, requiring every answer at law to admit or deny specifically each material allegation of the petition. The action is for attorney's fees for services alleged to have been rendered defendant's decedent, and comprises a very long list of items. The answer admits the jurisdictional averments, the appointment of the defendant as administrator, and the presentation of the claim, and, "further answering, defendant denies each and every allegation in said petition contained, not herein specifically admitted to be true."

The validity of the rule is challenged on the ground that section 914, Revised Statutes (17 Stat. 197, Act June 1, 1872 [U. S. Comp. Stat. 1916, § 1537]), known as the Conformity Act, provides that the practice, pleadings, forms, and modes of proceeding in civil causes other than admiralty and equity causes in the District Court shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing in the courts of record of the state, any rule of court to the contrary notwithstanding. Section 11314 of the General Code of Ohio states that the answer shall contain "a general or specific denial of each material allegation of the petition controverted by the defendant." But section 918, Revised Statutes (U. S. Comp. Stat. 1916, § 1544), provides that District Courts are vested with power to—"make rules \* \* \* directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

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It is well settled that section 914 is to be read in the light of section 918. In *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, in ruling that a state statute, requiring the jury to answer special interrogatories in addition to their general verdict, was not binding upon the federal court, the Supreme Court said of section 914:

"The conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

In the case of *Shepard v. Adams*, 168 U. S. at page 625, 18 Sup. Ct. 214, 42 L. Ed. 602, in the opinion of the court by Mr. Justice Shiras, it is said:

"We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of Congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

See, also, *Boston & Maine R. R. v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002.

While the general framework of the Ohio Code is no doubt, by section 914, Revised Statutes, the law of pleading of this court, it is also true that details going to form may be regulated by rule here for the advancement of justice and prevention of delays.

In *Hein v. Westinghouse Air Brake Co.*, 164 Fed. 79, the question was whether the District Court had power to change the rules of pleading required by state practice as to the form of the replication, and in answering in the affirmative Judge Sanborn said (164 Fed. 83):

"Section 914, then, is not mandatory in the sense of adopting every subordinate rule of the state practice. That practice as a whole is adopted; but the court may reject some subordinate rule, and exercise some degree of discretion in declining to conform absolutely and entirely to the state practice."

See, also, *Collin County Bank v. Hughes*, 155 Fed. 394, 83 C. C. A. 661, for a partial catalogue of matters of state procedure as to which the Conformity Act has been held not binding in the federal courts. They include signature of summons, service, the time, form, and character of the charge to the jury, motions for new trials, effect of special appearance, method of service, and time for filing answer.

The rule here in question does not substantially alter the method of pleading authorized by the Code. It was intended to prevent the confusion which results from a commingling of admissions, qualified admissions, explanatory averments, and a general denial (*Bakas v. Casparis Stone Co.*, 14 Ohio N. P. [N. S.] 577, 581), and to require of the defendant a specific answer, under oath, to each of the allegations to be met. That the rule is one convenient for the advance-

ment of justice and the prevention of delays seems to be thoroughly demonstrated by the fact that it is substantially the same as the provision found in equity rule 30 (201 Fed. v, 118 C. C. A. v), to the effect that the defendant in his answer shall, in short and simple terms, set out his defense to each claim asserted by the bill, omitting any mere statements of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial.

It is therefore concluded that the rule here challenged is one which the court had power to make. The answer does not comply with its requirements, and must accordingly be stricken from the files.

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**McKASSON v. UNION PAC. R. CO.**

(District Court, D. Wyoming. January 30, 1922.)

No. 1220.

1. Pleading  $\Leftrightarrow$  198—Petition by joint plaintiff which fails to state a cause of action as to one held demurrable.

Under Comp. St. Wyo. 1920, § 5651, subds. 4 and 8, providing that a misjoinder of parties plaintiff, or failure of the petition to state facts constituting a cause of action, shall be a ground of demurrer, a petition by joint plaintiffs, which states a cause of action as to one, but as to the other does not, is demurrable.

2. Pleading  $\Leftrightarrow$  193 (6)—Petition held demurrable for misjoinder of plaintiffs.

The petition in an action against a railroad company for negligence causing the death of an employé, whether based on section 1 of the federal Employers' Liability Act (Comp. St. § 8657), or on the state Railroad Employers' Liability Act (Comp. St. Wyo. 1920, § 5886), both of which statutes give the right of action to the personal representative of deceased, held demurrable, where the personal representative and the mother of deceased join as plaintiffs.

At Law. Action by Mary J. McKasson, administratrix of the estate of Patrick A. McKasson, deceased, and Mary J. McKasson individually, against the Union Pacific Railroad Company. On demurrer to petition. Demurrer sustained.

Edwin N. Burdick and Clarence O. Moore, both of Denver, Colo., for plaintiff.

Herbert V. Lacey and John W. Lacey, both of Cheyenne, Wyo., for defendant.

KENNEDY, District Judge. This action is brought by the plaintiff to recover damages against the defendant growing out of the alleged negligence of defendant in causing the death of Patrick J. McKasson, while employed by defendant as a brakeman in the operation of defendant's railroad at Rock Springs, in the state and district of Wyoming. The action is brought in the name of Mary J. McKasson,

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$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

as administratrix of the estate of the deceased, and also of Mary J. McKasson individually (she being the mother of deceased), as joint plaintiffs.

[1] The matter comes before the court upon a demurrer filed by defendant, containing two grounds: First, a general demurrer that the facts stated are not sufficient to constitute a cause of action; and, second, a misjoinder of parties plaintiff. Both grounds of the demurrer are directed, however, to the same general defect in the petition, to wit, that Mary J. McKasson as an individual is not a proper party plaintiff. Counsel for the defendant contend that the petition, so far as Mary J. McKasson as an individual is concerned, does not state facts sufficient to constitute a cause of action, and that upon the second ground stated in the demurrer, under our Code pleading in the state of Wyoming, which practice in law cases this court will follow as near as may be, the misjoinder of parties plaintiff is the rule which should be applied to this case.

The demurrer must be sustained on either ground or both. To maintain an action in the name of joint plaintiffs all plaintiffs must have a common ground for the relief sought. If one of the joint plaintiffs, therefore, has no cause of action it comes within the rule that the petition as to such plaintiff does not state facts sufficient to constitute a cause of action, and therefore must fail as to the joint plaintiffs. Likewise the same rule would obtain under the provisions of the Code as applying to a misjoinder of parties plaintiff, where one has a cause of action and the other has not. The reasons for the ruling of the court upon both grounds of the demurrer may be briefly stated as follows:

Section 5651, of the Wyoming Compiled Statutes provides in subdivision 4 that the misjoinder of parties plaintiff, and in subdivision 8 that the petition does not state facts sufficient to constitute a cause of action, shall be grounds for demurrer available to the defendant.

[2] The petition alleges that the defendant railroad company is a common carrier, that it was operating cars, locomotives, and trains over its tracks at Rock Springs, in the state of Wyoming, at the time of the injuries to plaintiff, which afterward resulted in his death, and that such injuries and death were caused by the alleged negligence of the defendant. There is no affirmative allegation in the complaint (which under the practice in this jurisdiction following the state practice should be denominated a petition) that the defendant railroad company is engaged in carrying on interstate commerce or otherwise. However, this would appear to be immaterial so far as the effect of the demurrer is concerned. If the defendant is operating a railroad entirely within the state of Wyoming, it would come within the rule laid down in the state Railroad Employers' Liability Act, found in sections 5386 to 5389, inclusive, of the Wyoming Compiled Statutes 1920; or if not within the state Employers' Liability Act the cause would at least be governed by section 5560 and 5561 of the Wyoming Compiled Statutes 1920. In the so-called Employers' Railroad Liability Act, above referred to, a cause of action growing out of the death of the employé holds the railroad company liable to the personal representative of the deceased for the benefit of the surviving widow, children or parents, or the next of kin, as the case may be.

Under sections 5560 and 5561 it is provided that causes of action such as we have here may survive, and that such a cause of action shall be brought in the name of the personal representative of the deceased, and amounts accruing therefrom shall be distributed in the manner provided by the statutes relating to the distribution of personal estates of deceased persons. It will therefore be seen that, if these sections are held to apply, then the action must be maintained only in the name of the personal representative of the deceased. If the cause of action might be held to be within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Statutes at Large, 65 [Comp. St. §§ 8657-8665]) the same rule would apply, for the reason that this act provides that the railroad company engaged in commerce between the several states shall be liable in damages on account of the death of an employé to his or her personal representative for the benefit of the surviving widow or other heirs, as the case may be.

Therefore, under any of the provisions of law giving a remedy to the parties aggrieved, as in this case, which could possibly be made to apply, the action would accrue to the personal representative of the deceased and to no other person. The demurrer will therefore be sustained, and the complaint be dismissed, at plaintiffs' costs, without prejudice, reserving, however, to the plaintiff McKasson, as administratrix, the right in lieu of such dismissal to file within 20 days an amended petition and to furnish the attorneys for the defendant a copy of the same, and in the event of the exercise of such option by said plaintiff that the defendant be given 20 days thereafter within which to plead to said amended petition.

The order may reserve an exception to the plaintiffs upon the ruling of the court.

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**W. A. SCHLEIT MFG. CO., Inc., v. SYRACUSE RADIATOR CO., Inc., et al**

(District Court, N. D. New York. January 24, 1922.)

1. **Patents 328—1,174,525, for draft regulator for water heaters, held valid and infringed.**

The Schleit patent, No. 1,174,525, for draft regulator for hot water heaters, *held* not anticipated, valid, and infringed.

2. **Patents 317—Right to injunction not defeated by discontinuance of infringement.**

The owner of a patent is entitled to an injunction against an infringer, though infringement has been discontinued.

In Equity. Suit by the W. A. Schleit Manufacturing Company, Inc., against the Syracuse Radiator Company, Inc., and others. Decree for complainant.

Denison & Thompson, of Syracuse, N. Y. (Eugene A. Thompson, of Syracuse, N. Y., of counsel), for plaintiff.

George H. Bond, Clarence R. King, and F. G. Bodell, all of Syracuse, N. Y. (Arthur E. Parsons, of Syracuse, N. Y., of counsel), for defendants.

COOPER, District Judge. [1] This is a suit for infringement of Letters Patent No. 1,174,525, issued March 17, 1916, to W. A. Schleit and by him assigned to the plaintiff corporation. The patent is for a draft regulator for hot water heaters, and the claims in suit are three in number, the first, second, and fifth. The patent describes a heater which embodies a combustion chamber and a smoke chamber separated by a draft valve, which has a lost motion connection with one end of a lever. This lever is pivoted in the smoke chamber, and the other end of it is in contact with a check damper, which controls the air inlet through the smoke chamber, but is not connected to it.

By the means described in this patent a close regulation of temperature is maintained. Upon a rise of the temperature of the water in the water heating system connected with the heater to a predetermined point of regulation, the thermostatic regulator operates to open a check damper, and thereupon the draft damper, restrained from closing by the closed check damper, is free to close, and upon a decrease in the temperature of the water the check damper automatically closes and operates the lever connected to the draft damper and causes the same to open. The claims are as follows:

Claim 1: "A heater having a check damper and a draft damper, means for operating the check damper, and means attached to a wall of the heater and in contact with the check damper for transferring the movement from the check damper to the draft damper in reverse form."

Claim 2: "A heater having a combustion chamber and a smoke chamber, a draft damper for the combustion chamber and a check damper for the smoke chamber, means within the smoke chamber and attached to a wall thereof for transferring movement from the check damper to the draft damper in reverse form, and means for operating the check damper."

Claim 5: "In a water heater, a check damper, a draft damper, a supporting member for said draft damper pivoted to a wall of the heater and having a lost motion connection with said draft damper, means for operating the check damper, said supporting member being operated by the movement of the check damper to open and close the draft damper."

The defendant conceded that it manufactured six heaters somewhat similar to the plaintiff's construction, and also that it had changed its construction immediately after receiving notice from the plaintiffs of the alleged infringement. This suit merely involves the old construction, the manufacture of which has since been abandoned by the defendant, the plaintiff not desiring to litigate at this time the later or present construction.

The defendant's machine is substantially a copy of that of the Schleit patent. While the defendants contend that the lever in their construction is not pivoted at the same place as that of the Schleit patent, they assert that the draft damper was operated by means controlled by the thermostatic regulator, and that the draft damper was connected by a chain to the inner end of a lever pivoted to the wall of the smoke chamber, and that the other end of the lever engaged the inner face of the check damper. Pivoted to the wall of the smoke chamber is substantially the same construction as is disclosed in the Schleit specification. It is specified in claim 2 thereof as "means within the smoke chamber and attached to the wall thereof." The fact that the smoke chamber in the patent is directly above the combustion chamber, while

the smoke chamber of the defendant's structure is at the side, does not enable the defendants to escape infringement; the same being substantially an equivalent. *Palmer v. Superior Mfg. Co.*, 210 Fed. 452, 127 C. C. A. 284; *Union Paper Bag Mfg. Co. v. Murphey*, 97 U. S. 120, 24 L. Ed. 935. It thus appears that the two structures are substantially the same, and the method of operation substantially identical within the terms of the patent.

The question then arises: Has the plaintiff a patentable invention? The best evidence of the novelty and utility of the Schleit patent is the fact that the defendant copied it. While the general art is not new, the Schleit patent is an improvement in the simplicity of operation and economy of construction, in that but one connection to the controlling valves is necessary. The fact that the plaintiffs themselves do not now manufacture the article is immaterial, as they may do so, and have granted licenses to others who have manufactured it.

Of the patents cited by the defendant to prove prior art, the Miller patent, No. 548,079, does not disclose a pivot member, but rather two valves, which are tightly connected to each other by a link which permits no relative movement of the two valves from a draft damper to a check damper in reverse form. Neither is there the means pivoted within the smoke chamber and attached to the wall thereof in the Hall patent, No. 692,277. That patent discloses a construction in which the operating mechanism has a separate connection to each damper.

In the Adair patent, No. 952,310, the pipes controlled by the damper are connected independently one above the other. Other patents cited are not anticipatory of the Schleit patent. The plaintiff's patent, therefore, is valid and infringed as to the claims in suit.

[2] Regardless of the fact that the defendant has ceased to further manufacture the construction, the plaintiff is entitled to the security of an injunction. *Celluloid Mfg. Co. v. Arlington Mfg. Co.* (C. C.) 34 Fed. 324; *Sawyer Spindle Co. v. Turner* (C. C.) 55 Fed. 979. The bill, however, is dismissed as to the individual defendants Jones and Collins; they being at the time merely agents of the defendant corporation, and having no activities outside of those of the corporate defendant.

The plaintiff is instructed that in any communications to the trade regarding this litigation it must advise the trade that this adjudication in no way affects the construction of defendant's present apparatus; that no claim for infringement was made in this suit against defendant's commercial structure, now being manufactured.

The plaintiff may have a decree.

**UNITED STATES v. ALEXANDER.**

(District Court, S. D. Florida.)

**1. Intoxicating liquors ⇨249—Search warrant held void for insufficient description of premises.**

A search warrant for intoxicating liquors, describing the place to be searched as the premises of a person named, "corner Davis & Ashley St., Jacksonville, Duval county, Florida," held void for insufficiency of description of the place.

**2. Intoxicating liquors ⇨255—Illicit liquor, seized under invalid search warrant, will not be returned.**

Illicit liquor, though seized under an invalid search warrant, will not be returned, but will be ordered destroyed.

Criminal prosecution by the United States against Jim Alexander. On motion by defendant, attacking validity of search warrant, and for return of property seized thereunder. Search warrant held void, and property ordered destroyed.

Damon Yerkes, Asst. U. S. Dist. Atty., of Jacksonville, Fla.  
Richard P. Daniel, of Jacksonville, Fla., for defendant.

CLAYTON, District Judge. A sworn motion was filed by defendant in this case, attacking the validity of a search warrant issued by the United States commissioner, under which warrant property of defendant had been seized, and also praying for a restoration of said property. The search warrant thus attacked was issued by the United States commissioner for this district on August 23, 1921. Said warrant recites:

"Whereas, complaint under oath and in writing has this day been made before me by C. E. Miller, of Internal Revenue, alleging that intoxicating liquor has been sold and is unlawfully concealed upon and by the use of corner Davis & Ashley St., Jacksonville, Duval county, Florida, being the premises of Jim Alexander, and being situate and within the district above named: You are hereby commanded, in the name of the President of the United States, to surrender the said premises," etc.

The return made upon the above warrant shows that 32 half pints of illicit liquor were found upon the premises searched. Defendant's motion attacks the validity of this search warrant upon the following, among other, grounds:

"(1) That said property was seized under an alleged search warrant which was and is void.

"(2) Because the pretended search warrant, under authority of which said property was seized, did not sufficiently describe the premises to be searched."

[1] Counsel for defendant contends that the description of the premises to be searched in the above warrant was too vague and indefinite to render the search warrant of any validity by reason of the fact that any one of four places could be searched under it if it had been legal. In support of this motion, counsel for defendant cites the cases of *United States v. Kozman*, and *United States v. Keydoszius*, both reported in 267 Fed., at page 866 et sequitur, and the case of *United States v. Mitchell et al.* (D. C.) 274 Fed. 128.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the Kozman Case the still and contents for making distilled spirits were seized under a search warrant describing the place to be searched as "being the premises of William Kozman, 123 Garfield street," in Dayton, Ohio. The search was made at 123 North Garfield street. There was also a South Garfield street in Dayton, Ohio. The court in its opinion said:

"The description of Kozman's premises was insufficient. There were two Garfield streets, and the statement does not locate his residence on either."

In the Keydoszius Case the place to be searched was described as, "being the premises of John Doe (Kardosi), corner of Troy and Dell streets," in Dayton, Ohio. It will be noted that the description in this case is the same as in the present case. The court said the search warrant was insufficient and the search and seizure were unauthorized. It is true that the affidavit in the Keydoszius Case was made upon information and belief, and the court did not definitely state in the opinion upon which defect it based its decision, but it is probable that both defects were considered by the court.

In the Mitchell Case the search warrant authorized a search of "880 Bush street." This particular place was a building containing four apartments. Defendant occupied apartment No. 4. The officers making the search, before entering the premises, telephoned the commissioner and received permission over the phone to insert in the warrant the words, "By order of Com. Krull, this to specify Apt. 4, especially." The officers then proceeded under this warrant as amended and seized a considerable quantity of liquor. In granting a motion to restore the property to defendant, the court in its opinion said:

"It is not merely a pro forma matter, but one of utmost importance, that search warrants should be properly issued in the first instance. They should not be lightly applied for, nor lightly issued, as they trespass upon the most important rights of the people. When issued, they should be promptly served and promptly returned. It should go without saying that they are of such grave importance that they may be amended, if at all, only by the officer issuing them, and then only in conformity with the affidavits or depositions upon which they are based. In the present instance we have an all-devouring warrant issued against an apartment house where many families reside. This of itself is sufficient to condemn it, as it was never claimed that the whole premises should be searched. 'Particularly describing the place to be searched' is the language of the Constitution, and 'particularly describing the property and the place to be searched' is the language of the act. The warrant could not be amended by the officers upon a telephone communication from the commissioner, nor could he himself amend it unless the affidavit itself were so amended as to specify the particular apartment to be searched."

[2] The court in the present case is inclined to follow the cases above cited. It is apparent here that the search warrant failed to "particularly" describe the premises to be searched as required by the Constitution. It was therefore insufficient and void, and the search and seizure of defendant's property thereunder was illegal, and all proceedings had under and by virtue of said search warrant were a nullity and of no effect. However, it appears that the property seized in this case was "illicit liquor," commonly called "moonshine" or "shine," made contrary to law, and the same should be destroyed by the marshal of this court.

An order may be entered that said search warrant is illegal, void, and of no effect, and that said "illicit liquor" be immediately destroyed by the marshal of this court.

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**CAMDEN FORGE CO. v. NATIONAL SALES & TRADING CO.**

(District Court, E. D. Pennsylvania. January 18, 1922.)

No. 8496.

**Pleading** ¶49—Action for breach of warranty must proceed on definite theory.

Sales Act Pa. May 19, 1915 (P. L. 543, 562, § 69; Pa. St. 1920, § 19717), provides (1) that, where there is a breach of warranty by the seller, the buyer may at his election "(b) accept or keep the goods, and maintain an action against the seller for damages for breach of warranty; \* \* \* (d) rescind the \* \* \* sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller, and recover the price or any part thereof which has been paid. Second. When the buyer has claimed and been granted a remedy in any one of those ways, no other remedy can thereafter be granted." *Held*, that a buyer may not defer his election until trial, but that his action must be based definitely on one or the other of the remedies given.

At Law. Action by the Camden Forge Company against the National Sales & Trading Company. On rule to strike off statement of claim. Rule made absolute.

Levi & Mandel, of Philadelphia, Pa., for plaintiff.

George Wanger, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff claims upon a contract to purchase from the defendant 500 tons of steel billets warranted to be free from cracks, pipes, seams, and other defects. It alleges shipment and delivery to it of 584 tons at \$55 per ton, at a total price of \$29,810.39, received at its plant and paid for after the usual and customary inspection. It alleges that the billets were defective, through the existence of seams, porosity, and segregation, and that it was impossible, by the ordinary means of testing employed in the trade, to discover these defects until the billets were actually put in process of forging. It alleges an offer to return to the defendant, and possession subject to its orders, and a right under a custom to recover the purchase price by reason of such defects and claims the amount of the purchase price paid, together with freight charges. Having stated the above cause of action, the plaintiff claims, in the alternative, damages for breach of warranty consisting of the difference between the contract price and the market value as scrap of the material delivered, at the respective times of delivery.

The position of the plaintiff is that, if it should be precluded from recovery of the price paid through delay in the testing and inspection and rejection of the steel, and should be thereby forced to abandon its theory of holding the steel as bailee for the defendant, it may shift

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its ground at the trial, proceed upon the theory that it took title to the steel, and recover damages for the breach of warranty.

The cause of action first alleged is that available to the plaintiff under section 69 of the Sales Act of May 19, 1915, P. L. 562, clause (d), and the alternative under clause (b), Pa. St. 1920, § 19717. The pertinent parts of the section are as follows:

"First. Where there is a breach of warranty by the seller, the buyer may, at his election: \* \* \*

"(b) Accept or keep the goods, and maintain an action against the seller for damages for breach of warranty; \* \* \*

"(d) Rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller, and recover the price or any part thereof which has been paid.

"Second. When the buyer has claimed and been granted a remedy in any one of those ways, no other remedy can thereafter be granted."

The office of pleadings is to inform the opposite party of the nature of the claim or defense. A defendant cannot be required to answer a claim in the alternative which leaves the plaintiff free to make its election at the time of trial. The two theories set up in the alternative by the plaintiff are entirely inconsistent. If the plaintiff has any cause of action, it either rescinded the contract of sale and offered to return the billets to the seller, in which case, if the proof is sufficient, it may recover the price paid, or it accepted the merchandise, in which case the title passed to it, and its right of action is for damages for breach of warranty. It must proceed upon a definite theory, and the statement must be good upon that theory, or it will not sustain a judgment. The right of election is not one which may be deferred until the trial. The theory upon which the plaintiff proceeds must be set out in the statement of claim.

Unless, therefore, the plaintiff shall file within 10 days a statement electing to proceed upon one or the other of the two inconsistent causes of action set out in its statement of claim, the rule to strike off the statement of claim will be made absolute.

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THE ROSE REICHERT.

THE JOHN F. LEWIS.

(District Court, S. D. New York. March 31, 1920.)

**Collision**  $\Leftrightarrow$  95 (7) — Both tugs held at fault for failure to keep proper lookout.

Two tugs *held* both at fault for failure to keep proper lookout, as a result of which neither observed the approach of the other in time to avoid a collision, by which a cattle float in tow of one of them was injured, and the fact that the cattle float and its tug were not in the middle of the river *held* only a condition, and not a cause, of the injury.

In Admiralty. Libel by the Central Union Stockyards Company against the steamtugs Rose Reichert and John F. Lewis. Decree entered for libellant against both tugs.

Decree affirmed 278 Fed. 312.

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$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Harrington, Bigham & Englar, for libellant.

Foley & Martin, of New York City, for claimant of the Rose Reichert.

Park & Mattison, of New York City for claimant of the John F. Lewis.

KNOX, District Judge. It seems to me that the collision for which damages are here asked was brought about through the fault of the Rose Reichert and the John F. Lewis, in that neither of them maintained an efficient lookout.

There was doubtless some mist on the morning of the accident, but it can, without difficulty, be found that the lights along both the Manhattan and Brooklyn shores were fairly bright, and, had the Reichert and the Lewis maintained proper lookouts, it is altogether likely that a collision might have been avoided. As it was, however, the approach of neither craft was observed by the other until a collision was practically inevitable. In the face of the evidence as to the existence of lights on the cattle float, I am of opinion that the question is not as to the showing of improper lights, but the failure of the Lewis to promptly observe such lights as were shown.

Likewise, even upon the assumption that the Rose Reichert and her tow were not in the center of the river, it may fairly be said, I think, that this fact was only a condition, and not a cause, of the injury sustained by the float.

I think the tugs were equally at fault, and a decree may be entered for the libellant.

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#### THE ROSE REICHERT.

#### THE JOHN F. LEWIS.

(Circuit Court of Appeals, Second Circuit. December 22, 1921.)

No. 83.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by the Central Union Stockyards Company against the steam tugs Rose Reichert and John F. Lewis. From a decree (278 Fed. 311) holding both tugs at fault, the Reichert Towing Line, Inc., as claimant of the Rose Reichert, appeals. Affirmed.

Foley & Martin, of New York City (William J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for the John F. Lewis.

Harrington, Bigham & Englar, of New York City (L. J. Matteson and C. W. Hagen, both of New York City, of counsel), for libellant-appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

**BLJUR v. KENNINGTON.**

(Court of Appeals of District of Columbia. Submitted November 22, 1921. Decided January 3, 1922.)

No. 1452.

- 1. Patents ¶113 (7)—Concurrent decisions of Patent Office tribunals not disturbed, unless clearly wrong.**

Where the three tribunals of the Patent Office concurred in awarding priority to one party to an interference proceeding, the decision must be affirmed, if not clearly wrong.

- 2. Patents ¶109—Joint application held reduction to practice by sole inventor.**

Where a joint application was filed for a patent, on which it was decided that one of the applicants was the sole inventor, and he thereupon filed a separate application, he was entitled to the date of the joint application for reduction to practice, as the application of the sole inventor was an amendment of the joint application, and related back to the time of the filing of the original application.

- 3. Patents ¶113 (1)—Decision of Court of Appeals in another case adhered to, when facts the same.**

Where the holding of the Court of Appeals in another case that an applicant for a patent did not reduce his invention to practice by reason of a certain test was not based on the testimony of the witnesses, but on his own conduct after the test in abandoning the experiment, and, though the testimony in a subsequent proceeding is somewhat stronger, it does not lessen the probative force of his conduct, the former conclusion will be adhered to.

- 4. Patents ¶112 (4)—Decision in another case held not res judicata, when matter not involved.**

The decision of the Examiner of Interferences in a prior interference that a party reduced his invention to practice in April or May, 1912, is not res judicata, where in that proceeding such party had a constructive reduction to practice as of March 13, 1912, and it was therefore entirely unnecessary for the Examiner to decide that he had actually reduced it to practice at a later date; the holding being merely obiter.

- 5. Judgment ¶735—Conclusive in action on different claim only as to matters on which decision rendered.**

Where a second action between the same parties is on a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, on the determination of which the finding or verdict was rendered.

Appeal from Decision of the First Assistant Commissioner of Patents.

Interference proceeding between Joseph Bijur and William O. Kennington. From a decision awarding priority to Kennington, Bijur appeals. Affirmed.

A. G. Davis, of Schenectady, N. Y., and J. Edgar Bull, of New York City, for appellant.

S. E. Hibben, of Chicago, Ill., and J. A. Watson, of Washington, D. C., for appellee.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

SMYTH, Chief Justice. From a decision of the First Assistant Commissioner of Patents, awarding priority to Kennington with respect to the invention of the issue, Bijur appeals.

The structure involved is described in four counts, illustrated sufficiently by count 1, which reads:

A starter for gas engines and the like, comprising in combination with a member operatively connected with the engine, a motor, a shaft driven thereby, a driving member adapted to engage and drive the engine member but normally out of engagement therewith, said driving member being mounted on the shaft and having screw-threaded engagement therewith whereby rotation of the shaft advances such driving member into engagement with the engine member, and means for yieldingly stopping said driving member and thus permitting it to yield and cushion the shock of starting the engine member.

[1, 2] The three tribunals of the Patent Office concurred in favor of Kennington. Were they clearly wrong? If not, we must affirm the commissioner's decision. *Ruth v. Groch*, — App. D. C. —, 277 Fed. 861, and cases cited therein. Bijur does not deny that Kennington conceived in January, 1912, but insists he did not actually reduce to practice until October, 1913. Kennington urges that he is entitled to May 24, 1912, for reduction to practice, because he and one McDermott filed a joint application on that date for the invention of the issue. Later it was decided that this application was not allowable, for the reason that Kennington was the sole inventor of the subject-matter disclosed. Kennington then filed the present application. Bijur says that he is not entitled to the filing date of the joint application, but must be confined to that of the present one, March 13, 1915.

We held in *Re Roberts*, 49 App. D. C. 250, 263 Fed. 646, that the sole inventor was entitled to the benefit of the date of the joint application, on the theory that his application was an amendment of the joint one. It is a rule that "an amendment relates back to the time of the filing of the original petition." *Union Pacific R. Co. v. Wyler*, 158 U. S. 285, 296, 15 Sup. Ct. 877, 882 (39 L. Ed. 983). From this it follows that Kennington is entitled to May 24, 1912, for constructive reduction to practice.

[3] The present application of Bijur was involved in *Halbleib v. Bendix*, 50 App. D. C. 247, 270 Fed. 683. He there relied on a device described as Exhibit 2 for reduction to practice, which he said took place in the early part of 1912. He stands on the same exhibit here and the same reduction to practice. In that case he contended that the device was tested on a Packard car, which had been furnished for that purpose by the Packard Company, and he presented the testimony of a number of witnesses to support his position. We held that, if his conduct after that test was such as to corroborate his proof concerning it, "reduction to practice could be readily inferred; but it was not." His conduct, we said, forced the conclusion that what he had done on the car in 1912 was an "abandoned experiment." We further said that he made no attempt after that to do anything with the device until January or February, 1914. The testimony which Bijur presents in this case somewhat strengthens the testimony in the former one, but that avails him nothing, because, as we have just said, the decision there rested, not upon the testimony of his witnesses, but

upon his own conduct after the test, which we held clearly established that he did not regard the "test as a success." Nothing that he has produced in this case lessens the probative force of his conduct, and therefore we must adhere to our former conclusion, namely, that he had not proven a satisfactory reduction to practice in 1912.

[4] Bijur, however, urges that the main question in this case is one of *res judicata*. He insists that in a prior interference, No. 38,013, between him and Kennington, the examiner of interferences held that Exhibit 2, which he claims embodies the invention of the present issue, was actually reduced to practice in April or May, 1912, and that this decision is final, because an appeal taken from it was subsequently denied. The Examiner's decision was offered in evidence by Bijur, but the record before us does not contain it. Without it we cannot decide that the question now presented for adjudication was disposed of by it, unless we unite the extracts which purport to have been taken from it as they appear in the opinion of the Patent Office tribunals and the briefs of the parties, and treat the result as a true copy. We have done so, and we proceed on the assumption that the copy is correct.

[5] Bijur had a constructive reduction to practice of the invention involved in that interference as of March 13, 1912. This was not denied. It was therefore entirely unnecessary for the Examiner of Interferences to decide that Bijur had actually reduced to practice at a later date. The question was not before him, and his holding was merely obiter. It is well settled that, "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U. S. 351, 353 (24 L. Ed. 195); *Radford v. Myers*, 231 U. S. 725, 730, 34 Sup. Ct. 249, 58 L. Ed. 454. The matter presented for decision in the prior interference was as to whether Kennington's reduction to practice preceded or followed Bijur's date, March 13, 1912. Whether or not Bijur had a later date was a question not in issue, and the Examiner of Interferences had no power to decide it in that proceeding.

Bijur has not established that the decision of the Commissioner of Patents is wrong, and it is therefore affirmed.

Affirmed.

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### BAUS v. COPONY.

(Court of Appeals of District of Columbia. Submitted November 25, 1921.  
Decided January 3, 1922. Rehearing Denied February 4, 1922.)

No. 1458.

1. Patents §91(4)—Evidence held to show junior party to interference was first to conceive invention.

In an interference proceeding involving a decking system for suspending automobiles in freight cars, so as to provide clearance for a second automobile beneath the first, evidence, consisting of oral testimony and letters and invoices respecting the use of a new system of loading, held

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to show that the junior party conceived and disclosed the invention prior to the senior party's date of conception.

**2. Patents  $\S$ 106(2)—No inconsistency between preliminary statement and testimony showing earlier experimental operation.**

An inventor of a decking system for suspending automobiles in freight cars during transportation was justified in subjecting it to a practical test before reaching a definite conclusion as to its practicability, and where it required a month or six weeks for experimental shipments to reach their destinations there was nothing inconsistent between his preliminary statement, in which he alleged that the device was first successfully and practically operated on or about April 15, 1916, and evidence showing that conception of the invention was completed in October or November, 1915, and that it was then being tried out, though mechanical changes were afterwards made.

Smyth, Chief Justice, dissenting.

Appeal from a Decision of the Patent Office.

Interference proceeding between Richard E. Baus and Alfred Copony. From a decision awarding priority to Copony, Baus appeals. Reversed.

James L. Stewart, of New York City, for appellant.

L. A. Janney, of Chicago, Ill., and J. H. Milans and C. T. Milans, both of Washington, D. C., for appellee.

ROBB, Associate Justice. This appeal involves concurrent decisions of the Patent Office tribunals in an interference proceeding awarding priority of invention to Copony, the appellee, to whom a patent covering the subject-matter had been issued prior to appellant's filing date. The two counts of the interference read as follows:

"1. The combination, with a freight car, of means for suspending an automobile therein to provide clearance for a second automobile beneath the first; said means comprising a triangular brace member forming a triangular brace in both vertical and horizontal planes.

"2. In a decking system for automobiles or the like in freight cars, the combination with a brace member, extending diagonally upward from the floor of the car and inwardly from the side thereof, of a transverse brace member co-operating with said first-mentioned brace member."

The invention, as indicated in these counts, relates to a system of loading automobiles on freight cars, whereby one machine is suspended over another and supported in that position by the device of the issue. In the Baus system there are four triangular braces employed for each double deck car, each brace comprising a relatively short and a relatively long leg secured together at their upper ends; the axle of the automobile resting upon the brace formed by these legs. The lower ends of these legs are secured to the car floor at or near the side of the car, the legs inclining upwardly and inwardly, and being braced at their upper ends by a member that connects them with the adjacent side of the car. It is a comparatively simple invention, and easily understood by any one having any mechanical knowledge.

Copony, in his preliminary statement, alleges conception and disclosure during the latter half of January, 1916, and reduction to practice

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at a later date. We shall assume that, by competent proof, he has established the various dates alleged.

[1] Previous to his connection in 1913 with the Studebaker Corporation, manufacturer of Studebaker automobiles, Baus had been manager of the Dayton plant of the Maxwell Automobile Company, where he had experience in loading automobiles. He was assistant manager for the Studebaker Corporation, and his duties included supervision of loading operations. In September of 1915 he commenced to devise "the new system" of loading here involved. He says:

"I had been more or less interested in the shipping and the troubles we were having, and they were getting more serious all the time, and they got to a point where we decided that something had to be done to get up a decent system that would stand all the bumps and rough handling that a carload of automobiles was put to in transit, and we gave the matter a lot of study. \* \* \*

Mr. Baus testified that in the latter part of September or early in October he conceived this invention, and immediately had his inspector of final loading, Mr. Henry, build an apparatus embodying his ideas. After this apparatus was completed, it was put in a freight car and an automobile placed thereon, after which the device was subjected to a test by having the freight car shunted down a track and against another car. The result was not altogether satisfactory, although Mr. Baus testified that—

"We could see, however, that we had something there, and we immediately set out to improve it. For instance, we did not have the angle of the legs, the one angle, or the one leg that was supposed to take most of the shock, the end thrust, the angle was not great enough, and the horses tipped over; so we immediately saw we had to raise out this one leg to give it the correct angle. \* \* \*

He also increased the length of the longer leg. These changes were made almost immediately, and, after a few more tests, he became satisfied that he had a device that would warrant experimental use in shipping automobiles. Thereupon he directed that 50 sets of the new deck, by which the new apparatus then was known, be made up and used from time to time in sending out automobiles. This, Mr. Baus testified, was done. He further testified that he caused to be sent out to the consignees of these various shipments a circular letter, the first of which, under date of November 26, 1915, was sent to C. N. Weaver, of San Francisco, Cal. This letter, which Mr. Baus testified was returned by Mr. Weaver at his request for purposes of the trial, was introduced in evidence without objection. It reads in part as follows:

"Within the last three or four months we have been having some complaints from dealers relative to wrecked automobiles, due to the upper automobile dropping down on the one below. \* \* \* We have investigated the matter very carefully, and have adopted a new system of double-decking. We have every confidence that the new system will overcome the trouble entirely, but, of course, we cannot tell in what condition the cars arrive, unless our branches and dealers inform us regarding same. We therefore ask that you kindly delegate some one to look over the shipment when it arrives, and advise us as to the condition of same. If the upper car or its supports are damaged in

any way whatever, will you kindly give us in detail just exactly what happened?

"We shipped you November 23d in S. F. car No. 64896 a carload of automobiles on which we used this new system of loading. When it arrives will you kindly advise us immediately as to its condition?"

"The Studebaker Corporation,

"(Signed) R. E. Baus, Asst. Production Mgr."

Mr. Baus identified his signature to this letter. There was produced by another witness, under cross-examination, a copy of the invoice of this shipment, under the date mentioned, with the notation thereon "New Deck." This copy was taken from the files of the Studebaker Corporation, and there was testimony that it had not been changed, and that the notation had been made by an inspector at the time of loading or immediately thereafter. No objection was interposed to the introduction of this copy in evidence.

Mr. Baus also testified that the period covered in the use of these 50 sets probably extended to about April following, that he received a substantial number of replies to the circular letters sent out with the shipments, and that the replies were favorable. After most of the old stock on hand was used up, the new system entirely displaced the old.

Mr. Henry, inspector of final loading, testified to having completed the first apparatus under the direction of Mr. Baus and to the various experiments with that apparatus. Under cross-examination he admitted, as did Mr. Baus, that the first tests were not satisfactory. He was asked:

"Q. So that the third time you tried it, what was the result then? A. Well, he [Baus] was tickled to death; he was satisfied.

"Q. Did that work satisfactorily? A. Yes, sir. \* \* \*

"Q. So that, as early as October, 1915, he had so adjusted his ideas as to make it practicable, did he? A. Well, it developed that it was practicable afterwards, but until we made the tests to ship the cars, I did not know whether it was practicable or not.

"Q. Well, on the third, he was tickled to death. What was the fourth experiment, if you made a fourth? A. Well, he gave me orders then to have the carpenter make up 50 sets."

The witness then testified that the first actual shipment in which the new deck was used was on October 29, 1915. There was produced under cross-examination by another witness, Mr. Cook, who had direct charge of shipments, and introduced in evidence without objection, a copy of the invoice of that shipment, giving the initials of the freight car, the motor and serial numbers of the automobiles, and bearing the notation "New Blocking." This witness corroborated the testimony of Mr. Baus as to the use of these 50 sets in shipping out automobiles.

In September of 1916 Mr. Henry and Mr. Cook were sent out by Mr. Baus that they might personally consult the various consignees to whom shipments had been made, and personally observe the working of the new system. They spent several weeks in this work, and their investigation satisfied them fully as to the practicability of the new system.

Mr. Cook, on cross-examination, gave the names and addresses of many of the consignees of shipments in which the first 50 sets of new decking were used, and, at the request of counsel for Copony, produced copies of the invoices, which were introduced in evidence.

It was developed during the cross-examination of the witness Cook that the new deck or shipping device weighed considerably less than those previously used, and that the Studebaker Corporation, being a member of the "Joint Weight and Inspection Bureau," under the control of the Interstate Commerce Commission, reported that difference in weight, and there was introduced in evidence the original agreement, under date of August 22, 1916, between the Joint Weight Inspection Bureau and the traffic manager for the Studebaker Corporation. At that time the new system had displaced the old. It further appeared that on November 15, 1916, the appellee, Copony, visited the Studebaker plant and was shown the Baus device, which he admitted was "in substantial conformity with that which was illustrated" in the Baus drawing.

The Examiner of Interference did not regard the proof offered by Baus as sufficiently definite. The Examiners in Chief, while of the view that the testimony of Baus, Henry, and Cook "does establish the fact that the system experimented with by the Studebaker Corporation, with a view to changing the old system of decking above described, did embody the subject matter in interference," and that "Baus was justified in taking the course he says he pursued in sending out cars loaded according to his system a few at a time, and in waiting for reports from the consignees as to the condition of the car on its arrival," were not satisfied that Baus had established a date of conception prior to January of 1916, when Copony entered the field. The Board also was not satisfied that the circular letter was written and sent out on the date it bears. The Assistant Commissioner who considered the case also criticized the testimony concerning this letter, saying:

"Had that letter been dated 1916, instead of 1915, it does not appear that Baus or Cook or Henry would have any recollection that it was in fact written on a different date."

The Assistant Commissioner further criticised the Baus proof, because a Mr. Prue, an inspector of loading, who made many of the notations "New Deck" or "New Decking" on copies of the invoices, had not testified, although it appeared that this man was a soldier in France, and therefore not available as a witness. None of the tribunals attached importance to the fact that each of these exhibits was introduced in evidence without objection.

Briefly summarized, the proof offered by Baus amounts to this: He has testified fully, candidly, and convincingly to events leading up to the conception and disclosure of this invention prior to any date even claimed by Copony. He has testified with equal candor and persuasiveness to the making, under his directions, of a device embodying the issue prior to the entry of Copony into the field. Mr. Henry and Mr. Cook, whose testimony convinces us of their integrity and good faith, corroborate Mr. Baus in detail. The testimony of these three witness-

es is reasonable, consistent, and free from any taint of suspicion. In addition, there was introduced in evidence a circular letter, without objection from appellee, as we have said. Supplementing this letter, the names and addresses of the consignees of machines sent under this new system, together with the dates of these shipments, were furnished appellee. And yet we are asked, in effect, to hold that these three witnesses have deliberately committed perjury, and have fabricated all the documentary evidence about which they have testified. It is inconceivable that counsel for appellee would have failed to call one of the many consignees of these shipments, had there been the slightest doubt as to the truth of this testimony, and, after their failure to do this, there is every reason why we should accept this convincing proof, and no reason why we should reject it.

In *Smith v. Kihlgren*, 43 App. D. C. 193, where we reversed concurrent decisions of the Patent Office, and where there was evidence from credible witnesses that a machine embodying the issue had been made by the appellant, and was in existence and accessible to the appellee, we held it was the duty of appellee to meet this evidence before asking us to reject it. To the same effect is *Schneider v. Driggs*, 36 App. D. C. 116. In *Tompkins Co. v. N. Y. Woven Wire M. Co.*, 159 Fed. 133, 86 C. C. A. 323, an infringement suit, in which the defense was prior use, and supported by the testimony of a single interested witness, Judge Coxe, speaking for the Circuit Court of Appeals, said:

"Is Mr. Prince's statement true? Having in mind the fact that he is an interested witness, and that his statements must be established beyond a reasonable doubt, we see no way to avoid the effect of his testimony, unless we are prepared to say that he has committed willful perjury. This we cannot do. Mr. Prince appears on the record to be an intelligent, straightforward, conservative business man. \* \* \* Though he did not produce a Regis spring, he gave the names of a number of dealers to whom the spring had been sold, so that, if his statements were untrue, it could easily have been discovered by an examination of these persons and the defendant's books. There is nothing astonishing or inherently improbable in Prince's testimony and we cannot disregard it."

[2] Counsel for appellee find an inconsistency between the proof offered by Baus as to reduction to practice and his preliminary statement, wherein he alleges:

"That on or about the 15th of April, 1916, said construction or device was first successfully and practically operated in the city of Detroit."

We agree with the Examiners in Chief, however, that Baus was quite justified in subjecting his invention to a practical test before reaching a definite conclusion as to its practicability. There is evidence that it required a month or six weeks for the experimental shipments to reach their destinations. While conception of the invention by Baus was complete in October or November of 1915, various mechanical changes were made in the device thereafter, and it well may have been that he did not regard the structure as complete until the end of the experimental period. In *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1,000, an inventor had put down a pavement and permitted its use for more than two years before he filed his application for patent,

yet the court held that the use was justified because necessary to determine practicability. In *Jenner v. Bowen*, 139 Fed. 556, 561, 71 C. C. A. 540, 545, Judge Lurton, afterwards Justice Lurton of the Supreme Court, considering what constituted such a public use as to defeat a patent, said:

"A use which is impliedly excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment."

We regard the use as to the Baus device prior to April of 1916 in the same light.

In our view, the evidence in behalf of Baus establishes beyond a reasonable doubt that he is the prior inventor of the subject-matter of the claims here involved, and we therefore reverse the decision of the Patent Office.

Reversed.

SMYTH, Chief Justice, dissents.

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MORRIS et al. v. FOSTER et al.

(Court of Appeals of District of Columbia. Submitted January 3, 1922. Decided February 6, 1922.)

No. 3710.

**1. Executors and administrators §29(5)—Appointment of administrator is not an adjudication of intestacy.**

In view of Code of Law 1901, § 290, providing that the subsequent discovery and probate of a will shall revoke letters of administration, an order granting letters of administration, when it was known that a will executed by decedent was in existence, so that the letters were improvidently granted, was not an adjudication that decedent died intestate.

**2. Wills §712—Silence of beneficiary, after letter stating that application for letters of administration would be made on ground of intestacy, held not to estop claim under will.**

Where a nonresident beneficiary under a will was informed by letter that the husband of testatrix claimed that his marriage and the birth of issue subsequent to the execution of the will revoked it, and that he would apply for letters of administration, the silence of the beneficiary did not estop her from thereafter asserting her rights under the will, since she had a right to assume, under Code of Law 1901, § 140, that, unless she signed and acknowledged waiver of her rights, nothing would be done affecting her interests without the notice required by that section.

**3. Attorney and client §20—Attorney can properly represent two beneficiaries under a will, whose interests do not conflict.**

The interests of an infant daughter of testatrix, who would take more under the will than in case of intestacy, did not conflict with the interests of another beneficiary, so that it was not improper for counsel for the infant to enter their appearance also as counsel for the other beneficiary.

**4. Wills §191—Subsequent marriage and birth of issue do not revoke.**

Under Code of Law 1901, § 1626, specifying the manner in which a will may be revoked, and concluding with the words, "any former law or

usage to the contrary notwithstanding," a will is no longer revoked by the marriage of testatrix subsequent to its execution and the birth of issue who are necessarily not provided for in the will.

**5. Wills  $\S$ 361—Beneficiary under will established by decree is proper appellee.**

On appeal from a decree admitting a will to probate, a beneficiary under the will, who had been permitted to appear in the probate court in support of the will, was a proper appellee, and entitled to oppose the appeal alone, especially where she had been formally designated as a party appellee.

Appeal from the Supreme Court of the District of Columbia.

Proceeding to probate a will by Mary Helen McNeely and another, by their guardian ad litem, opposed by Charles H. Morris and others, in which Ella Finley Foster entered her appearance in support of the will. From a decree admitting the will to probate, Charles H. Morris and others, including Mary Helen McNeely, appeal. Affirmed.

L. A. Bailey and Walter M. Bastian, both of Washington, D. C., for appellants.

Nina I. Thomas, of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District on June 30, 1921, admitting to probate and record a paper writing dated May 11, 1904, as the last will and testament of Bridget A. Morris, who died in the District of Columbia on May 11, 1909.

In 1892 the testatrix married Samuel A. McNeely, and of this marriage three children were born, two of whom, John and Mary Helen McNeely, are living; the third child, Elsie McNeely, having died in 1904 unmarried and intestate. A divorce was granted testatrix on November 22, 1907, and on December 10th, following, she married appellant Charles H. Morris. Of this union one child, Anna Marie Morris, was born on December 14, 1908.

Upon the death of his wife, Morris filed in the probate court of this District a petition praying that he be appointed administrator of her estate. In that petition he set forth that since the death of his wife "a certain paper writing bearing date May 11, 1904, and purporting to be her last will and testament, disposing of her entire estate, was filed in this court, but no further proceedings have been had in reference thereto." He further averred that, by reason of her subsequent marriage to him and the birth of the child, "for whom the decedent made no provision by will or previous settlement, the said paper writing became and is wholly inoperative and invalid, and that the said Bridget A. Morris died intestate." The petition then averred that the persons named in the will, other than the three children, resided in the city of Washington, "excepting only the said Ella Finley, who is now Mrs. Ella Foster, wife of Mr. William Foster, and who resides at Compania de Real del Montey Pachuca, Hacienda de Loreto, Pachuca, Hgo., Mexico." Thereupon a guardian ad litem was appointed for the children, and Morris, through his attorney, filed a motion, verified by him, in which he sought to have the court "waive process by publi-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

cation and all other and further notice to the said Mrs. Ella Foster."

In this paper he set forth that, through his attorney, he had sent a letter addressed to Mrs. Foster, a copy of which was annexed, but that no reply had been received. In the letter referred to Mrs. Foster was informed of the death of her sister, of the existence of the will in which she was named as a beneficiary, of her sister's marriage to Morris, that Morris had been advised by counsel that such marriage and the birth of the child, then living, invalidated the will, and that Morris had filed a petition for his appointment as administrator of the estate. Mrs. Foster was further informed in this letter that the entire estate would go to her sister's four children and to Morris "as tenant by curtesy." The letter closed with a request that Mrs. Foster "sign and acknowledge before a United States consul or clerk of the court or notary public and return to me the paper which I inclose herewith for me to file in the probate court as evidence of your assent to the prayers of his [Morris'] petition." Thereupon the court entered an order reciting "that notice of said petition was given to Mrs. Ella Foster by the means and in the manner set forth in the affidavit of the said Charles H. Morris" (to which we have just referred), and that further notice "by citation, publication, or otherwise" was waived; the order concluding with the appointment of Morris as administrator of the personal estate. Two days later Morris filed a petition, in his own right and as administrator, in which he set forth the amount of the personal estate, averred that as the surviving husband of the decedent he was entitled to all of the personal estate in his own right, and prayed that he be permitted to file a special bond under the provisions of section 275 of the Code. This petition was granted.

In August of 1920 Morris filed a bill in equity in the Supreme Court of the District, seeking the sale of his wife's real estate and partition of the proceeds, alleging that the wife died intestate. Nina I. Thomas was appointed guardian ad litem for the two infant defendants, Mary Helen McNeely and Anna Marie Morris. Thereupon the guardian ad litem, by authorization of the court, filed a petition on the probate side of the court for the probate and record of the will of Mrs. Morris, alleging, inter alia, that, as the interests of the two defendants apparently were antagonistic, Walter M. Bastian had been appointed guardian ad litem for Anna Marie Morris. To this petition Morris filed a plea setting forth the antecedent proceedings, and averring that the court, in 1909, had "adjudged said paper writing to be ineffective and invalid as the last will and testament of said decedent." On July 25, 1921, appearance for Ella Finley Foster was entered below by Nina I. Thomas, who thereafter entered her appearance in this court for Mrs. Foster and the infant appellee. Upon attaining her majority the latter, Mary Helen McNeely, obtained leave of court to be made a party appellant, Mrs. Foster remaining as the sole party appellee.

[1] We first will consider the question whether the order of 1909, granting letters of administration to Morris, amounted to an adjudication that Mrs. Morris died intestate. The petition upon which that order was based made known the existence of the will and the parties interested therein and averred that no proceedings had been taken for the probate of the will. It did not seek an adjudication as to the

will and the order is silent on that point. The explanation of the court's failure to make any finding as to the will is found in section 290 of the Code, which provides:

"If administration be granted, and a will disposing of the estate of the deceased shall afterwards be proved according to law, and letters testamentary shall have issued thereon, the same shall be considered a revocation of the letters of administration."

Under the facts of this case, there can be no doubt that the letters of administration to Morris were improvidently issued. See *In re Estate of Henry Coit*, 3 App. D. C. 246.

[2] Nor was Mrs. Foster estopped by anything that occurred in the proceeding for the appointment of the administrator from thereafter asserting her rights under the will, since she was not served with the notice required by section 140 of the Code, relating to "Trial of Issues as to Wills." The letter to her certainly did not amount to such a notice. Moreover, in view of its concluding paragraph and the provisions of the Code, she had a right to assume that, unless she signed and acknowledged a waiver of her rights, nothing would be done affecting her interests until the provisions of the law as to notice had been complied with. The position of counsel for appellants on this question is inconsistent. On the one hand, they contend that the issue raised by the petition for the appointment of an administrator was whether Mrs. Morris died intestate—that is, that the validity of her alleged will was in issue—while, on the other hand, they contend that they were under no obligation to comply with the plain provisions of the statute as to notice.

[3] There is no conflict between the interests of Mrs. Foster and Mary Helen McNeely, as suggested by appellants. Each is a beneficiary under the will, and, if the will is sustained, Miss McNeely's interest in the estate will be greater than in the case of intestacy. There was no impropriety, therefore, in counsel for Miss McNeely appearing for Mrs. Foster.

[4] This brings us to the contention of appellant that the subsequent marriage and birth of issue to Mrs. Morris rendered her will inoperative, "under the well-established rule of the common law." As no caveat to the will has been filed, this question really is not before us, and therefore would not be considered ordinarily. It appearing, however, that the will disposes of both realty and personalty, that the time for filing a caveat has not expired, that the question has been fully presented by counsel on either side, and that this is a proceeding of an equitable character, we will dispose of the question now and save further expense.

Section 1626 of the Code specifies with particularity the manner in which a will may be revoked, and concludes with the words "any former law or usage to the contrary notwithstanding." In *McGowan v. Elroy*, 28 App. D. C. 188, one of the questions was whether a conveyance of land previously devised by will operated as a revocation of the will, notwithstanding the cancellation of the deed for fraud and undue influence. The court said:

"The question is an unimportant one, however, in view of the provisions of our Code, which declares the manner in which wills shall be revoked, and concludes with the words, 'any former law or usage to the contrary notwithstanding.'"

This ruling, made more than 15 years ago, accorded to the quoted words of the Code their plain and ordinary meaning, and a different conclusion now would require very cogent reasons. Counsel for appellants rely on the decisions of the courts of Maryland, Michigan, and Massachusetts. See *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295, *Durfee v. Risch*, 142 Mich. 504, 105 N. W. 1114, 5 L. R. A. (N. S.) 1084, 7 Ann. Cas. 785, and *Nutt v. Norton*, 142 Mass. 242, 7 N. E. 720. It is unnecessary to review those decisions, however, because of the difference between the statutes in those states and our Code. The words "any former law or usage to the contrary notwithstanding" were stricken from the Maryland statute in 1860, while the decision in the *Baldwin Case* was in 1886. In Michigan the statute provided the manner in which wills might be revoked and concluded with the words:

"Excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition of the testator."

And in Massachusetts there was a similar statute. Yet, notwithstanding these changes in the laws of other jurisdictions and the ruling in the *McGowan Case*, Congress has not deemed it advisable to amend our Code. We therefore adhere to our former ruling.

[5] The remaining question is whether Mrs. Foster is a proper party to this appeal. That she is an interested party is of course apparent, since the decree below admitting the will to probate fixed her status as such; she being named in the will as a beneficiary. Her entry of appearance thereafter in the court below therefore was within her rights as such interested party. Two of the present appellants brought the case here, designating as appellees Mary Helen McNeely, by her guardian, and Ella Foster, née Finley. Had Miss McNeely continued as a party appellee, it is inconceivable that any question would have been raised as to the right of Mrs. Foster to be heard here. Moreover, having been formally designated as a party appellee, it is difficult to perceive upon what theory Mrs. Foster could be precluded from protecting her interests thus challenged. We are clearly of the view, in these circumstances, that she is a proper party to this proceeding.

The decree is affirmed, with costs.

Affirmed.

**In re HASKELL (two cases).**

(Court of Appeals of District of Columbia. Submitted January 12, 1922. Decided February 6, 1922.)

Nos. 1471, 1472.

**Patents 66—Claims for cement for veneering held not anticipated by general statements in earlier patent.**

Claims for a process for making a cement from a mixture of black albumen and disodium silicate, substantially, though not actually, in the proportions specified, whereby the mixture is given a syrupy consistency, and for the product of such process, *held* not anticipated by a patent dated 22 years before the filing of the application, which stated generally that all albumens acted as acids toward alkalis and formed double salts, especially where, 10 years after the earlier patent, an expert had stated that the mixture disclosed thereby had not been used with good results.

Appeals from the Commissioner of Patents.

Separate applications by Henry L. Haskell for patents for a process for making cement and for the cement. From decisions of the Commissioner of Patents, rejecting two claims of the process application and one claim of the product application, the applicant appeals. Reversed.

Henry L. Haskell, in pro per., Fred L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., and W. F. Freudenreich, of Chicago, Ill., for applicant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. These are appeals from decisions of the Patent Office rejecting claims 7 and 8 in the first case and claim 6 in the second, the three rejected claims reading as follows:

"7. Process of preparing and applying cement consisting of dissolving black albumen in water, adding thereto disodium silicate, mixing the same until the mixture is homogeneous in substantially the proportions specified, applying the same to surfaces to be joined, and applying heat and pressure to set the same, as specified.

"8. Process of preparing and applying cement consisting of dissolving black albumen in water, adding thereto disodium silicate, mixing the same until the mixture is homogeneous in substantially the proportion specified, applying the same to surfaces to be joined, and applying heat and pressure to set the same, thereafter boiling the laminated wood to completely soften and heat its texture and molding the same under heat and pressure to desired form."

"6. A cement consisting of a mixture of a solution of blood albumen and silicate of soda dissolved and chemically combined together and of a syrupy consistency."

Inasmuch as the application in the first case is a division of the application in the second, we will consider the latter case first.

In his specification applicant says that the objects of his invention—

"are to provide an improved waterproof cement or glue which shall resist the action of the elements in use to an unusual degree and is especially well adapted to cementing or glueing veneer for canoes, boats, or for aeroplanes, including the wings, body and other parts. \* \* \* In the preparation of my improved waterproof glue or cement I mix and dissolve black albumen,

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which is dried blood, in water in the proportion of forty-five (45) per cent. of blood to fifty-five (55) per cent. of water by weight and stir the same to dissolve the said black albumen as fully as it is possible to do it at the usual atmospheric temperature of a room at, say, about 70°. I place this material in a suitable stirring apparatus so that the same is stirred very thoroughly and continuously for several hours, usually about six hours. This insures a complete solution of black albumen or blood in the water as is possible to accomplish at the temperatures indicated and makes a homogeneous mixture. \* \* \* I mix this blood preparation with a heavy grade of silicate of soda in the proportion by weight of five parts of dried blood to one part of silicate of soda solution. \* \* \* Apparently reaction takes place between these ingredients. I stir and mix the same thoroughly until the mixture has an appearance similar to heavy molasses."

The cement is applied to veneers in the usual way and the material is then subjected to heat at substantially the boiling point of water. The specification further states that "there is slight variation possible from these proportions but to secure the thickening or syrupy effect the proportions of blood to silicate cannot be much varied." Applicant also says in his specification that veneer put together with his cement can be molded afterwards as desired; that he has boiled samples continuously for four months without apparent injury.

The Examiner was of the view "that applicant has probably discovered certain proportions of albumen and silicate which produce valuable results, such as were not appreciated by the patentee Gardner," and therefore allowed claims 1 to 5. He, however, denied the claim here involved because persuaded that the "broad idea" of this claim is disclosed in the Gardner patent. This view was adopted by the Examiners in Chief. On appeal the Assistant Commissioner said:

"There is no doubt that an applicant who has made a patentable discovery in a composition of matter should ordinarily be allowed latitude for these proportions that would prevent an unauthorized user from varying his recipe slightly while obtaining substantially the same desired result without paying tribute for the information given the public by the discovery."

Nevertheless the Assistant Commissioner reached the conclusion that, in view of what he conceived to be limitations in the specification, the appealed claim was not allowable.

The British patent to Gardner, considered by the lower tribunals, is dated October 1, 1896, or about 22 years before the present application was filed. The subject of that invention was a waterproof glue and in the specification it is stated that—

"All albumines possess towards alkalic substances the character of acid because they unite and form salts; i. e., double salts."

Among the eight alkalic substances mentioned as "capable of being employed" are silicates, and among the four albumines is blood. A reading of the very general terms of the specification convinces us, as it apparently did the Patent Office tribunals, that Gardner had no conception of the invention made by Haskell. It is one thing to conceive the idea that a certain result is possible and quite another thing to demonstrate the possibility; that is, actually devise means to accomplish the result and convert the possibility into a reality. In the affidavit filed by Mr. Haskell in support of his application he sets forth:

That it is not possible, in carrying out the Gardner process, to produce a material that even approximately approaches his own in strength and durability; "that all other glue joints with which he has been familiar prior to his invention herein, or that he has ever seen advertised by others as made under the Russian method or under secret process, have yielded and broken down after a period of one of three hours of boiling, whereas he has boiled samples of his material for a period of four months, as above indicated, without effect upon the joint; \* \* \* that the joint resulting from his improved material is of such quality and character that the laminated board made up of veneers is capable of being boiled and molded, retaining its form without breaking the joint", etc.

As further evidence that applicant has made a valuable discovery, our attention has been invited to the action of the Commissioner, who, early in 1919, prohibited applicant, under the provisions of Act Oct. 6, 1917 (Comp. St. 1918 Comp. St. Ann. Supp. 1919, § 9429a) from making public his invention at that time, because it had "been found to contain subject-matter which might be detrimental to the public safety or assist the enemy in the present war." Manifestly this action would not have been necessary, had the Gardner disclosure really anticipated this invention. In the allowed claims the approximate proportions of the ingredients are supplied, but in each of the claims it is stated that the mixing must continue "until the mass becomes of a homogeneous syrupy consistency." Gardner evidently did not appreciate the necessity of combining the ingredients in the manner employed by the applicant and makes no mention of mixing such materials "until the mass becomes of a homogeneous syrupy consistency." This is important and goes far toward demonstrating that applicant and not Gardner really is the originator of the subject-matter of the claim here under consideration. Moreover, almost 10 years after the grant of the Gardner patent, A. M. Luther, in his German patent, said:

"It is a well-known fact that blood or blood albumen by itself as well as mixed with lime or alkalis, possesses adhesive properties. But it has as yet not been used with good results for gluing together pieces of wood; e. g., for veneering."

In other words, the British patent did not disclose to Luther, an expert, what the Patent Office has ruled, in effect, must have been disclosed to the applicant here. While applicant has stated in his specification that only slight variation from the given proportions is possible, he concededly has produced a result not contemplated before. Haskell has given the public a very useful and valuable material and we are not disposed, in such circumstances, to withhold from him adequate protection because of vague and general expressions in a patent more than 20 years old. The allowance of the five claims might be of little value without the appealed claim. That claim, in our view, goes no farther than he has gone. It covers, and should cover, what he actually has done, and we think it should be allowed. See *In re Lower*, 50 App. D. C. 159, 269 Fed. 675; *In re Huff*, 48 App. D. C. 258.

What we have just said applies with equal force in No. 1471, since the same reference was relied upon in each case. It follows that the two decisions appealed from must be reversed.

Reversed in No. 1471.

Reversed in No. 1472.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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HAYDEN v. FILIPPONE et al.

(Court of Appeals of District of Columbia. Submitted January 5, 1922. Decided February 6, 1922.)

No. 8509.

1. Landlord and tenant  $\S$  278½, New, vol. 11A Key-No. Series—Ball Act does not affect court's jurisdiction, but is a rule of evidence.

The Ball Rent Act, making the finding of the rent commission conclusive as to the right of a tenant in possession, merely changed the rule of evidence, and did not affect the jurisdiction of the municipal court over the subject-matter of an action between a landlord and tenant, and if neither party invoked the Ball Act the court could proceed as effectively as if the act had never been passed, so that the tenant cannot question in the Court of Appeals the sufficiency of the notice to quit under the Ball Act, after failing to raise that question in either of the lower courts.

2. Landlord and tenant  $\S$  120(2)—Notice to tenants by sufferance held sufficient under the Code.

Under Code of Law 1901, § 1221, providing that a tenancy by sufferance may be terminated by a notice to quit on the thirtieth day after day of service, a notice at the end of 30 days from the date of service is sufficient, since it gave the tenant at least full 30 days, and if it could be construed as giving more than 30 days that would not affect its validity.

Appeal from the Supreme Court of the District of Columbia.

Suit by Rocco Filippone and another against James R. Hayden to recover premises from the defendant as a tenant at sufferance. Judgment for the plaintiffs in the Supreme Court of the District, on appeal from the municipal court, and defendant appeals. Affirmed.

P. H. Marshall, of Washington, D. C., for appellant.

C. V. Imlay and G. W. Offutt, Jr., both of Washington, D. C., for appellees.

SMYTH, Chief Justice. The Filippones filed a complaint in the municipal court, in which they alleged that their grantors had rented the described premises to Hayden as a tenant at sufferance, that they had served 30 days' notice on him to vacate the property, and that he had refused to do so. The municipal court gave them judgment, and Hayden appealed to the Supreme Court of the District. As provided by the nineteenth rule of that court, the Filippones filed an affidavit of merit, which set up the facts on which they based their action. A copy of the notice served on Hayden was attached to the affidavit as an exhibit. The affidavit recited that the building occupied by Hayden was badly in need of repairs, that they desired to remodel it, and that Hayden was notified to quit "at the end of 30 days from" the service of the notice upon him.

In response Hayden filed an affidavit of defense, in which he admitted that he resided on the premises, did not deny he was a tenant at sufferance, alleged he had a good defense, and that he was advised that the notice served upon him was not in accordance with the statute. On the basis that the affidavit was not sufficient under the nineteenth rule, the Filippones moved for judgment, which was granted, and Hayden appeals. He asks a reversal on two grounds: First, that the affidavit of merit was not sufficient, because no necessity for possession of the premises in question was shown as contemplated by the Ball Rent Act; and, second, that the notice to quit was defective, because not in compliance with the requirements of section 1221 of the District Code.

[1] Hayden did not invoke the Ball Act (41 Stat. 298) in either of the lower courts. Therefore he cannot avail himself of it here. *Lehker v. Joyce*, 273 Fed. 763; *Smith v. Pyne*, 274 Fed. 142. In each of these cases we held that, unless the Ball Act was relied on in the lower courts, the case should be disposed of under the Code. The Ball Act simply changed the character of the evidence upon which the court could act in such a case. It made the finding of the rent commission conclusive as to the right of the tenant to possession. Nothing that the rent commission could properly determine was open for determination by the courts where the benefit of the act was claimed. But the Ball Act did not affect the jurisdiction of the municipal court over the subject-matter of an action between a landlord and tenant. If neither party invoked the Ball Act, the court could proceed as effectively as if the act had never been passed. Consequently the alleged insufficiency of the notice in this case under that act cannot be inquired into here. That was a question for the rent commission in the first instance, and for this court on appeal from the commission, if the parties were not satisfied with the decision of the latter.

[2] The commission, as we have said, was not appealed to by either party. The litigants were willing to have their rights determined according to the Code, and hence the validity of the notice is to be tested by it and not by the Ball Act. Code, § 1221, says:

"A tenancy by sufferance may be terminated at any time by a notice in writing from the landlord to the tenant to quit the premises leased \* \* \* on the thirtieth day after the day of the service of the notice."

Whether the Filippones needed the premises for any of the purposes named in the Ball Act is immaterial. The notice which was served upon Hayden said that he should quit "at the end of 30 days from the date of the service" upon him, instead of on the thirtieth day thereafter. Because of this it is urged that the notice is defective. This is hypercritical. The notice gave him full 30 days, and this complied with the Code. But, if it could be construed as giving more than 30 days, that would not affect its validity. *Bliss v. Duncan*, 44 App. D. C. 93; *Boss v. Hagan*, 49 App. D. C. 106, 261 Fed. 254, 8 A. L. R. 1508.

For these reasons, the judgment of the lower court must be, and it is, affirmed, with costs.

Affirmed.

**UNITED STATES ex rel. NORRIS v. FORBES, Director of the Bureau of War Risk Insurance, et al.**

(Court of Appeals of District of Columbia. Submitted January 3, 1922. Decided February 6, 1922.)

No. 3702.

1. **Mandamus**  $\Leftrightarrow$  3(8)—Statutory remedy under War Risk Insurance Act is exclusive.

The provision of Act of May 20, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514kk), that in the event of disagreement between the war risk insurance bureau and any beneficiary, an action may be brought against the United States in the District Court of the United States, is the exclusive remedy of a beneficiary of war risk insurance and prevents mandamus by a foster father to compel the payment of the insurance to him on the ground that the estate of insured was designated as beneficiary only because the foster father could not be prior to the amendment of the statute, since relator cannot deny that he is a beneficiary within the remedial act without denying his right to relief.

2. **United States**  $\Leftrightarrow$  125—United States can be sued for war risk insurance only in manner indicated by consent.

A suit to enforce a claim for war risk insurance is one against the United States which cannot be maintained without its consent, and, where it has consented to be sued in a particular manner, the suit so permitted is the exclusive remedy.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States of America, on the relation of John F. Norris, against Charles R. Forbes, Director of the Bureau of War Risk Insurance, and another. Rule to show cause discharged, and petition dismissed after relator elected to stand on his demurrer to the return and relator appeals. Affirmed.

Richard P. Evans, of Washington, D. C., for appellant.

Peyton Gordon and Letitia H. Wardwell, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. Relator filed a petition against the Director of the Bureau of War Risk Insurance and the Secretary of the Treasury in which he asked for a mandamus directing them to pay to him, as the foster father of one William Ricketts, a soldier, who died as the result of wounds received in line of duty during the late war, \$10,000, the amount of insurance on the life of Ricketts called for by a contract made in accordance with the Act of Congress of October 6, 1917, as amended July 11, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 514k-514vv) and December 24, 1919, c. 16, 41 Stat. 371. A rule to show cause went out, and the defendants made a return thereto. Relator demurred to the return. The demurrer was overruled, and, the relator having elected to stand on it, the rule was discharged and the petition dismissed. Relator appeals.

The soldier, at the time of his death, was a resident of Maryland. The relator is also a resident of that state. He claims that he received Ricketts into his family when the latter was but four years old and

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

raised him as his own child; that during his whole life he stood in loco parentis to him. Ricketts, because of the condition of the law at the time, so it is alleged, made his estate his beneficiary in the contract of insurance. After the death of Ricketts Congress, by the act of December 24, 1919, amended the War Risk Insurance Act so as to provide that the term "father" in the statute should include a father by adoption "and persons who have stood in loco parentis to a member of the military \* \* \* forces," etc. Relator claims that under this amendment he is entitled to the insurance. Defendants deny it. A disagreement exists, therefore, between the defendants, representing the Bureau of War Risk Insurance, and the person claiming to be the beneficiary under the policy.

[1] By the Act of May 20, 1918, § 1 (40 Stat. 555; Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514kk), it is provided:

"That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides. \* \* \*

Relator cannot deny that he is a beneficiary, for that is the basis on which he asks relief; consequently, the statute applies. It is a familiar rule, which the courts apply, that where a statute provides a remedy, it is exclusive. *Dimmick v. Delaware, Lackawanna, etc., Railroad Co.*, 180 Pa. 468, 36 Atl. 866; *Curran v. Delano*, 235 Pa. 478, 84 Atl. 452; *Janney v. Buell*, 55 Ala. 408; *State of North Dakota ex rel. William Lemke v. Chicago, etc., Ry. Co.*, 257 U. S. —, 42 Sup. Ct. 170, 66 L. Ed. —.

[2] Moreover, the debtor under the contract of insurance is the United States, which cannot be sued without its consent. *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *The Davis*, 10 Wall. 15, 19 L. Ed. 875. And when it consents it can prescribe the terms upon which it may be sued. *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125; *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 37 L. Ed. 171; *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128. With respect to the contract here involved it has given its consent to be sued and named the court in which the action may be brought. The inevitable conclusion is that relator's only remedy lies in an action against the United States in the District Court of the United States for the district in which he resides.

The judgment of the lower court is affirmed, the costs to be assessed against the appellant.

Affirmed.

In re KUSTERER.

(Court of Appeals of District of Columbia. Submitted January 12, 1922. Decided February 6, 1922.)

No. 1400.

1. Patents  $\S$  26(2)—Assembling old elements to produce new result may be invention.

The assembling of elements which are old in the art in such a manner as to produce a new result may be invention.

2. Patents  $\S$  26(2)—Assembling elements from two old devices to operate in same manner as one of them is not invention.

The assembling of available parts of two prior devices to produce a device, which operates in substantially the same manner as one of the prior devices, is not invention.

3. Patents  $\S$  36—Doubt as to patentability resolved in favor of invention.

Where the dividing line between patentability and the exercise of mechanical skill is difficult to define, the doubt is resolved in favor of invention.

Appeal from the Commissioner of Patents.

Application by Carl C. Kusterer for a patent for a table slide structure. From a decision of the Commissioner of Patents, refusing the allowance of a claim, applicant appeals. Affirmed.

Fred L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents, refusing to allow claim 3 in appellant's application, which reads as follows:

"3. A table slide structure comprising a center slide adapted to be secured to the bridge of the table, an outer slide member secured to one portion of the table top and an inner slide member secured to the opposite portion of the table top, said slides having coengaging parts, a pulley with a vertical axle on the central slide, a cable looped over said pulley and connecting the inner slide member to the outer slide member, clearance way being formed in said slides for the cable, whereby the movements of the slides are equalized."

This claim was denied on reference to a British patent issued to one Pocock, in 1805; a patent issued to one Curry, September 21, 1869; and a patent issued to one McMahon, June 25, 1912.

The invention relates to an extension table, in which the extension slides, moving in opposite directions, are connected by cables in such manner as to equalize the movement of the slides.

The patent of Pocock discloses a rectangular frame so mounted that it slides between fixed rails, and a similar frame with one end open and mounted to slide on the outer sides of the fixed rails. Pulleys are mounted near the center of the fixed rails, and the cords placed over the pulleys with one end attached to the inner frame and the other end to the outer frame, in such manner that the movement of one frame

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

simultaneously moves the other. The patent to McMahon discloses two fixed rails carrying a table top, with the rails tongued and grooved and a clearance space for the rack and pinion shifting mechanism. The patent to Curry discloses slides tongued and grooved with clearance spaces for the cords.

[1, 2] It therefore appears that the claim in issue shows a combination of elements, old in the art; in other words, it covers the construction of McMahon, modified by the cord and pulley slide shifting mechanism shown in the Pocock patent. It is well settled that elements which are old in the art, when assembled in such a manner as to produce a new result, may be held to constitute invention. We think, however, that the rule is not applicable in this case. Appellant's device, while showing a high degree of mechanical skill in the selection and putting together of available parts of the different devices above referred to, operates in substantially the same manner as did the old British patent.

[3] In cases where the dividing line between patentability and the exercise of mechanical skill is difficult to define, we resolve the doubt in favor of invention; but the present case does not, in our opinion, belong to that class. While appellant produced a valuable improvement, we are unable to reach the conclusion that what he accomplished amounted to invention.

The decision of the Commissioner of Patents is affirmed.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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### In re DUNBAR.

(Court of Appeals of District of Columbia. Submitted March 16, 1921. Decided February 6, 1922.)

No. 1399.

**Patents  $\Leftrightarrow$  120—Assignee of two applications is bound by election to take patent with narrow claims reading on other disclosure.**

Where two applicants each assigned their copending applications to the same assignee by an assignment which left no interest in the applicant, the election of the assignee to take the patent on one application, which contained narrow claims reading on the disclosure in the other application, is binding on him, and precludes his right to issuance of patent on the other application, containing broader claims covering the same features.

Appeal from the Commissioner of Patents.

Application by Francis W. Dunbar for a patent, assigned to the Kellogg Switchboard & Supply Company. From a decision of the Commissioner of Patents denying the application, applicant appeals. Affirmed.

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Curtis B. Camp and C. C. Bradbury, both of Chicago, Ill., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. Appellant, Dunbar, filed the present application for patent October 9, 1905. One Dyson filed a co-pending application March 19, 1906, on which a patent was issued December 12, 1916. Both applicants assigned to Kellogg Switchboard & Supply Company, and both applications have been prosecuted through the Patent Office by the same attorneys.

It is unnecessary to consider the mechanism or the line of division between the Dunbar and Dyson claims, or the right of the common assignee to disclaim the invention of the claims in the Dyson patent, since this appeal turns upon a question of law. The Dyson application, which went to patent, contained certain narrow claims which would read upon the earlier application of Dunbar. Dunbar has broad claims, covering the same features of the invention, and he is here insisting upon the allowance of his claims.

The tribunals below recognize the dilemma in which Dunbar finds himself, and the Commissioner in his opinion states the grounds upon which relief was refused, as follows:

"By taking out the Dyson patent, an election was made on the question of priority between Dyson and Dunbar, and the common assignee is just as much bound by that election as if an interference had been declared and priority decided in favor of Dyson. The reason for the rule holding that interferences will not be declared between coassignors is that the presentation of the testimony on behalf of each assignor is in control of the common assignee, and that there are, therefore, no parties having adverse interests. If an assignee is to be allowed, after having made such election and taken out the patent, to repudiate the election and present the claims in another application, monopoly would obviously be extended."

The record is silent as to the nature of the assignment from Dunbar to the Kellogg Company. In this situation we must assume that the assignment was absolute and conveyed all the right, title, interest, and claim in the patent to the assignee. Dunbar has, therefore, no interest left in the invention which he can now assert. The case resolves itself into the right of the assignee to a patent upon the present Dunbar claims. To grant these claims to the assignee, after the assignee, by its own election, had accepted the Dyson patent, would be, as held by the Commissioner, a clear extension of the monopoly. If the assignment from Dunbar to the Kellogg Company was a conditional one, whereby Dunbar would be prejudiced by the election of the assignee to accept the Dyson patent, a different question might be presented; but in the state of the record Dunbar has no interest left upon which he can personally claim protection.


The decision of the Commissioner of Patents is affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

**IRONSIDES CO. v. CITIZENS' WHOLESALE SUPPLY CO.**

(Court of Appeals of District of Columbia. Submitted January 11, 1922. Decided February 6, 1922.)

No. 1465.

**Trade-marks and trade-names and unfair competition** 58—Shield inclosing scroll with monogram held not to infringe shield containing picture.

A trade-mark consisting of a shield inclosing a scroll bearing the words "Golden Rule," and a monogram formed of the initials of the owning corporation, the dominating features of which are the words and monogram, does not conflict with a trade-mark consisting of a shield in which is the picture of the frigate Ironsides.

Appeal from the Commissioner of Patents.

Petition by the Ironsides Company against the Citizens' Wholesale Supply Company for cancellation of a trade-mark. From a decision of the Commissioner of Patents denying the petition, the petitioner appeals. Affirmed.

Percy H. Moore, of Washington, D. C., for appellant.

E. T. Fenwick and C. R. Allen, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents sustaining a decision of the Examiner of Interferences and denying the petition of the Ironsides Company, appellant here, for the cancellation of a trade-mark of the appellee, the Citizens' Wholesale Supply Company.

The mark sought to be canceled consists of a shield inclosing a scroll bearing the words "Golden Rule" and a monogram formed of the letters "C. W. S." and the abbreviation "Co.," with two stars in each of the upper corners of the shield. The dominating features of the mark are the words and the monogram. Appellant's mark consists of a shield in which, and almost completely filling it, is the picture of the frigate Ironsides. While the evidence tended to show that even this mark was not adopted until after the date of adoption and use of the "Golden Rule" mark, it is unnecessary to review the evidence on that point, since we are clearly of the view, as was the Patent Office, that there is no conflict between the two marks. The decision therefore is affirmed.

Affirmed.

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 For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**LADEN et al. v. METROPOLITAN DISTRIBUTING CO., Inc.**  
(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2758.

**Bills and notes**  $\S$  509.—In action against maker and indorser of check, defendants held entitled to show whole transaction.

In an action against the maker and indorser of a check on which the maker had stopped payment, where plaintiff claimed as an innocent holder for value, to whom the payee had indorsed and delivered the check in part payment for merchandise, defendants held entitled to show the entire transaction and to introduce evidence tending to show that the sale of the merchandise was to the maker of the check, through the payee as a broker, who in accepting and indorsing the check acted as plaintiff's agent with plaintiff's knowledge, and that plaintiff's only right of action was against the maker of the check on the contract of sale.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action at law by the Metropolitan Distributing Company, Inc., against Samuel R. Laden and Morris Snyder. Judgment for plaintiff, and defendants bring error. Reversed.

Barney Larkey and Merritt Lane, both of Newark, N. J., for plaintiff in error Snyder.

Harold Simandl, of Newark, N. J., for plaintiff in error Laden.

Jos. G. Cohen, of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the Metropolitan Distributing Company brought suit against Morris Snyder, the drawer, and Samuel R. Laden, the payee and indorser, of a check, to recover \$5,000, the amount thereof. The case resulted in a verdict against both men for the full amount, and, on entry of judgment on the verdict, this writ of error was sued out.

As the case was tried, we do not think the decisive, underlying issue was submitted to or passed on by the jury, and as it goes back for retrial we deem it proper to point out that issue, with a view to aiding in the future retrial, rather than of now entering on a detailed discussion of the assignments of error in the past trial.

Turning, then, to the proofs, there was testimony which tended to show that the plaintiff, the Metropolitan Distributing Company, a corporate citizen of the state of New York, was, on August 19, 1920, the owner of 1,000 cases of bottled in bond whisky, which was stored in a United States bonded warehouse at the distillery of the A. McGinnis & Co. at Carrollton, Md. This whisky they were willing to sell at \$30 per case, f. o. b. distillery, the buyer "to deliver to seller or distillery a properly authenticated United States internal revenue purchase permit in the name of A. McGinnis & Co., of Carrollton, Md."

Laden, one of the defendants, was a broker, and with a view of earning a commission of \$1 a case on the whisky, he approached the plaintiff company to ascertain whether, if the whisky was bought by Sny-

der, the other defendant, at \$31 per case, he (Laden) would get a commission of \$1. This being agreed to by the plaintiff company, Laden indorsed and turned over to the plaintiff company a check of even date for \$5,000, drawn by Snyder, the other defendant, and a paper in the form of a receipt, signed by the plaintiff and marked "Accepted, Samuel R. Laden," was passed between the parties. This paper, which is in the form of a receipt, recites in substance that the plaintiff has "received from Sam Laden \* \* \* a check for \$5,000, issued by Morris Snyder and indorsed by Mr. Sam Laden, as part payment for 1,000 cases McGinnis whisky bottled in bond at \$30 per case, f. o. b. Distillery." This paper, it will be observed, fixed the price of the whisky, as between the plaintiff and Laden, at \$30 per case, and in that regard tends to support the contention that its purpose was merely to evidence the agreement of the plaintiff that Laden was to receive \$1 per case as a commission, if Snyder bought at \$31.

At this point we note that the contention of Laden, as above stated, namely, that the paper was simply a part of the whole transaction, and was merely intended to secure him a \$1 commission in case Snyder bought at \$31, and that, as Laden contends, he was a mere broker, a "go-between," as he expressed it, between the plaintiff and Snyder, becomes all-important, for the contention of the plaintiff is that Laden was the real and only purchaser, and that the \$5,000 check of Snyder was paid by Laden to the Distributing Company as part payment for the whisky sold him; that the plaintiff had no dealings with Snyder, and was therefore an innocent holder for value of Snyder's check, and under the New Jersey statute (3 Comp. St. 1910, p. 3742, § 61), as quoted in the margin<sup>1</sup> was entitled to recover for the check. This underlying and all-important question of fact, namely, whether there was a sale by the Distributing Company to Laden, or whether the sale was made by the Distributing Company to Snyder, was not submitted to or passed on by the jury. Its decisive relation to the controversy is apparent on two grounds: First, if the paper was only a part of the whole transaction, and its purpose was, as between the plaintiff and Laden, to fix the commission, and Laden was the broker, agent, or "go-between," to sell the whisky to Snyder at \$31, and the sale was in reality a sale by the Distributing Company to Snyder, then, Laden being the agent of the plaintiff, and indorsing and turning over to his principal the check which had come into his hands as such agent, he should not be held as an indorser, within the meaning of the statute; and, secondly, if Laden was acting as the agent, broker, or "go-between" to effect a sale by the plaintiff to Snyder, then the check, coming into the hands of the plaintiff's agent, Laden, and subsequently into its hands through such agent, as a payment on account of its sale to Snyder, Snyder could stop payment, because the New Jersey

<sup>1</sup> "The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it; but the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder."

act did not prevent his doing so. But in such case the seller had the right to refuse to perform the contract, and sue for full payment and performance. Seeing, then, the significance of this underlying issue of the sale, whether one to Laden or one to Snyder, the materiality of showing the whole transaction, the fact that the plaintiff knew of the whole transaction, that Snyder was the real buyer, that the check was not turned over to the plaintiff until after Snyder had agreed to buy at \$31, that an additional paper was drawn whereby Snyder was to pay \$31, all became proper matters of proof. In this regard the significance of the record, and the relevancy of the excluded testimony, becomes clear when the record, quoted in the margin, is examined.<sup>2</sup>

"Q. What did you [Laden] state to him? This was at the time that the check, Exhibit P-2 was handed over to Mr. Goldberg; is that right? A. I came into the Metropolitan Distributing Company and told Mr. Goldberg that Mr. Snyder wanted to buy a thousand cases of McGinnis, and told him that price that Mr. Snyder was willing to pay for the stuff—\$31. I said, 'Mr. Goldberg, what is in it for me?' We dickered, and he said, '\$30 to me, and \$1 if the deal is closed; you get \$1 out of it.' I said, 'All right, Mr. Goldberg; it goes.' I turned over the check to Mr. Goldberg and he drew up a contract.

"Q. You did not turn over the check right then and there? A. No.

"Q. You went back to Newark; did you go back to Newark then? A. Absolutely, sure.

"Q. Did you see Mr. Snyder? A. I did.

"Q. And at that time what price did you quote him? A. Thirty-one dollars.

"Mr. Cohen: I object to that as incompetent, immaterial, and irrelevant, and not binding on the plaintiff.

"The Court: I do not think what he said to Mr. Snyder is competent, so I will strike that out.

"Q. Now relate the rest of your conversation with Mr. Goldberg.

"The Court: I want him to give me the rest of the conversation with Mr. Goldberg. A. When I agreed with Mr. Goldberg to pay him \$31 for the merchandise, then I was to get \$1 back as the go-between.

"Q. Who was buying the stuff? A. Mr. Snyder was buying the stuff from the Metropolitan.

"Q. I see. Now, you gave Mr. Goldberg the check which has been marked Exhibit P-2; that check was given to you by Mr. Snyder? A. Yes; and in turn turned it over to Mr. Goldberg.

"Q. To Mr. Goldberg that morning? A. Yes.

"Q. Then did you do anything else? A. Well, then Mr. Goldberg gave me an agreement.

"Q. By an agreement you refer to the paper which has been marked Exhibit P-3 in evidence? A. I don't know just which one of these it was.

"Q. Is this the agreement (handing witness Plaintiff's Exhibit P-3)? A. Yes; that is the agreement, and there is another one.

"Q. You signed that agreement, did you? A. Yes; I signed one, and Mr. Goldberg signed one.

"Q. Is that Mr. Goldberg's signature on that paper? A. Yes.

"Q. And at the time you signed that, what, if anything, did you tell him as to the buyer of that liquor? A. Mr. Snyder was the buyer of the merchandise. \* \* \*

"By the Court: Q. Did you give Mr. Snyder anything for that check of \$5,000 which is Exhibit P-2? A. Well, the only thing I gave him was the receipt that I received from Mr. Goldberg. I did not give him anything else.

"Q. What was that receipt? A. The receipt that the goods are secured with the Metropolitan Distributing Company for 1,000 cases of McGinnis, lying at the McGinnis Distillery Company, in Maryland.

"Q. Where is that receipt? A. I don't know what became of it. I turned my receipt over to his people.

Such being the proofs, it is clear there was testimony tending to show that Snyder, and not Laden, was the real buyer from the plaintiff, and that the check was received by Laden as the agent of the plaintiff, and was not delivered by Laden to the plaintiff as part payment on a sale made by the plaintiff to Laden. And such testimony should have been admitted in full, the jury instructed that if they so found, and the real transaction was a sale by the Metropolitan Distributing Company to Snyder, and that the check, while given in form to Laden, was in reality given to the Metropolitan's agent, Laden, as a part payment on the sale by the Metropolitan to Snyder, then and in that event the transaction was in substance not different than if the check had been given by Snyder direct to the Metropolitan, and therefore liable to stoppage before payment, and that, having been stopped, the Metropolitan could then repudiate the sale, because the hand money was not paid, or stand upon the contract with Snyder and sue him for the breach.

The judgment is therefore reversed.

"Q. To what people? A. To Mr. Snyder.

"Q. You gave Mr. Snyder a receipt? A. I offered him a receipt and I gave it to him.

"By Mr. Unger: Q. Your receipt? A. The transaction that took place between Snyder, me, and the Metropolitan, the deal that I closed for Snyder with the Metropolitan. \* \* \*

Cross-examination by Mr. Cohen:

"Q. Mr. Laden, I understood you to testify that you told Mr. Goldberg, at the time you negotiated this deal, that you were acting as an agent; is that correct? A. Well, I was acting in the affair to help the two of them come together and to close the deal, and I was to get \$1 for every case that was bought between Mr. Snyder and Mr. Goldberg.

"Q. In other words, any agreement of sale that may have been made, or that was to be made, was to be made between the Metropolitan Distributing Company and Mr. Snyder? A. I was the go-between; yes.

"Q. But they were the principals in the transaction? A. Absolutely.

"Q. That is, in other words, Snyder was the buyer and Mr. Goldberg was the seller? A. Mr. Snyder was the buyer, and Mr. Goldberg was the seller; yes, sir.

"Q. All right. Now, the purchase price to Mr. Snyder was to be \$31,000? A. Thirty-one thousand dollars.

"Q. That is, \$31 a case? A. Yes.

"Q. Now, at that time you were acting for Mr. Snyder, were you not? A. I was acting for Mr. Goldberg, as well as for Mr. Snyder. \* \* \*

"Q. In other words, signed another paper, in which the price was \$31 a case. A. Absolutely. \* \* \*

"Q. Mr. Laden, I understand you to say that you delivered a writing to Mr. Snyder, in which it was stated that the goods were sold for \$31 a case? Is that right? A. I am sure that it was a paper either for \$30— I am not quite sure, but there was an additional paper drawn for \$31, or it was the same paper for \$30; but I really believe that there was an additional paper drawn between Goldberg to Snyder. I think, I am not sure about it, there was an additional paper drawn whereby Mr. Snyder was to pay \$31."

ENGELHARD v. SCHROEDER et al.

(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2782.

1. Judgment  $\S$  822(2)—Not entitled to full faith and credit as evidence against one not a party to it.

Const. art. 4, § 1, does not require a court to give full faith and credit to a judgment of another state as evidence against one who was not a party to it.

2. Judgment  $\S$  828(3)—Federal court cannot set aside judgment of state court on ground of after-discovered evidence.

A federal court is without power to set aside a decree of a state court, where the bill simply presents a case of after-discovered evidence; the remedy being in the court which rendered the decree.

3. Judgment  $\S$  828(3)—Party bound by judgment which he invoked.

A party who, having the choice of tribunals between the federal and state court, chooses the latter, is bound by its decree, and cannot later invoke the jurisdiction of the federal court to set aside such decree on the ground of newly discovered evidence showing that it was obtained by fraud and perjury.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Suit in equity by George H. Engelhard, as receiver of the partnership of Schroeder & Rogers, against George J. Schroeder and Mae D. Schroeder. Decree for defendants, and complainant appeals. Affirmed.

Coult & Smith, of Newark, N. J. (Gustavus A. Rogers, Tudor Jenks, and Williston Benedict, all of New York City, of counsel), for appellant.

Ziegner & Lane, of Jersey City, N. J. (Harry Lane, of Jersey City, N. J., of counsel), for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. From the proofs it appears that Engelhard, the plaintiff in this case, had been duly appointed by the Supreme Court of New York as receiver of the firm of Schroeder & Rogers. Subsequently, in pursuance of the directions of that court, he filed a bill in the Chancery Court of New Jersey against Mae D. Schroeder and the two partners to set aside and declare void an assignment to her of certain accounts which the firm had owned. She appeared, alleged the assignment was valid, and made a counterclaim against the receiver, that he be decreed to pay to her certain accounts embraced in the assignments to her, which he had collected. After protracted litigation, testimony on both sides, report of a master, and hearing by the Court of Chancery, a final decree was entered August 13, 1920, by said court, adjudging, inter alia, that the assignment to Mrs. Schroeder was valid, and granting relief to her on her counterclaim. Thereafter the receiver appealed from said decree to the Court of Errors and Appeals of New Jersey, and on February 28, 1921, that court affirmed the decree of the Court of Chancery. Thereafter the

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Decree affirmed 257 U. S. —, 42 Sup. Ct. 332, 66 L. Ed. —.

plaintiff, on May 4, 1921, filed the present bill against Mrs. Schroeder in the District Court, seeking to enjoin her from enforcing the decree in her favor in the Court of Chancery, and praying:

"That said decisions in the Court of Chancery and the Court of Errors and Appeals of the state of New Jersey may be declared void, illegal, and of no effect."

In the court below the bill was heard on affidavits. Two contentions were there made. First: That the decree of the Court of Chancery had been procured by fraud, the allegation of the bill in that regard being:

"The said decree of the New Jersey court was obtained by and based upon false, misleading, and perjured testimony on the part of the defendants, in that the said defendants testified upon the trial that the moneys advanced by the defendant Mae D. Schroeder to the defendant George J. Schroeder were advanced to the partnership, and as a loan to the partnership; whereas, as a matter of fact, and as has been developed since the affirmance by the Court of Errors and Appeals of the state of New Jersey, the said George J. Schroeder has heretofore admitted that the said advance by the said Mae D. Schroeder to him were personal loans, and not loans to the partnership, and in that the said Mae D. Schroeder testified upon the trial that she had received no moneys from her husband or from the partnership, but as a matter of fact, as has been developed since the decision of the Court of Errors and Appeals of the state of New Jersey, that the said Mae D. Schroeder received moneys in the sum of five thousand five hundred (\$5,500) dollars from her husband, which he has fraudulently abstracted from the firm assets of Schroeder & Rogers, and which were firm moneys, and that as against any amount which the said Mae D. Schroeder claimed, and was entitled to, from any amount allowed to her."

[1] The second contention was: That the decrees of the Court of Chancery and of the Court of Errors and Appeals were illegal and void, because the Court of Chancery did not give full faith and credit to a decree of the Supreme Court of New York in the receivership, which adjudged the assignment to Mrs. Schroeder was void. By the opinion of the court below, quoted in the margin,<sup>1</sup> it will be seen that the judge

<sup>1</sup> "George H. Engelhard, as receiver of Schroeder & Rogers, filed in this court a bill which, in so far as material, alleges that Messrs. Schroeder & Rogers were associated as copartners in conducting a business in the city of New York, the partnership expiring by its terms December 1, 1917. The principal assets of the partnership were book accounts of the approximate value of \$20,000, certain of which were assigned on or about January 5, 1918, by the defendant, George J. Schroeder, to his wife, Mae D. Schroeder, for the purpose, as claimed, of securing loans and advances said to have been made by her to the partnership, and further alleges that the assignment was fraudulent, and was made solely for the purpose of hindering and delaying creditors of the partnership.

"The bill sets forth the institution of proceedings in the Supreme Court of the state of New York for the dissolution of the partnership, the appointment of the complainant herein as temporary receiver, and the institution by him, under order of the New York court, in the court of chancery of this state, of a suit against George J. Schroeder and Mae D. Schroeder for the purpose of setting aside the assignment of the book accounts referred to. A final decree in the New York action was entered November 3, 1918. In this decree the assignment to Mae D. Schroeder was declared void. She was not, however, a party to that proceedings. On August 13, 1920, a final decree was entered in the Court of Chancery, wherein it was decreed that the assignment to Mae D. Schroeder was not void, that she was a creditor of the partnership in

held that Mrs. Schroeder, not being a party or heard in the case in the Supreme Court of New York, was not concluded by its decree, and that "the courts of New Jersey are not bound to give full faith and credit to the doings of a New York court, where persons said to be bound by such doings were not before the court." We agree with the court in holding that this judgment in the Supreme Court of New York did not conclude Mrs. Schroeder, and therefore, whatever the effect of that judgment might have been, if received in evidence, it had no evidential effect of any nature whatever in the case against Mrs. Schroeder in the Chancery Court of New Jersey. In other words, there was no judgment of the New York case against Mrs. Schroeder, to which any effect against her could be given in the case in New Jersey. Indeed, the very purpose of the New York court in directing its receiver to sue Mrs. Schroeder in the New Jersey court was to enable the latter court to enter against her a decree which the New York court could not do by reason of its not having obtained jurisdiction over her.

[2] As to the other ground advanced, namely, that the decree of the Court of Chancery of New Jersey had been procured by fraud, it is to be observed that the allegations of the bill simply present a case of after-discovered evidence, which, for aught that appears in the bill, might have led the Court of Chancery to enter a different decree. In that respect the judge below said:

"Such allegations furnish no basis for the intervention of this court. If the Court of Chancery has been imposed upon, it has power over its decrees."

[3] Without entering upon a discussion of the ways and means open to the plaintiff, to make a timely application to the Court of Chancery, to open up its decree, we must assume, in the absence of any statement in the bill of the date when the new evidence came to the knowledge of the plaintiff, and to the further fact that he does not aver or now claim that he had no form of relief in the New Jersey courts, that he might have sought relief in such courts. And we are further justi-

the sum of \$9,000, and entitled to a lien on the accounts receivable and the moneys collected thereon to the extent of the amount of her claim against the said partnership.

"The bill states that the final decree of the Court of Chancery was affirmed by the Court of Errors and Appeals, which is the court of last resort in this state, on February 28, 1921. The bill then charges that the decree of the New Jersey court was obtained through false and misleading testimony on the part of the defendants at the trial, and charges that George J. Schroeder and Mae D. Schroeder conspired together falsely and fraudulently to misrepresent the facts to that court. The bill charges that the decision of the Court of Chancery of New Jersey and the Court of Errors and Appeals of this state are illegal, void, and of no effect, inasmuch as the Chancery Court did not give full faith and credit to the decree of the New York court, by which court the partnership property was being administered, and in which court the assignment to Mae D. Schroeder, not a party to the proceeding, was declared void.

"The bill prays that the defendants, George J. Schroeder and Mae D. Schroeder, account with respect to the accounts receivable of the firm of Schroeder & Rogers, and that they be restrained from collecting or obtaining the accounts and from enforcing the decree of the Chancery Court, and also that the decision of the Court of Chancery and Court of Errors and Appeals be declared void, illegal, and of no effect, and that the receiver appointed in the Chan-

ged in the conclusion that the filing of the bill in this court was not an effort to right a wrong irremediable in the courts of New Jersey, but rather the attempt of an unsuccessful suitor in one court to possibly obtain a more favorable result in another. When the receiver found it necessary to seek the aid of a court in New Jersey in order to serve process on Mrs. Schroeder, it was open to him to then invoke the jurisdiction of either the federal or state court. But, having chosen one of them, and having had an opportunity to bring before the selected

cery Court be directed to turn over all moneys received by him upon said accounts receivable to the plaintiff, or the receiver, if any, appointed by this court.

"It is to be noted that George H. Engelhard, as receiver of Schroeder & Rogers, filed a bill in the Court of Chancery of New Jersey against Mae D. Schroeder, a resident of this state. Annexed to the bill filed in the Court of Chancery of New Jersey is the order appointing Mr. Engelhard as receiver. In the present bill he is referred to as temporary receiver, but in the order annexed to the bill in the Court of Chancery, which bears date the 17th day of January, 1918, and appears to have been entered in the Supreme Court of the state of New York, he is referred to as receiver, and appears to be appointed as such. In pursuance of an order of the New York court he appealed to the Court of Chancery of New Jersey, that court having jurisdiction over Mae D. Schroeder, for the express and avowed purpose of having the assignment of the book accounts referred to in the present suit declared void. The receiver in the New York action having instituted a suit in the Court of Chancery under the order of the court appointing him, and Mae D. Schroeder having appeared in that action and answered the bill of complaint exhibited against her, and having counterclaimed against the complainant, as receiver of the firm of Schroeder & Rogers, for moneys advanced by her to the firm, and the receiver having answered the counterclaim, the case was put at issue, and, having been disposed of by the Court of Chancery, a court having jurisdiction of the parties, there is no reason why the receiver, not having succeeded in that action either in chancery or on appeal to the Court of Appeals, should now seek to have the same issue tried here. In so far as this court is concerned, the matter is clearly *res adjudicata*.

"But it is said that the decree of the Court of Chancery is not in accord with the decree of the Supreme Court of the state of New York, but admittedly the Supreme Court of the state of New York had no jurisdiction of the defendant Mae D. Schroeder, a resident of this state; otherwise, it would not have been necessary for the receiver to have instituted his action in the Court of Chancery or to have declared void the assignment made by George J. Schroeder to Mae D. Schroeder; so the decree of the Court of New York, not having been made in an action wherein the parties were before the court, has no force and effect outside of that state, and was, of course, not binding upon the court of New Jersey. The courts of New Jersey are not bound to give full faith and credit to the doings of a New York court, where persons said to be bound by such doings were not before the court. Clearly, the full faith and credit provision of the Constitution requires this court to uphold the adjudication of the Court of Chancery in so far as it affects Mae D. Schroeder, who was a party defendant to the suit brought by the New York receiver. The New York court had admittedly no jurisdiction of Mae D. Schroeder, the owner of the book accounts. The Court of Chancery did have jurisdiction. The decree of the latter court was binding. The decree of the former court was not.

"The bill further seeks to have the New Jersey chancery proceedings set aside, for the alleged reason that the adjudication of that court was procured by fraud and perjury. Such allegations furnish no basis for the intervention of this court. If the Court of Chancery has been imposed upon, it has power over its decrees.

"The bill will be dismissed, with costs."

tribunal, either prior to its decree or in subsequent correction thereof, every contention he now seeks to make, not only is the decree of the chosen court *res adjudicata*, but the review, control, or enjoining by the federal court of the decree of the state court would be to create confusion, if not worse.

The jurisdiction of a federal court to declare a judgment void in cases where a party has had no hearing, (*Simon v. Southern etc.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492), where the judgment is fraudulent (*Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547), or an inequitable use is being made of it (*Wells v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205), is clear, but the present is not such a case.

The decree below, dismissing the bill, was not error. It is therefore affirmed.

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JOHN M. KELLEY CONTRACTING CO. v. UNITED STATES FIDELITY &  
GUARANTY CO.

(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2755.

1. Principal and surety ⇨149—Provision of bond limiting time for bringing action against surety held valid.

In a bond given to secure performance of a contract containing provisions which enabled the other party to demand full performance within approximately 90 working days, a provision limiting the time for bringing action against the surety to one year from the date of the bond held valid.

2. Principal and surety ⇨149—Right of action on bond held to have accrued on default of principal.

Where a contractor defaulted and abandoned the contract, and his surety on demand refused to complete performance, a right of action in favor of the obligee on the bond held to have accrued at once, though the amount of damages was not then ascertainable.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action at law by the John M. Kelley Contracting Company against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bleakly & Stockwell, of Camden, N. J., for plaintiff in error.

Lewis Starr, of Camden, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. From a study of the record in this case, it appears that the plaintiff, John M. Kelley Contracting Company, a corporate citizen of New Jersey, was engaged in building a public highway in that state. On May 29, 1919, Elmer Barber duly contracted in writing with that company to deliver to it—

"approximately forty-five thousand tons of road building material. Sand and stone to be unloaded and hauled and dumped at intervals convenient for

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

your mixing gang. \* \* \* I am to deliver approximately five hundred tons of sand and stone per day, and proceed with my deliveries as fast as grading is done, it being understood that the grading shall be done as fast as your equipment can do it. You are to order and have shipped such quantities of sand and stone as I am able to unload so that there may be no hold-up in my outfit. Should the shippers of the sand and stone fail to ship sufficient quantity, or less than five hundred tons daily, you will immediately go into the open market, and purchase sufficient material to make up above-mentioned five hundred tons. \* \* \* I am to furnish you bond for the faithful performance of the above work to the sum of ten thousand dollars."

In pursuance of said contract, Barber furnished a surety bond of the defendant, a corporate citizen of Maryland, in the penal sum of \$10,000, which bond is sued upon in this case. It recites the contract from which the above extracts are made and makes it a part of the bond. The condition of the bond is:

"That if the said principal [Elmer Barber] shall well and truly indemnify and save harmless the said obligee [John M. Kelley Contracting Company] from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions of the said contract on the part of the said principal, to be performed, then this obligation shall be void; otherwise, to remain in full force and effect in law: Provided, however, that this bond is issued subject to the following conditions and provisions: Third, that in no event shall the surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 31st day of May, A. D. 1920."

While Barber's contract did not specify any date within which performance was to be made, it nevertheless is apparent that it contemplated performance in 90 working days. As appears from the pleadings, Barber—

"commenced the execution of said contract and partially furnished and delivered supplies therefor, but on or about March 20, 1920, the defendant defaulted under said contract and refused to proceed with said work and abandoned the unloading and delivering of road materials specified in said contract and thereafter performed no more work and refused to furnish, deliver or unload any other materials or supplies."

The pleadings further show that the plaintiff, within 30 days, notified the defendant surety company of Barber's default and requested it to complete the contract. This the surety company refused to do; thereupon the plaintiff itself completed Barber's contract at a loss exceeding the amount of the bond, and on January 27, 1921, brought suit to recover the same on the bond. The defendant answered, averring the suit was brought subsequent to May 31, 1920, the limitation stipulated in the bond, and moved to dismiss the complaint. This motion the court below granted in an opinion printed in the margin,<sup>1</sup>

<sup>1</sup> "The plaintiff, a New Jersey corporation, brought an action in the New Jersey Supreme Court, which was subsequently removed into this court by appropriate proceedings, against the defendant, the United States Fidelity & Guaranty Company, a Maryland corporation, upon a written contract by which the defendant obligated itself to indemnify and save harmless the plaintiff from any pecuniary loss resulting from a breach of a contract made between the plaintiff company and one Elmer Barber, whereby Barber obligated himself to unload and deliver sand, stone, and cement on a certain road to be built between Da Costa, New Jersey, and a point 8,700 feet below Egg Harbor, New Jersey. The contract of indemnity provides in the third paragraph:

and to an order so dismissing, this writ of error was taken by the plaintiff.

[1] We find no error in the court's conclusion. We cannot hold, as a matter of law, that on its face the bond shows that the limitation of one year within which suit was to be brought was, as contended by the plaintiff, against public policy. On the contrary, it appears from the contract, which was, by reference, made part of the bond, that the

'That in no event shall the surety be \* \* \* subject to any suit, action or other proceeding thereon that is instituted later than the 31st day of May, A. D. 1920.'

"The present action was commenced January 22, 1921, and the present motion is to strike the complaint as not brought within the period of limitation obtained in the contract. The bond of indemnity is dated May 31, 1919, and refers to a contract between the plaintiff company and Elmer Barber, the principal in the indemnity bond. This contract made May 29, 1919, is annexed to the pleadings.

"It is apparent that the defendant's obligation was to indemnify and save harmless the plaintiff from pecuniary loss resulting from a breach of the contract referred to in the bond. The bond provides that the defendant shall not be subject to an action instituted later than the 31st day of May, 1920. Obviously this clause of limitation must control, unless the limitation is so short as to render the contract of indemnity of no practical service. 20 Cyc. 1438.

"Reference to the principal's contract discloses that he was to deliver approximately 500 tons of sand and stone per day, and in all to deliver approximately 45,000 tons. Therefore in 90 days the principal could have performed his entire obligation under the contract. The principal's contract also imposed upon the plaintiff in this action the duty 'to order and have shipped such quantities of sand and stone as I [Barber] may be able to unload so that there may be no hold-up in my outfit. Should the shippers of the sand and stone fail to ship sufficient quantities or less than 500 tons daily, you [the plaintiff here] will immediately go into the open market and purchase sufficient material to make up the above-mentioned 500 tons.'

"It therefore seems that the provision limiting the right of action upon the indemnity contract to a period within one year is not so unreasonable as to make the indemnity contract of no practical service to the plaintiff. Referring to the contract between the plaintiff and Barber, it is apparent that Barber could have performed within 90 working days. It is further apparent that the plaintiff was obligated to exert its best efforts to make performance possible by buying material in the open market. How can it be said that the indemnity contract, with the express limitation of suit within one year after making the contract, is in any wise unreasonable or of a character to render it of no practical value? When the contract was made the plaintiff was obligated to use his best efforts to secure 500 tons of material a day, and the principal in the indemnity contract, Elmer Barber, was in turn obligated to deliver along the road, which the plaintiff was building, 500 tons of material a day until he had delivered approximately 45,000 tons of materials.

"Clearly, it was in the contemplation of the plaintiff and the principal in the indemnity contract that the contract would be performed within approximately the period of 90 days. Therefore an indemnity agreement, whereby the plaintiff was to be saved harmless by reason of any default by Barber, containing the limitation that any action for default must be brought within one year from the date of the indemnity contract, was reasonable and of practical service and value to the plaintiff. Had it not been, the plaintiff could have said to Barber we will require an indemnity contract which will run for a period of more than a year. See also *United States v. Fidelity & Deposit Co. of Maryland*, 224 Fed. 869, 140 C. C. A. 288, on the question of reasonable limitations.

"The motion will be sustained."

contract was to be performed in about 90 working days, and that in default of performance the plaintiff could, on each daily default, "go into the open market and purchase sufficient material to make up the above-mentioned 500 tons." In view of the provisions of the contract, it is quite apparent that the Kelley Company was in a position where it could insist on such timely performance by Barber, or, in case of his default itself go into the market and purchase the contract requirements, within such earlier part of the stipulated year as would allow several months leeway before the stipulated year of limitation expired.

[2] We are therefore of opinion that, under the circumstances, the limitation was not against public policy, or indeed was it, as contended, unreasonable, unjust, or oppressive under the circumstances. Nor do we agree with the further contention that the plaintiff, even in view of its omission to hold Barber to a timely fulfillment of his contract deliveries, did not have a right of action against the surety company when Barber defaulted and abandoned his contract on March 20, 1920. Certain it is that, on such refusal and abandonment by Barber to perform, there then accrued to the plaintiff a right of action against him. It is true the quantum of the damage was not then ascertained, but the fact of the damage and the legal wrong sustained by the plaintiff arose from the refusal of Barber to perform and his abandonment of the contract. The plaintiff had a contract right to call on him to perform and when he in March, 1920, abandoned the contract and refused to perform, the legal right to make him answer for that default, and therefore for the damages sustained from such default, then arose.

Barber, the principal in the bond, having thus defaulted, the Kelley Company recognized that fact and notified the surety company to fulfill the contract. It refused to do so, and therefore placed itself in the condition of forfeiture stipulated by its bond, because its principal, Barber, had failed to "well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions of the said contract." etc.

Seeing, then, that Barber breached and abandoned the contract, and that a right of action against him inured to the plaintiff company, seeing that the surety company refused to perform for him, it is quite clear that a right of action also inured to the plaintiff against the surety company on its bond. The fact that all the sand and gravel were not then furnished by Barber, or that the cost of doing so for Barber had not then been ascertained, in no way affected the fact that the contract had been breached and abandoned by him, and a legal wrong done the plaintiff. The ascertainment of such damages, whether nominal or substantial, was a detail of proof. That could be done in several ways: By reletting the contract, by going into the open market and buying the contracted-for and defaulted road material at market prices, or by the Kelley Company going ahead, as it did, and completing the contract itself. In the absence of proof, the right of action might simply result in nominal damages; but it was the fact of contract breach and contract abandonment which created the right of action, and not the ascertainment of the quantum of damages, by proper proof.

Seeing then, that the one-year limitation was not in itself unlawful, and that before that limitation expired a right of action on the contract against Barber and on the bond against the surety company had inured to the plaintiff, the court below rightly held that such right of action on the bond was not asserted within the year stipulated therein, and therefore rightly dismissed the complaint.

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ROSSI v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 9, 1922.)

No. 8710.

1. Conspiracy  $\S$  33—War savings certificates, with stamps attached, are "obligations of the United States."

War savings certificates, with stamps attached, are "obligations of the United States," so as to support an indictment for conspiracy to defraud the United States and alter obligations of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Obligation of United States.]

2. Indictment and information  $\S$  125(5½)—Indictment for conspiracy to defraud the United States and alter war saving certificates and stamps not duplicitous.

An indictment charging a conspiracy to defraud the United States and to alter war savings certificates and stamps, by removing the stamps from the certificates and erasing registration or identification marks, was not duplicitous, as charging a conspiracy to defraud the United States and violate several sections of the Penal Code.

3. Criminal law  $\S$  1031(4)—No objection lies after judgment for failure to arraign or enter plea.

The mere failure to arraign defendant or enter a plea after a demurrer to the indictment was overruled deprived him of no substantial right, where the trial was otherwise fair, and an objection thereto will not be entertained after judgment.

4. Criminal law  $\S$  1053—Court's remark held not ground for reversal, as reflection on defendants or their witness, where no exception was taken.

Where a witness for defendants stated that he had asked to be placed on the stand, in order that he might get the truth before the court and his friends, the court's question, "Who is your friend?" and his further remark, after the witness had answered that he had friends all over the Coast, that "I thought you meant Rossi [defendant]," was not ground for reversal, where the court's attention was not directed thereto at the time, and no exception was reserved; the remark not being intended or capable of being understood as a reflection on defendants or the witness.

5. Conspiracy  $\S$  45—Criminal law  $\S$  1169(1)—United States  $\S$  91½, New, vol. 15A Key-No. Series—Testimony as to mode of registering war savings stamps immaterial, in prosecution for alteration of stamps, and admission harmless.

The fraudulent alteration of war savings certificates and stamps was an offense, whether the stamps were registered or unregistered; and hence, in a prosecution for conspiracy, evidence as to the mode of registering such stamps, objected to on the ground that the indictment did not show that the stamps were registered, was immaterial, and its admission could not have been prejudicial, especially as the court might perhaps take judicial notice of the matter.

6. Criminal law ⚡409—Striking out testimony of statements or admissions, on subsequent showing of promises of immunity, held sufficient.

Where the preliminary examination of a special agent of the Department of Justice showed that accused was fully apprised of his rights, and that any statement or admissions made by him might be used against him, and no proof had been offered or received that defendant's statements to the witness were induced by promises of immunity theretofore extended by other officers of the government, the testimony was properly admitted, and the court did all that was required by subsequently striking it out, and instructing the jury to disregard it, when it was shown that the statements were induced by promises of immunity by other officers.

7. Criminal law ⚡532(1)—Voluntary character of confession is question for court before admission.

The voluntary or involuntary character of a confession is a question of law, to be determined by the court from the facts, as a condition precedent to the admission of the confession.

8. Criminal law ⚡531(4)—Evidence to show improper influence to induce confession should be offered and received before confession admitted.

Ordinarily the testimony of the defendant, to show improper influence inducing a confession, should be offered and received before the confession is admitted.

9. Criminal law ⚡696(5)—Motion to strike defendant's testimony given before grand jury properly denied, when evidence not objected to as involuntary.

Where no objection was made to the testimony of the foreman of the grand jury concerning evidence given before the grand jury by the appealing defendant, on the ground that it was induced by promises of immunity, and, on the contrary, counsel for defendants asked the court to caution the jury that it could not be considered against the other defendants, there was no error in denying a motion subsequently made to strike out the testimony, or in charging that it was competent and pertinent.

10. Criminal law ⚡814(16)—Instruction hypothesizing giving of testimony before grand jury because of promises held not necessary.

If defendant appeared before the grand jury voluntarily and of his own accord, there was no foundation for a requested instruction that, if his evidence was inspired by assurances made by officers of the government, it was inadmissible and should be disregarded.

11. Larceny ⚡64(6)—Inference from possession of recently stolen property only arises when possession unexplained.

The inference that recently stolen property was stolen by the person in whose possession it is found only arises where such possession is unexplained.

12. Criminal law ⚡1038(3), 1043(2)—Error could not be predicated on instruction on incidental matter without specific objection or request for modification.

Where defendant was not charged with having possession of stolen war savings stamps or of conspiracy with others to that end, but with conspiracy to defraud the United States and to alter war savings certificates and stamps, and an instruction concerning the inferences arising from possession of the stolen stamps related to a mere incident of the trial, error could not be predicated thereon, in the absence of any specific objection or request for modification.

13. Conspiracy ⚡33—Receiving stolen goods ⚡2—Not offense against United States, unless stolen stamps were its property.

The possession of stolen war savings stamps, or a conspiracy to have such possession, is not an offense against the United States, unless the stamps are the property of the government.

14. Criminal law §1174(1)—Court's answers to questions propounded by jury, which were immaterial, not prejudicial.

On a trial for conspiracy to defraud the United States and to alter war savings certificates and stamps, the court's answers to questions propounded by the jury as to whether removal of a stamp from an unregistered certificate would make it an altered stamp, and whether defendants could be found guilty, if they did not know the stamps were altered registered stamps, *held* not prejudicial, in view of the fact that the distinction between registered and unregistered stamps was immaterial.

15. Criminal law §910—New trial as to one of accused's codefendants did not entitle him to new trial.

Where an indictment charged a conspiracy between defendant and several others named, and others unknown, the grant of a new trial to one of accused's codefendants did not entitle him to a new trial.

16. Criminal law §1041, 1124(3)—Whether new trial should be granted because of grant to codefendant not reviewable, when not raised below, and all the evidence not before the court.

The question whether the court should have granted a new trial to one accused of conspiracy, because of the grant of a new trial to one of his codefendants, is not before the court, where no such question was raised below, and the bill of exceptions does not contain all the evidence.

17. Criminal law §925½(4)—Motion for new trial because of newspaper comments addressed to court's discretion.

A motion for a new trial because of alleged prejudicial newspaper comments during the trial was addressed to the sound discretion of the trial court.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Angelo H. Rossi was convicted of conspiracy to defraud the United States, etc., and he brings error. Affirmed.

See, also, 268 Fed. 620.

The indictment in this case charges a conspiracy to defraud the United States, and to alter certain obligations of the United States, to wit, United States War Savings Certificates and United States War Savings Certificate Stamps, by removing the stamps from the certificates and erasing from the face of the stamps certain registration or identification marks. The defendant Rossi interposed a demurrer to the indictment on the ground that it failed to charge facts sufficient to constitute an offense against the United States and on the ground of duplicity. The demurrer was overruled, and this ruling forms the basis of one of the principal assignments of error. After the demurrer was overruled, the defendant was placed upon trial without a formal plea. This, also, is assigned as error. Upon the trial one of the witnesses for the defense stated that he had asked the attorney for the defendant to place him on the witness stand, thus giving him an opportunity to explain away some newspaper notoriety, and to get the truth before the court and his friends. The following proceedings were then had:

The attorney for the defendant asked: "Q. This was a personal request of me as a friend of yours? A. Yes, absolutely. The Court: Q. Who is your friend? A. Well, I have friends all over the Coast, your honor. The Court: Q. I thought you meant Rossi."

It is now claimed that this remark or comment of the court was highly prejudicial to the defendant, although no objection was made or exception reserved at the time. Again the court admitted, over objection, the testimony of a post office employee to explain the mode of registering War Savings Certificate Stamps. This ruling is assigned as error. The court further admitted testimony as to admissions, or statements, made by Rossi to a special agent of the Department of Justice and before the grand jury. Later the

court struck the testimony of the special agent of the Department of Justice from the record and instructed the jury to disregard it. After striking this testimony and directing the jury to disregard it, the court charged the jury as follows:

"I instruct you, however, that the statement made by Rossi in giving evidence (before the grand jury) is not to be so disregarded by you. There is evidence tending to show that Rossi appeared before the grand jury voluntarily, and of his own accord, and, although warned that whatever statement he might make would be used in evidence against him, he, notwithstanding, gave such evidence without insisting upon his immunity. The evidence, therefore, of Mr. Young, the foreman of the grand jury, was competent and pertinent to prove the admissions of Rossi with reference to the stamp transactions, and you are to regard these admissions for whatever tendency they may have, if any, to show Rossi's connection with the alleged conspiracy."

This charge is assigned as error as well as the refusal of the court to charge as follows:

"If you believe that the confession made by Mr. Rossi to Mr. Young, foreman of the grand jury, was traceable to the hope inspired by the assurances made by Mr. Walters and Mr. Glover in the first instance, and that Mr. Rossi at the time was relying upon such assurances when he made the confession to Mr. Young, then such confession is inadmissible and you should disregard it. It is not material whether Mr. Young knew that Mr. Glover had inspired the hope in the mind of Mr. Rossi, provided there was causal connection between the hope aroused and the confession. The fact that the confession was not made to the officer arousing that hope is immaterial. When an improper influence has been exercised, it becomes the duty of the government to show that it has been removed before this subsequent confession can be held admissible."

Again the court charged the jury as follows:

"You will inquire whether the stamps were stolen, and, if so, whether by either of the defendants. And in this relation I may say to you that the possession of recently stolen property affords a strong inference that the property was stolen by the person having it in his possession."

After retirement the jury returned into court and propounded certain questions to the court, whereupon the following took place:

"Now, gentlemen of the jury, the first question that you propound is the following: Does a stamp, simply by being removed from a certificate, said certificate not being registered, become an altered stamp? To that I answer: That if the certificate has a stamp attached, and the name of the party written upon the certificate, and the stamp thereafter has been removed with intent to defraud, then the defendant would be guilty, whether the certificate or stamp was registered or not."

"The next question you ask is this: If defendants thought at the time that they were handling stolen stamps, but did not know they were altered registered stamps, could we find them guilty on this indictment? My answer to that is: That if the defendants were handling these stamps, knowing them to be stolen, and they handled them with intent to defraud the United States, then they would be within the purpose of this indictment."

Error is also assigned to the refusal of the court to grant a new trial because of certain prejudicial newspaper comments during the trial, and because this court has heretofore granted a new trial as to Peterson a codefendant. *Peterson v. United States* (C. C. A.) 274 Fed. 929. To review the judgment on a verdict of guilty, the present writ of error has been sued out by the defendant Rossi.

Barnett H. Goldstein, of Portland, Or., for plaintiff in error.

Lester W. Humphreys, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT and HUNT, Circuit Judges, and RUDKIN, District Judge.

RUDDIN, District Judge (after stating the facts as above). [1] The argument in support of the demurrer for want of sufficient facts is based on the false or erroneous assumption that War Savings Certificates with stamps attached are not obligations of the United States. *United States v. Sacks*, 257 U. S. —, 42 Sup. Ct. 38, 66 L. Ed. —, decided by the Supreme Court November 7, 1921.

[2] The claim of duplicity is based on the ground that the indictment charges a conspiracy to defraud the United States and to violate several sections of the Penal Code of the United States. This question has likewise been answered adversely to the plaintiff in error by the Supreme Court and by this court. *Frohwerk v. U. S.*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; *Magon v. U. S.*, 260 Fed. 811, 171 C. C. A. 537; *Anderson v. U. S. (C. C. A.)* 269 Fed. 65.

[3, 4] The mere failure to arraign or enter a plea, under the circumstances disclosed by this record, deprives the accused of no substantial right, where the trial is otherwise fair, and such an objection will not be entertained after judgment. *Garland v. State of Washington*, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772. The remark of the trial court was manifestly not intended as a reflection upon either the witness or the defendants on trial, and could not be so considered by the jury. The attention of the court was not directed to the remark at the time, no opportunity to correct or explain was given, no exception was reserved, and the incident calls for no further comment.

[5] Testimony as to the mode of registering War Savings Stamps related to a matter of which the court would perhaps take judicial notice, as the mode is either prescribed by law or by regulations of one of the departments, but in any event the testimony was wholly immaterial, and the ruling of the court could not be prejudicial. The objection was urged to the testimony on the ground that the indictment failed to charge that the stamps had been registered, but for reasons already stated the fraudulent alteration was an offense, whether the stamps were registered or unregistered.

[6-8] When the special agent of the Department of Justice was called as a witness, an objection was interposed to his testimony on the ground that the admissions or statements to which he was expected to testify were not voluntarily made by the accused, but were induced by promises of immunity theretofore extended by other officers of the government. No proof of any such promises had been offered or received up to that time, and inasmuch as it clearly appeared from the preliminary examination of the witness that the accused had been fully apprised of his rights and that any statement or admissions made by him might be used against him on the trial, the testimony was properly admitted in the first instance. It appeared later, however, from testimony offered by the defense, that in fact promises of immunity had previously been made by other officers, and the court thereupon struck the testimony from the record and instructed the jury to disregard it. This was the utmost the court could have done under the circumstances. The voluntary or involuntary character of a confession is a question of law, to be determined by the court from the facts, as a condition precedent to the admission of the confession, and or-

dinarily the testimony of the defendant to show improper influence should be offered and received before the confession is admitted. Wharton's Criminal Evidence (10th Ed.) §§ 689, 689a. But, where that course is not followed, a direction to disregard the testimony is the only relief the court can grant or the parties can claim.

[9] A different situation arises as to the testimony of the foreman of the grand jury. No such objection was interposed to his testimony. Indeed, the defense seems to have acquiesced in its admission from the following statement of counsel when the witness was called:

"At this time, if the court please, I think it is only fitting and proper that the jury be warned and cautioned that, so far as statements of Mr. Rossi are concerned, while they may be admissible as against him, in view of the fact that the conspiracy has long since ended, therefore any statements that Mr. Rossi made to him cannot in any event be considered binding upon any other defendant in this case, or cannot be considered in any event as proof of a conspiracy, being a declaration of a past event. There should not be any confusion or misunderstanding as to the extent and limitation of this particular testimony. I therefore move at this time that the jury be so instructed."

[10] A party cannot acquiesce in the admission of testimony, and claim the benefit of it if in his favor, or move to strike it out if not to his liking. There was, therefore, no error in denying the motion to strike the testimony of the foreman of the grand jury, or in the giving of the instruction on that subject. And if, as stated by the court, Rossi appeared before the grand jury voluntarily and of his own accord, there was no foundation in the record for the instruction requested in his behalf.

[11-14] As an abstract proposition of law, the charge of the court as to the inference arising from possession of property recently stolen is incorrect, because that inference only arises where the possession is unexplained. But the instruction related to a mere incident of the trial, and not to the principal charge. The plaintiff in error was not accused of having the possession of stolen stamps, or of conspiring with others to that end. The possession of stolen stamps, or a conspiracy to have such possession, is not an offense against the United States, unless the stamps are the property of the government. No specific objection was made to the instruction, and no request was made for a modification. Under such circumstances the assignment of error is not well taken. In propounding the two questions to the court, the jury apparently had in mind a distinction that might exist between registered and unregistered stamps. Inasmuch as that distinction is not material, for reasons already stated, the answers of the court were not prejudicial.

[15, 16] The fact that a new trial has been granted to a codefendant cannot avail the plaintiff in error here. Had there been only two parties to the conspiracy charge, a finding that one of them was not a party would necessarily inure to the benefit of the other. But here the indictment charges a conspiracy between Peterson, the plaintiff in error, and four others by name, and still others to the grand jurors unknown. A finding, therefore, that Peterson was not connected with the conspiracy, does not impel a like finding as to the plaintiff in error here. Furthermore, that question is not now before this court.

No such question was raised in the court below, and the bill of exceptions does not contain all of the evidence.

[17] The motion for a new trial based on the newspaper comments was addressed to the sound discretion of the trial court and no abuse of discretion is shown.

We have carefully considered the briefs and arguments, and, finding no error in the record, the judgment is affirmed.

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In re WOOD.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 48.

1. **Bankruptcy**  $\Leftrightarrow$ 440—Summary order requiring payment of money to trustee reviewable only on petition to revise.

A summary order of a court of bankruptcy, requiring third persons to pay over money to a trustee, is an administrative order made in the ordinary course of the proceedings, and reviewable only on petition to revise, under Bankruptcy Act, § 24b (Comp. St. § 9608, subd. [b]).

2. **Bankruptcy**  $\Leftrightarrow$ 288(1)—Adverse claimants cannot be required to turn over property by summary order.

A court of bankruptcy is without jurisdiction, without their consent, to require third persons, by a summary order, to surrender to a trustee property claimed by them, and of which they are in full possession.

3. **Bankruptcy**  $\Leftrightarrow$ 279—Trustee not entitled to recover rent from tenants of property while in possession of fraudulent grantee.

Where a conveyance by bankrupt of an undivided interest in real property was set aside at suit of his trustee, several years after the bankruptcy, as a fraud on his creditors, the trustee held not entitled to recover from tenants in common of the property rents which accrued from or were collected by them prior to the decree.

4. **Bankruptcy**  $\Leftrightarrow$ 288(1)—Adverse claimants held not to have waived objection to summary jurisdiction.

Adverse claimants of property, who, on being served with an order to show cause before a referee why they should not turn over the same to the trustee, applied to the District Court to set aside such order, held not to have waived objection to the summary jurisdiction of the court, nor did they waive such objection by waiting until the accounting ordered had been taken, and an order requiring them to pay over money to the trustee had been entered before filing a petition to revise.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of James T. Wood, bankrupt; Joab H. Banton, Trustee. This is a petition to revise, and also an appeal from, an order, dated February 5, 1921, confirming the report of the referee in bankruptcy, directing the appellant, Isaac G. Terry and Morris J. Terry, to pay over to the trustee in bankruptcy, certain sums claimed to be due to the trustee in bankruptcy on an account between them. Appeal dismissed, and order reversed on petition to revise.

P. L. Housel, for appellants.

Arthur Carter Hume, of New York City (Harold E. Lippincott, of New York City, of counsel), for trustee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. James T. Wood, Isaac G. Terry, and Morris J. Terry owned, as tenants in common, real property situated at Sayville, Long Island. The property is a two-story frame store building and barn. The Terrys each owned a one-fourth interest, and Wood owned the other one-half. This one-half interest vested in Wood on September 9, 1911. Prior to that time he had a less interest in this one-half, together with other members of his family. The Terrys became vested of their one-half of the property through the death of their father in 1893. The property was vested in the family of Wood since 1849, and was used by the petitioners as a place of business until May 15, 1915. For years prior to the adjudication in bankruptcy of Wood, the petitioners paid the Wood owners an annual rental of \$200, less one-half of the taxes, insurance, and repairs. There was no lease or other formal agreement entered into. From May 15, 1915, until the commencement of this proceeding, it was not occupied continuously, but it was rented to various tenants from time to time. On May 8, 1912, Wood conveyed his interest in the property to Nancy Harrison, and on July 19, 1912, he was adjudicated a bankrupt on an involuntary petition dated June 4, 1912, and the present trustee in bankruptcy was appointed September 26, 1912. The conveyance to Nancy Harrison was adjudicated fraudulent and void as to the trustee on January 10, 1920. During this ownership in common, the care of the property devolved entirely upon the petitioners. They paid the taxes and repairs, and kept the property insured for the benefit of themselves and the members of the Wood family during their respective ownership, and later for the benefit of Nancy Harrison after the conveyance to her.

On January 14, 1920, the referee in bankruptcy granted an order ex parte, which was served upon the petitioners, directing them to show cause why they should not account for all income, receipts, and profits of the property heretofore jointly owned by the bankrupt herein and the said petitioners, and "then and there to pay over in cash to the trustee herein all the amounts due or found to be due to said trustee." Other relief was prayed for. On July 20, 1920, the petitioners, on application to the District Court, obtained a stay of these proceedings under the referee's order, and directed that cause be shown on July 29, 1921, before the court, why the order should not be wholly vacated and the petition dismissed. On July 24, 1921, on an ex parte application, the District Judge modified his order, so as to allow the referee to proceed with the accounting ordered by the referee, and directed the petitioners to appear for that purpose before the referee on July 27, 1921. It thus appears that the accounting was summarily ordered without the petitioners' opposition having been heard, and counsel for them, believing that he had a legal excuse for not appearing on July 27th, advised his clients accordingly, and they did not

appear before the referee. His excuse was held insufficient by the referee, and their failure to appear resulted in their being certified in contempt. The taking of testimony in the absence of the petitioners commenced, and was adjourned until July 29, 1920, on which day the application to vacate the referee's order came on to be heard in the District Court, and, upon representation made to the District Judge that they were in contempt, they were refused a hearing of their motion until they purged themselves of their contempt by appearing before the referee. They were directed by an order to show cause on August 5, 1920, why they should not be punished for contempt.

One of the petitioners appeared on the 29th before the referee, and was examined as to the matters relating to the account. When the motion to vacate the referee's order was heard, it resulted in the petitioners being directed to account "for the use, income, receipts, profits, and enjoyments, occupancy, and benefits of the property of the bankrupt," and they were directed to file a statement of all moneys and property "received by them in their hands for which they are accountable, having to do with the property of the bankrupt herein," and to appear before the referee on September 24, 1920, and thereafter submit to an examination as to said accounting and, upon full compliance therewith, it was ordered that the motion to punish them for contempt be denied. By a separate order, the motion to vacate the referee's original order was in all respects granted, except as to the accounting. Under the direction of these orders, an account was filed, to which the trustee filed objections. Hearings were had, and it resulted in an order of the District Court directing the petitioners to pay the balance of \$2,809.25.

[1] Upon this appeal, the propriety of the District Court granting this order is challenged, as well as the result reached upon the accounting had. The summary nature of the order appealed from is clearly an administrative order in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate. Its character indicates the proceeding that should be undertaken for its review. We think it should be reviewed on a petition to revise, rather than by an appeal. *Hoskins v. Funk*, 239 Fed. 278, 152 C. C. A. 266. It was apparently intended to be in the nature of a turn-over proceeding, and the petition to revise is the only remedy. *In re Shidlovsky*, 224 Fed. 450, 140 C. C. A. 654. The appeal will therefore be dismissed.

[2] We think that the trustee mistook his remedy in applying for and securing a summary order. It is within the power of the bankruptcy court to assert and exercise a summary power over the property of a bankrupt, and even against third persons holding property and claiming title, provided such claim is merely colorable or fraudulent. But, inasmuch as such proceeding deprives a person of the usual due process of law, a summary order directing its surrender should be based upon facts which no fair mind can dispute. *Louisville Trust Co. v. Cominger*, 184 U. S. 24, 22 Sup. Ct. 293, 46 L. Ed. 413. It was never intended to deprive third parties, claiming property of which they were in full possession, of the usual and due process of law. *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

[3] The conveyance on May 8, 1912, to Nancy Harrison was adjudicated a fraud on Wood's creditors on January 28, 1920. It was not annulled as a fraud on Wood, and therefore as to him and his heirs it remained a valid conveyance. *Byrd v. Hall*, 196 Fed. 762, 117 C. C. A. 568; *Norton v. Pattee*, 68 N. Y. 144; *Comyns v. Riker*, 83 Hun, 471, 31 N. Y. Supp. 1042. The trustee in bankruptcy has no separate or more extensive rights than that of a judgment creditor in a like case. During the existence of the Harrison title, and until this conveyance was declared void, she could convey or incumber it only subject to the rights of the plaintiff after the filing of the lis pendens. Therefore a tenant, paying rent to Harrison, would be protected as to this payment, and could not excuse nonpayment to Harrison as against the trustee, who succeeded in avoiding the conveyance. A receiver for the payment of the rent may have been appointed in the proceeding to set aside the conveyance. While title was in Harrison, the right to an accounting for the rents collected remained with Harrison. It did not pass from Harrison to the trustee by the force of a judgment. This right to rents does not pass, even with a voluntary conveyance of the land, where there is privity of estate between the grantor and grantee. *Edwards v. Cobb* (C. C. A.) 264 Fed. 488. And there is no privity of estate between Harrison and the trustee, and no title to the rents accrued passed from Harrison to the trustee. But the trustee's rights in the premises to the rents of the property are protected. One of the incidents of the judgment entered against Harrison was the right of the trustee to require an accounting for the use of rents and profits during the period of her ownership, and this right is exclusive of every remedy against the occupants or cotenants. *In re Medina* (D. C.) 179 Fed. 929; *Hillyer v. LeRoy*, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919; *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. 392, 4 L. R. A. 353, 10 Am. St. Rep. 495. Harrison was not called to account by the judgment. Whatever may have been the agreement between the Terrys and Wood while cotenants, it ended at the time of the conveyance to Harrison. Petitioners had no agreement with Harrison and never paid her rent. The oral agreement for occupancy by the petitioners was good up to May 8, 1912. It was an agreement between cotenants, and, as there was no expressed renewal, no inference of renewal can be drawn from continued occupation by the petitioners after May, 1913. *Valentine v. Healey*, 178 N. Y. 391, 70 N. E. 913; *Burchell v. Burchell*, 96 Misc. Rep. 600, 160 N. Y. Supp. 805. And a valid lease for more than one year must be in writing. *Real Property Law N. Y. (Consol. Laws, c. 50) § 259*. In this proceeding the petitioners have been held responsible for rentals which accrued during the Harrison title.

These and other questions which were argued at bar satisfy us that the petitioners have a defense to the claim for the rents which they collected, and which they are now in part directed to pay over to the trustee. It is more than colorable, and is substantial. It is a controversy which should be determined in a plenary action, and not by summary order. The remedy pursued by the trustee is erroneous.

[4] Nor did their conduct amount to a waiver or consent to this

summary proceeding. The proceeding cannot, by the filing of the petition before the referee, summon the petitioners to account. The petitioners might have objected by answering or demurring before the referee. This would have been the proper practice. But they did object, as indicated by their obtaining an order to show cause why the referee's order should not be vacated, and it resulted in the vacation of the order, except as to the requirements of the accounting.

The mere fact that the order entered recites it was granted on motion of the attorney for the petitioners does not constitute a waiver. They had succeeded in part and were defeated in part on their application. No mere recital of the order having been granted on motion of their attorney, under these circumstances, can be said to be a waiver of the right to object to the procedure. A petitioner can appeal from an order which is entered on his application. *Butte Co. v. Montana Co.*, 121 Fed. 524, 58 C. C. A. 634. That part of the order which required an accounting was interlocutory, and not final. They may have filed a petition to revise, and this court may have considered the question of jurisdiction. *In re Schaffner* (C. C. A.) 267 Fed. 978. But it is apparent that, upon the hearing of the motion to confirm the report of the referee in the District Court, the question of jurisdiction was argued. The want of jurisdiction is now assigned as error. We think it clear that, under the facts disclosed by the record, there was no jurisdiction to proceed in this summary manner. The petitioners did not lose their right to question this jurisdiction by waiting for the final order confirming the report of the referee.

For these reasons, the order is reversed.

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### THE AUTOMATIC.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 77.

**Towage ☞11(6)—Tug held liable for injury to tow from collision.**

A tug held liable for damage to a barge in tow from collision with an unidentified steamship at night in New York Harbor, where the master, who had previously supposed the steamship to be anchored ahead and off his port bow, when 1,000 feet away, saw that she was moving on a crossing course, but, instead of obeying the starboard hand rule, ported his helm.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Frederick Starr Contracting Company against the tug Automatic; the Tice Towing Line, claimant. Decree for respondent, and libellant appeals. Reversed.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and L. J. Matteson, both of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellee.

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before HOUGH and MAYER, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

MAYER, Circuit Judge. The libel was filed by the owner of the scow John Donnelly against the steam tug Automatic to recover damages sustained by the scow as the result of a collision between the scow and an unidentified steamship on April 13, 1918. The story of the collision is most unusual and is told by witnesses for the tug. Nevertheless, as the events recited by those witnesses are not impossible, we are not disposed to characterize their testimony as imaginative when, so far as the record discloses, they are reputable harbor men.

The contention of the libelant is that the Automatic brought her tow into collision with an anchored vessel, or, if not, then that she was at fault for failing to hold her course and speed. The first contention requires that we should discredit the tug's witnesses, and speculate as to just where she and the vessel with which her tow collided were at the time of collision. In our view of the case, neither of these courses is necessary.

The master of the Automatic had been a licensed man in the harbor for seven years. About 2 a. m. on the morning of April 13, 1918, he took the scow John Donnelly in tow at Long Island City. The John Donnelly is a deck scow, 100 feet long over all, 82 feet between bulkheads, and 29.2 feet wide. At Forty-Sixth street, East River, another scow was taken in tow and made fast to the stern of the John Donnelly. The two scows were made fast end to end, not more than 2 feet apart. The tug put out two hawsers, about 10 fathoms long, one to each of the forward corners of the John Donnelly. The tug and tow were bound for the Federal Shipyard at Newark, N. J.

About 3:30 or 4 a. m., the tug went down the East River. The night was clear, and the tide ebb. The testimony of the master developed the facts which follow. He was in the pilot house, and his deckhand was there with him. He went down between the Battery and Governor's Island. He saw a steamer with two anchor lights and deck lights off his port bow from two to three points. The master of the Automatic was heading for Robins Reef light, and when he first saw the steamer he was "coming around Governor's Island." The steamer was in the channel "way outside" of the anchorage ground. There were no other boats "around there," and the master of the tug navigated as though the vessel were at anchor, in view of the fact that she showed anchor lights, and not running lights. The lights on the steamer were electric lights. His testimony on direct examination then was:

"Q. Did you navigate as though that vessel were at anchor and would remain there? A. Yes.

"Q. If she had done so, how much would you have cleared that steamer? A. Oh, 1,000 feet.

"Q. When did you first suspect that she was not at anchor, but that she was in motion? A. When I saw her coming so fast for us.

"Q. How far was she from you at that time? A. Oh, 500 feet."

On cross-examination the master testified:

"Q. How close were you to her when you first appreciated that she was moving? A. About 1,000 feet away. \* \* \*

"Q. Did you realize that she was moving when she was 1,000 feet away?  
A. Yes. \* \* \*

"Q. Will you draw a line, and show me on this piece of paper his heading up the river and your heading across the river, with the steamer 3 points on your port bow? (The witness indicates on paper.)

"Q. This was at the time that you realized that the steamer was moving?  
A. Yes.

"Q. And you say at that time she was 1,000 feet from you? A. Yes."

On redirect the master testified:

"Q. I think you said, in answer to a question I put to you, that you thought she was about 600 feet away when you blew the first whistle to her, and in answer to Mr. Jones you said she was 1,000 feet away; is that an estimate of judgment on your part? A. Yes.

"Q. Which do you think is the nearest? A. 1,000 feet; I should think; between 600 and 1,000 feet.

"Q. Between 600 and 1,000 feet is your best judgment? A. Yes."

It will be noted that in the first part of this answer the master said 1,000 feet, and later modified this estimate to "between 600 and 1,000 feet." While we are appreciative that distance in such circumstances cannot be accurately measured, we are satisfied that the master believed that he was about 1,000 feet away when he first realized that the steamer was moving and not anchored. At that time he blew the steamer one whistle and put his wheel to port; but, prior thereto, he had noted that the steamer did not change her bearing, and when he saw her first she was about a quarter of a mile away. He further testified that, when he was 1,000 feet away, he realized that the tug and steamer were on crossing courses and that the steamer was on the tug's port bow. The tug was going "maybe" about 6 miles an hour, and the steamer "may have been going" 5 or 6 miles an hour. The steamer made no change in her course.

As a result of putting the helm to port, the tug went to starboard, and then the master blew the danger signal, got no answer, then put his wheel hard aport, then saw the ship "was coming right for us," then swung the tow right around, and headed right up the river again. As soon as the scow was swung around, the master put the wheel hard astarboard again, to swing the scow's corner away from the steamer. He got away from the stern of the steamer, but the anchor of the steamer, which was hanging over its side, behind the stern, and the scow came in collision about 10 feet behind the corner of the scow on the port side.

The master ordered the hawsers cut, and this the deckhand did at the time of collision, and when the master saw he had the corner of the scow clear he blew to let the deckhand know to let go. The master then "hollered" to the man on the bow of the steamer that the latter had no running lights, and the man said he knew that. The master, however, could not get close enough to the steamer to make out its name, and, after diligent effort thereafter, neither the master nor the Tice Line, the owner of the tug, could ascertain the name of the unidentified steamer.

The engineer in effect corroborated the master and testified that the steamer was moving. The deckhand testified that the steamer was about 1,200 feet away when he first saw her, and about 800 feet away

when he saw that the vessel was moving. His testimony substantially corroborated that of the master. The testimony of the scow captain was of no service on the point here under consideration. The testimony of the master is consistent with his report on May 9th to the local inspectors.

It is, of course, now elementary that libelant must prove negligence; but, as said in *The Delaware* (C. C.) 20 Fed. 797, "the occurrence suggests an inference of negligence on the part of the tug which it devolves here to repel." We have accepted the master's testimony, and from his story it is clear that the tug and the steamer were on crossing courses. The case was not one of special circumstances. The fact that the steamer did not have running lights was, of course, exceedingly strange. Whether she was unused to these waters, and supposed she was in anchorage ground, and was changing her position, or whatever the reason or occasion for her conduct, we shall not attempt to guess; but she never changed her course, and, at a distance of 1,000 feet, the tug was so circumstanced that there was no difficulty in adhering to the rule.

Departure from the rule might only invite some unexpected maneuver from the approaching vessel. The master, as was his duty, thoroughly understood the rule, and he stated it succinctly when he said:

"The one that has the other on his own port side will proceed and keep her course and speed."

Hardship, of course, sometimes results from a compliance with rules, where a navigator thinks departure may be the wiser course; but, in the long run, safe navigation is better served by strict application of the rules than by resort to exceptions in order to exculpate. As recently said in *The Binghamton* (C. C. A.) 271 Fed. 69:

"The statement or wording of the rule can no longer be questioned in this court. It is the duty of the privileged vessel to keep 'on her course until a departure is necessary to avoid immediate danger,' and the rule as to speed is the same as that regarding the course. *Yang-Tsze Ass'n, etc., v. Furness*, 215 F. R. 859, 861, 132 C. C. A. 201, certiorari dismissed 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409."

There is no explanation by the master for his failure to observe the rule, except, perhaps, the existence of the anchor lights; but this is not enough on the facts in this case. The result is that, in this controversy between tug and tow, we cannot say that the collision might not have been avoided if the rule had been observed.

Finally, it is urged that libelant's pleading does not suggest its present contention; but it will be noted that the libel charges as a fault that "the Automatic failed to keep her tow clear of the steamer with which she collided." This general allegation was sufficient, and all which could be expected of libelant when all the facts were in possession of those on the tug. The case below was clearly tried on the theory that, in any event, the rule was violated.

The decree is reversed, with costs, and the District Court is instructed to enter the usual decree in favor of libelant against the Automatic, with costs.

UNITED STATES v. GUINZBURG.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 54.

**Internal revenue § 7—Dividend declared before Income Tax Act took effect held not "income" of stockholder, taxable thereunder, though not paid until afterward.**

Under Income Tax Act Oct. 3, 1913, § 2, A, subd. 1, which took effect from March 1, 1913, and imposed an annual tax on the entire net income of citizens and residents "arising or accruing from all sources in the preceding calendar year," a dividend declared by a corporation prior to March 1, 1913, though not paid until after that date, *held* to have been capital of the stockholder at the time the act took effect, and not taxable as income arising or accruing thereafter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against Henry A. Guinzburg. Judgment for defendant, and the United States brings error. Affirmed.

William Hayward, U. S. Atty., of New York City (Edward F. Unger, of New York City, Asst. U. S. Atty., of counsel), for the United States.

Sullivan & Cromwell, of New York City (Eustace Seligman, of New York City, of counsel), for defendant in error.

Before HOUGH, MANTON and MAYER, Circuit Judges.

MANTON, Circuit Judge. On the 17th of February, 1913, the I. B. Kleinert Rubber Company declared a dividend of 18 per cent. to common stockholders of record on January 30, 1913. This dividend was payable July 1, 1913. The defendant in error was a stockholder on the 30th of January, 1913. The dividend was declared out of the profits of the company earned during the year 1912. It was the only dividend paid during the year 1913. The declaration of this dividend was in accordance with the established practice of 20 years' standing; that is, one dividend each year was declared in February out of the earnings of the company, and made payable the following July 1st. The reason given for the postponement of the payment of the dividend until July 1st in each year was to permit the corporation to have use of the earnings in its business as a bank balance. This purpose was said to be to avoid being forced to borrow money. The defendant in error, in his return for 1913, did not include the dividend so received by him, amounting to \$70,380, and it is because of his failure to pay an income tax on such sum that this action was brought.

We think that the dividend declared prior to March 1, 1913, the effective date of the Income Tax Act here considered, was not income when paid because it was part of the capital of the defendant in error on March 1, 1913. By the declaration of a dividend, the earnings

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of the company to the extent declared were separated from the property of the corporation, and were appropriated by that action to the then stockholders, who became creditors of the corporation for the amount of the dividend. The relation then created was that of debtor and creditor. *N. Y. Trust Co. et al. v. Edwards, Collector*, 257 U. S. —, 42 Sup. Ct. 68, 66 L. Ed. —, decided November 21, 1921; *Wheeler v. Northwestern Sleigh Co. (C. C.)* 39 Fed. 347; *People ex rel. U. S. Trust Co. v. Barker*, 86 Hun, 131, 33 N. Y. Supp. 388; *Billingham v. Gleason Mfg. Co.*, 101 App. Div. 476, 91 N. Y. Supp. 1046, affirmed 185 N. Y. 571, 78 N. E. 1099. It is the separation of the earnings from the balance of the corporate property, together with the promise to pay arising from the declaration of the dividend, that works this change. The holder of stock, with respect to the dividend, is on a par with the other creditors of the corporation. *Staats v. Biograph Co.*, 236 Fed. 454, 149 C. C. A. 506, L. R. A. 1917B, 728. The fact that the dividend is payable at a future date does not alter the rights thus created. The obligation of the corporation as debtor commences with the declaration of the dividend, although the payment is postponed for the convenience of the company. The rights of the stockholders are immediately vested the moment the dividend is declared. *N. Y. Trust Co. v. Edwards*, supra. The action of the board of directors is the appropriation of a portion of the earnings to the defendant in error as the holder of a certificate of stock. The same rule prevails in the state courts of New York, under which laws the corporation here in question was organized. *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771. The fact that they are payable at a future time is immaterial. *Matter of Kernochan*, 104 N. Y. 618, 11 N. E. 149.

The Income Tax Act, as of March 1, 1913, provides (Section 2, 38 Stat. 166, 168):

"A. Subd. 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere. \* \* \*

"D. The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive. \* \* \*

Anything which accrued prior to March 1, 1913, was part of the taxpayer's principal at the time when this act became effective. Property held prior to March 1, 1913, must be considered as capital and the dividends in question must be treated as such. The act provides that "the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States \* \* \*" shall be taxed. Accumulations that accrued to a corporation prior to

January 1, 1913, were held to be capital, and not income, for the purpose of the act, in *Southern Pacific Co. v. Lowe*, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142. The term "income" has been held to have no broader meaning in the 1913 act than in the 1909 act (Act Aug. 5, 1909, § 38, 36 Stat. 112). *Stratton's Independence v. Howbert*, 231 U. S. 417, 34 Sup. Ct. 136, 58 L. Ed. 285. The Supreme Court based its conclusion in the *Southern Pacific Case*, *supra*, upon the view that it was the purpose and intent of Congress, while taxing the entire net income "arising or accruing" from all sources during each year, commencing the 1st day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and substance it accrued before. Under the 1909 act, the expression "income received during such year" was held to look to the time of realization rather than the period of accrument "except as a taking effect of the act on a specific date (January 1, 1909) excludes income that accrued before that date." *Hays v. Gauley Mt. Coal Co.*, 247 U. S. 193, 38 Sup. Ct. 470, 62 L. Ed. 1061. In the *Hays Case* it was held that income received within the year for which the assessment was levied, whether it accrued within that year or some preceding year, when the act was in effect, could be taxed, but it excluded all income that accrued prior to January 1, 1909, although afterwards received while the act was in effect. So, where value was received by shareholders on the surrender of their certificates of stock, where the company sold all its property and made final distribution of the proceeds to the shareholders, and where the amount received by each was twice the par value of the stock, but represented no increase since the effective date of the act, it was held that it did not "arise or accrue" after the act became effective.

In *Maryland Casualty Co. v. United States*, 251 U. S. 342, 40 Sup. Ct. 155, 64 L. Ed. 297, cited by the government, the Income Tax Act of 1913 was considered in so far as it concerned the dealing with corporations as distinguished from dealings with individuals, and which imposed a tax under the language of one paragraph upon income "arising or accruing" during the year, and under another paragraph of the act upon income received within the year. It was held that it was not sufficient for income to accrue within the year in order to render the corporation taxable, but the income must have been received by the corporation. But this was due to ambiguous paragraphs of the act which taxed the corporation. It was a construction favorable to the taxpayer under such paragraphs. Nowhere in the opinion is there a suggestion that the court changed the rule announced in *Southern Pacific Co. v. Lowe*, *supra*, and *Hays v. Coal Co.*, *supra*, wherein it was held that income which had accrued prior to March 1, 1913, if received thereafter, would not be taxable.

The case at bar is different from the cases where commissions are to be received at a future date upon a contingency, and where there is no fixed certainty of such receipt. There it cannot be said that the income has accrued. *Edwards v. Keith*, 231 Fed. 110, 145 C. C. A. 298, L. R. A. 1918A, 498; *Woods v. Lewellyn*, 252 Fed. 106, 164 C. C. A. 218. Dividends declared and paid in the ordinary course by

a corporation to its stockholders after March 1, 1913, whether from current earnings or from surplus accumulated prior to that date, have been held to be taxable as income to the stockholder. *Lynch v. Hornby*, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149.

"We deem the legislative intent manifest only if, and when, and to the extent that, his interest in them comes to fruition as income, that is in dividends declared." *Eisner v. Macomber*, 252 U. S. 204, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570.

We conclude that, upon the declaration of a dividend, the debt was immediately created in favor of the defendant in error, payable at a future date. By that action a vested right was created in favor of the stockholder, who could sell his right by assigning or pledging or otherwise disposing of it, and this was not income arising and accruing within the meaning of the statute, such as might be taxed under the Income Tax Act of March 1, 1913, here in question. The same views are expressed in the rulings of the Treasury Department. Treasury Decision 2048, November 12, 1914.

We find no error below, and the direction of a judgment for the defendant is affirmed.

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**CHARLES SCRIBNER'S SONS v. BOARD OF EDUCATION OF DIST. NO. 102, OF COOK COUNTY, ILL., et al.**

(Circuit Court of Appeals, Seventh Circuit. August 20, 1921. Rehearing Denied November 22, 1921.)

No. 2981.

**1. Constitutional law §276—Schools and school districts §167—Illinois Text-Book Law held constitutional.**

Illinois Text-Book Law, in force July 1, 1917 (Laws 1917, p. 754), while it contains provisions which, standing alone, might be an invasion of the constitutional right to contract, taken in its entirety and construed in view of its purpose, is limited in its application to the sale and purchase of books for actual use in the public schools of the state, and as so limited is constitutional and valid.

**2. Schools and school districts §80(1)—Filing of list of text-books by publisher and giving bond constitutes contract to furnish books adopted during its term.**

Under Illinois Text-Book Law, in force July 1, 1917 (Laws 1917, p. 754), which requires publishers desiring to sell books for use in the public schools to file with the state superintendent of public instruction a list of their books, with prices, and to give a bond conditioned that it will furnish any of such books as required during a term of five years at the list price, and requires the superintendent to furnish copies of such list to the authorities of each school district in the state who may adopt therefrom such books as they desire, the filing of such list by a publisher and the giving of the bond is not a mere offer, which may be withdrawn at will, but constitutes a contract binding it to furnish such books as may be adopted by a district during the term.

**3. Schools and school districts §81(1)—"School district" and "school corporation" defined.**

Under Illinois Text-Book Law, § 1, subd. 2 (a) (Laws 1917, p. 754), providing that, before any person shall offer any school text-books for

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adoption, sale, or exchange, he shall file a bond conditioned that he will furnish, for a period of five years, the books listed in accordance with the act, and at the list prices, to any "school district" or "school corporation" in the state, the term "school district" has reference to the public school system, and "school corporation" means boards of education and other public school corporations, if any there are, existing under public or private laws of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, School District; Second Series, School Corporation.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Charles Scribner's Sons, a corporation, against the Board of Education of District No. 102 of Cook County, Ill., and others. Decree for defendants, and complainant appeals. On petition for rehearing, after entry of order of affirmance without opinion. Denied.

William Rothmann, of Chicago, Ill., for appellant.

Clarence N. Boord, of Springfield, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. Affirmed, without opinion.

### On Petition for Rehearing.

Appellant, a publisher of school text-books, brought its action against the state superintendent of public instruction of Illinois and against the board of education of school district No. 102, Cook county, Ill., to restrain enforcement against appellant of the provisions of the Illinois Text-Book Law entitled "An act to regulate the adoption, sale and distribution of school text-books," in force July 1, 1917 (Laws 1917, p. 754). The bill shows that in respect to those provisions thereof which require appellant to supply listed school text-books, when listed in accordance with the act, at the list prices for the five year period as in the act provided, under the terms of the act, appellant, in 1917, duly filed with the state superintendent its bond and its list of school text-book publications as by the act required, that adoptions of some of such publications were made by certain school districts in Illinois, and that said school district No. 102 had recently adopted a certain book from such list, and was insisting upon being supplied with same. The bill further alleges that, owing to war conditions, there has come about a very great increase in the cost of everything which enters into their production, so that such books could not be sold at the list prices, except at great loss to appellant, and while appellant signified its willingness to complete its undertaking to furnish books at list prices for the statutory period where adoptions had been made, it was unwilling to accept or comply with the requirements of any further adoptions; that it had notified the state superintendent that it would accept no further adoptions, and that such officer denied its right to refuse compliance with adoptions made during the five-year period covered by the statutory bond filed, and it asked that the state superintendent of public instruction be restrained from enforcing such bond or any of the penalties in the act prescribed, as to any adoptions that might be made after its said notice to the state superintendent.

The bill charges that the act transgresses the Fifth and Fourteenth Amendments to the federal Constitution and also section 8 of article 1 thereof, and is therefore unconstitutional and void. Appellant contends that the act is so broad that it unwarrantably restricts and interferes with appellant's right to contract for and sell its school text-books to schools other than public-schools of the state, or to persons generally, except it be in the manner specified in the

act and at the prices fixed as in the act provided, and that such restriction deprives appellant of property without due process of law, abridges appellant's rights and immunities, denies it equal protection of the laws, and unwarrantably interferes with interstate commerce. On motion of appellees the court dismissed the bill for want of equity.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] The title of the act and some of its provisions considered alone may be broad enough to warrant the interpretation contended for. Section 1 provides that no person shall offer any school text-book for adoption, sale, or exchange in the state until he has complied with the act. Section 7 makes it unlawful for a dealer to sell the books listed in accordance with the act, at a price to exceed 15 per cent. advance of the net listed price. But does a fair consideration of the whole act and the evils it was designed to relieve require so inclusive an interpretation of these portions of it? The Illinois Constitution (article 8, § 1) requires the General Assembly to "provide a thorough and efficient system of free schools, whereby all children of the state may receive a good common school education," and the statutory enactments to that end have been and are many and voluminous. Among them there have been acts preceding the act in question, respecting text-books to be used in the public schools. Long prior to the last enactment it was well understood or at least generally believed that great abuses had grown up in the adoption and supplying of public school text-books; that prices were often extortionately high, and that changes in the books were made with scandalous frequency, with resultant undue burden upon parents who had to supply them. It was against such supposed conditions that legislation was from time to time directed, the last enactment being this law. When we consider the evil at which the act is leveled as one existing in connection with the public school system only, we should be more ready to look to the whole act to learn whether it may not appear limited to books to be actually used in the public schools of the state. It seems that the official named in the act for receiving the lists of publications and prices, fixing the amount of the bonds and approving same, and repeatedly named in the act as the one official charged with its application and operation and enforcement, is the state superintendent of public instruction, a constitutional officer, whose very title indicates that the general nature of his duties is with reference to public instruction alone.

[3] Section 1, subd. 2 (a), makes provision for a condition in the bond that for the indicated period the books be supplied "to any school district and any school corporation in the state of Illinois," etc. The term "school district" clearly has reference to the public school system with which alone the "school districts" have to do, and "school corporation" evidently means boards of education and such other public school corporations, if any there are, existing under public or private laws of the state. Section 3 provides for sending by the state superintendent copy of such lists "to the school authorities in each district in the state," and section 4 makes it "the duty of the board of education, or the board of directors of each school district of the state" to notify the superintendent of violations of conditions of the bonds. Section 5 is directed against rewards or promises thereof, in securing

adoption of "any school text-book in any school district in this state" or any inducement "to any teacher or school officer in any school district." In section 6 it is provided that—

"Boards of education or boards of school directors are empowered, and it shall be their duty to adopt such text-books listed under the provisions of this act needful for use in said schools, \* \* \* and said books shall be used exclusively in all public high schools and elementary schools of the state for which they have been adopted."

Section 8 states that "school districts are hereby authorized to purchase \* \* \* text-books from the publishers at the prices listed \* \* \* and to sell said books to the pupils, \* \* \*" and section 9 provides that "school districts are \* \* \* authorized to purchase" the listed school text-books, and to designate retail dealers to act as the agent of the district in selling the books to pupils and to "make settlement with the district for such books," and that such dealers shall not sell the books at an advance of more than ten per cent. Section 11 provides that "when a family removes from one school district to another within the state, the clerk of the district may purchase \* \* \* text-books in actual use by the children of the family," and resell them to other pupils coming into the district. In no part of the act is there any intimation of its application to schools other than the public schools, or to dealing in or selling such books, otherwise than in connection with the public schools, except as this might be inferred from the wording of the title and of sections 1 and 7 referred to. The state had undoubted power to make regulations concerning the sale of the text-books to be for use by the pupils of its free schools, even to the extent of the state itself producing and providing them. It seems equally clear that it had no power to regulate the sale of such books for use elsewhere than in its public schools, or for others than the pupils thereof.

Viewed in the light of the supposed conditions to be relieved by this legislation, the power of the state over the subject-matter, and the numerous provisions to be found in the act referable only to a legislative intent that it have application only to the sale and purchase of books for actual use in the public schools of the state, we conclude that the act itself was not intended to have, and does not have further scope. So limited it is not subject to the constitutional objections urged against it.

[2] It is the further contention that the listing of the books and prices is but an offer to contract, and may be withdrawn by the publisher at any time before acceptance through adoption by school districts. Appellant's counsel seem to treat the statute as though it made provision only for the offering of text-books for sale. If so limited the act would avail little or nothing. The title covers the subject of adoption, sale, and distribution. The bond provided for is conditioned that the person filing it shall furnish for five years any of the books listed, at the stated prices, to any school district or corporation in the state. It is made the duty of the state superintendent to publish the lists and distribute them to all the public school authorities, who may make adoptions only from such listed books. Cases cited on the sub-

ject of unrelated and option contracts have no application where, as here, the statute clearly intends that one filing the bond and lists shall be obligated to supply the books as adopted during the statutory period.

The petition for rehearing of the order of affirmance heretofore made herein is denied.

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**FRANZEN et al. v. CHICAGO, M. & ST. P. RY. CO.**

(Circuit Court of Appeals, Seventh Circuit. August 20, 1921. Rehearing Denied October 25, 1921.)

No. 2894.

1. Courts ⇐366(11)—Decision of state court as to right to maintain condemnation proceedings followed.

A decision of the state court establishing a railroad's right to maintain condemnation proceedings for certain purposes settles the issue for the federal courts, when no reason is advanced why it should not be accepted.

2. Courts ⇐281—Condemnation action may be brought in federal court.

An action to condemn land is a suit at common law, within the meaning of the federal Judiciary Act, and may be brought in the federal court of the district in which the land lies.

3. Pleading ⇐111—Refusal to dismiss proper, where defendants did not show proceedings in other action, or that it involved the same land.

The burden being on defendants to establish their plea in abatement, setting up the pendency of another suit, the refusal to dismiss on that ground was proper, where it appeared that a judgment dismissing the petition in such other suit was reversed, but the evidence did not disclose what subsequently occurred, nor that the two actions involved the same land.

4. Abatement and revival ⇐12—Pendency of condemnation suit in state court not bar to action in federal court.

Condemnation proceedings involving the same land pending in the state court are no bar to the maintenance of a similar action in a federal court, where the state court, in first taking jurisdiction, did not take possession of the res.

5. Courts ⇐352—Selection of jurors in condemnation suit in federal court not governed by state statutes.

The Illinois statute authorizing condemnation proceedings, requiring the jurors to be selected from the freeholders of the county, and regulating the number of challenges, does not govern a condemnation action in the federal courts, as the Legislature was not authorized, and did not intend, to prescribe for federal courts a practice in conflict with Judicial Code, § 287 (Comp. St. § 1264), and other federal statutes.

6. Eminent domain ⇐262(1)—Admissibility of evidence of selling price in condemnation suit rests with trial judge.

Whether lands are sufficiently similar in character and location to that sought to be condemned to admit evidence of their selling price, and whether the previous sale of the land or other similar land may or should be shown, are matters concerning which the trial judge can best decide.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

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⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by the Chicago, Milwaukee & St. Paul Railway Company against George E. Franzen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The parties will be designated as they appeared in the court below. Plaintiff, operating a railroad, instituted in the state court proceedings to acquire certain rights in land owned by defendants. Its right so to do was at first denied, but on appeal was established. *C., M. & St. Paul Ry. Co. v. Franzen*, 287 Ill. 346, 122 N. E. 492. Thereafter condemnation proceedings were instituted in the federal court to acquire land from the defendants; the basis for the claim of jurisdiction being diversity of citizenship and the amount involved exceeding \$3,000. A judgment based on the verdict was duly entered, and this writ of error followed.

A. F. Mecklenburger, of Chicago, Ill., for plaintiffs in error.

O. W. Dynes and C. S. Jefferson, both of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. [1] Plaintiff's right to maintain condemnation proceedings for the purposes set forth in the petition was established by the decision of the Supreme Court of Illinois in the case above cited. No reason is advanced why this ruling should not be accepted by us, and the issue is therefore settled. *Hairston v. D. & W. Ry. Co.*, 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; *Union Lime Co. v. C. & N. W. Ry. Co.*, 233 U. S. 211, 34 Sup. Ct. 522, 58 L. Ed. 924.

[2] But defendants contend that the federal court cannot maintain an action to condemn; the state court alone being authorized by the Illinois statute to try issues arising out of such proceedings. A very interesting and, we may add, able brief is submitted in support of this contention. But the question is closed by the decisions of the Supreme Court. *Miss., etc., River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; *Mason City & Ft. Dodge Ry. Co. v. Boynton*, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629; *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.

10 Ruling Case Law, 207, we think, correctly announces the law of these decisions to be:

"A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act; and when the requisite diversity of citizenship exists such a suit may be brought in or transferred to the federal District Court of the district in which the land lies."

See, also, *Nichols on Law of Eminent Domain* (1917 Ed.) pp. 1040, 1041.

True, in the cases above cited, the court was considering the propriety of removing condemnation proceedings from the state to the federal court, and in at least one case the landowner was the moving party. We

fail, however, to appreciate the force of the distinction, for actions are removable only when they could, in the first instance, have been brought in the federal court.

[3, 4] Attack is made upon the judgment because there was a proceeding pending in the state court, involving the identical issues, when this action in the federal court was begun and when it was tried. We do not find substantiation for this position in the record. It does appear that condemnation proceedings were begun in the state court, that a judgment dismissing the petition was entered, an appeal taken, and the Supreme Court reversed the judgment of dismissal. The record does not disclose what occurred subsequently, and we are not able to say that the two actions involved the same land. The burden being upon the defendants to establish their plea in abatement, it follows that no error was committed in refusing to dismiss on this ground. But had the record disclosed pending condemnation proceedings involving the same land, it would have been no bar to the maintenance of this action, in view of the character of a condemnation proceeding. *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; 1 *Corpus Juris*, 87, 88.

A different situation would have existed had a state court, in first taking jurisdiction of the cause of action, also taken possession of the res. *Farmers' Loan & Trust Co. v. Lake Street Elevated Rd. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. It is apparent from the large and carefully selected list of cases cited by defendants' counsel that courts have not always recognized the necessity of the res being possessed, but an examination of the facts in most of these cases discloses such possession, and the language of the opinion was used with reference to the facts in the case under consideration and should be read as so limited.

[5] It is also urged that error was committed upon the trial in the admission and rejection of evidence and in impaneling the jury. In respect to the latter assignment of error complaint is made because the jurors were not freeholders of Du Page county, where the real estate was situated and defendants were denied five peremptory challenges. No challenge of any juror for cause was made; no complaint was made of the jury; nor was any juror objected to because he did not hail from Du Page county. Not until after the trial did defendants object to the jury. The question may well be disposed of by broadly denying defendants' right to a trial by jury selected from the freeholders of Du Page county.

When the Illinois statute authorizing condemnation proceedings was enacted, the right to have such actions tried in the federal courts (the necessary amount and diversity of citizenship appearing) existed as the cases cited disclose. It was also the established law that the practice respecting the impaneling of a jury in the federal courts was governed by the federal statutes, or section 287 of the Judicial Code (Comp. St. § 1264). *Southern Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Detroit M. & T. S. L. Ry. Co. v. Kimball*, 211 Fed. 633, 128 C. C. A. 565. Not only

is it fair to assume then that the Legislature of Illinois was speaking to the state courts only, and was laying down a practice to be followed therein; but it was not authorized, nor did it intend, to prescribe for the federal courts a practice which conflicted with the congressional enactments for those courts on the same subject.

[8] In reference to the admission of evidence respecting sales of similarly or nearly similarly situated lands, as well as the purchase price of the land in question a few years preceding, the rules of law are too well settled to call for restatement. Whether the lands are sufficiently similar in character and location to admit evidence of their selling price, whether the previous sale of the land in question or other similar land, may or should be shown, are matters concerning which the trial judge can best decide. Recognizing that this evidence is received for the purpose of placing a jury in a better position to pass judgment upon the ultimate question of fact—the value of the land condemned and the injury to the balance—it is usual for the court to permit a rather wide range of investigation, leaving it to the counsel to point out the weakness or the strength of the comparative sales and to the jury to weigh the evidence and ultimately determine the issue. Perhaps such evidence sometimes assumes too great importance. But the trial judge is in the best possible position to decide whether the situation has been clearly and satisfactorily presented, and he has it within his reasonable discretion to order or withhold a view of the premises to better enable the jury to understand and weigh such evidence. We find no error in regulating this matter, but instead commend the District Judge for the way he controlled the range of this evidence.

The verdict finds ample support in the evidence.

The judgment is affirmed.

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FORD MOTOR CO. v. K. W. IGNITION CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1921.)

No. 2879.

**1. Patents  $\Leftrightarrow$  222, 261—Owner held estopped by acquiescence in manufacture of patented article by defendant.**

The inventor of an ignition coil for automobiles explained his invention to the engineers of defendant, a large manufacturer of cars, who assisted him in perfecting the same, and later defendant adopted such coil as a part of its standard equipment and built and equipped at large expense a department for their manufacture in part to supply its needs, the inventor assisting in selecting and installing the machinery. Afterward he obtained a patent for the invention and assigned the same to complainant, which in the years following supplied defendant with coils to the number of 5,000,000, besides large numbers of parts for use in its own manufacture, of which complainant had full knowledge, from which arrangement complainant derived large profits. Defendant during such time had no actual knowledge of the patent, and coils made by complainant were not marked as required by Rev. St. § 4900 (Comp. St. § 9446). *Held*, that complainant, by its conduct and affirmative acts, was estopped to assert infringement or to challenge defendant's right to manufacture such coils in the future, and was precluded by failure to mark its product from recovering damages for infringement by defendant.

**2. Costs ~~€~~238(1)—Denied to successful appellant, filing reply brief more elaborate than original brief.**

Where appellant's reply brief of 250 pages covered the same subjects as the original brief, but far more elaborately, thereby necessitating further briefs by appellee and answering briefs by appellant, costs of appeal will be denied appellant, though decree is reversed.

Appeal from the District Court of the United States for the District of Indiana.

Suit in equity by the K. W. Ignition Company against the Ford Motor Company. Decree for complainant, and defendant appeals. Reversed.

Edward Rector and W. Clyde Jones, both of Chicago, Ill., Otto F. Barthel and H. C. Underwood, both of Detroit, Mich., and Arthur M. Hood and George B. Schley, both of Indianapolis, Ind., for appellant.

Edward G. Hoffman, of Ft. Wayne, Ind., and Mosely Arthur Keller, of New York City, for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Appellee brought this suit against appellant for damages for past infringement, and to enjoin future infringement of patent No. 1,092,417, covering an ignition apparatus, which patent was issued to James A. Williams and by him assigned to appellee. From a decree sustaining the patent, directing an accounting, and restraining further infringement, appellant appeals. Numerous defenses, including invalidity, estoppel, laches, and non-infringement in the state of Indiana, where the suit was begun and tried, are set forth.

[1] It will not be necessary to consider any defenses other than estoppel.

Upon this issue the facts are singularly free from dispute. Many of them are established by letters. Where there is any serious dispute, we have resolved it in favor of the appellee. So analyzed and examined, the record shows:

The appellant to be an extensive manufacturer of automobiles, who during the period of alleged infringement (1914-1919) turned out 3,000,000 cars equipped with 12,000,000 ignition coils of the type under consideration. About 5,000,000 of these coils were supplied by appellee and the remainder manufactured by appellant, and for their alleged wrongful production damage is sought. In addition a large number of parts or entire coils were made by both parties to supply the retail trade or Ford users.

The Williams coil, it is alleged, tended "to eliminate any lack of synchronism or timing in the operation of several cylinders." It displaced, or tended to displace, an apparatus known as the master vibrator in the production of which Williams was interested and which he manufactured. Appellant did not equip its cars with this master vibrator. It was while Williams was negotiating for advertising space in a trade paper published by appellant that he first spoke of a new coil for which he claimed better results in the respect above mentioned. As a result of this conversation he later met appellant's engineers, and tests were made of his coil. Appellant's engineers and Williams there-

after made numerous changes in the construction and arrangements of parts in this coil. While Williams denies that the changes were vital or essential to produce greater synchronism, it is apparent that they were productive of economy in construction, in simplification of the parts, and were largely persuasive in inducing appellant to adopt the coil as a part of its standard equipment.

Prior to this time appellant purchased its coils from different manufacturers, using three different types, the Heinze, the Kingston, and the J & B coils. It manufactured none. These various coils were produced by different manufacturers. Neither Williams nor appellee had any of appellant's coil business.

In order to avoid confusion resulting from the use of different types of coils and to cheapen the cost of production and lessen the cost of the stock in trade which the retailer was required to carry, appellant decided to standardize its coil. It considered various makes. In the main they were similar in appearance and in the general method of operation they were alike. It would serve no useful purpose to set forth their differences.

After examining the various types or models then on the market, appellant selected the Williams coil and thereafter all of its cars were equipped therewith. It was understood at the time of the adoption of this coil as a part of its standard equipment that appellant should, on account of its extensive business, have two sources of supply. To avoid the delays and damage resulting from fires, strikes, etc., appellant insists on two sources of supply for all of its standard equipment. It was therefore understood and agreed that appellant should install a department for the manufacture of these coils. It was equipped by appellant, but Williams assisted in the selection and arrangement of machinery. Thereafter the enormous demand for these coils was supplied by both parties.

Appellee at all times knew appellant was manufacturing the coils in large numbers. Mr. Williams was frequently in appellant's coil manufacturing department where from three to four hundred employees were at work and knew that large sums of money had been expended in building and equipping this department. The parties exchanged parts used in manufacturing the completed coils and appellee frequently sold large quantities of parts to appellant to be used in manufacturing its coils. We quote a few of the many letters establishing these facts.

The quotations are all taken from letters written by appellee's manager to appellant or some officer thereof. On January 7, 1919 it wrote:

"Confirming our telephone conversation with you this morning, we are expressing you today 100,000 T-6772, 5/16ths inch hexagon nuts 12-32 thread.  
\* \* \* Investigation shows that you are using a punched nut on this job. As we prefer a machine nut and are using same, please do not replace this shipment to us, and we will make arrangements to replenish our own stock."

On another date:

"We are pleased to acknowledge your valued order #77604, covering 5,000,000 T-6799 Tungsten point rivets."

A year earlier this letter was written:

"We have your valued order #75354, covering 500,000 part T-6799 Tungsten point rivets, was duly received by us and the December shipment made you on December 14th. Shipments will be made at the rate of 100,000 per month from now on as requested."

Again:

"In answer to your letter of August 13th, the instructions we received were not in the form of a communication, but were verbal instructions given to the writer while in your coil department."

The following is most significant:

"Regarding yours of the 14th, in reference to our securing wood backs and bottoms from the Michigan Truck & Lumber Co. We note that you are at this time taking their entire output and, therefore, cannot allow them to ship us 5,000 sets as requested. If you will please advise us your other source of supply on these, we will take it up with them and see if we can possibly secure these parts from them. The tractor plant is after us for delivery on metal boxes and we are handicapped at this time on account of wood backs and bottoms. If there is any possible way that you can help us out without interfering with yourselves, we would appreciate the same very much."

The purchase of 5,000,000 Tungsten point rivets alone was notice to appellee that appellant was manufacturing the units on a large scale. The letters indicate not only normal, but extreme, cordiality, where one manufacturer accommodated the other by loaning parts which were replaced.

At no time was the subject of a patent mentioned.

Williams, however, after making his arrangement with appellant, sought and secured the patent in issue. He never marked any of his products with his patent number and in no way suggested that his coil or any part of it was covered by a patent. At no time prior to the commencement of a suit in which another corporation, Henry Ford & Son, Inc., an organization formed to manufacture and sell tractors, was indirectly interested, did appellant have actual knowledge of the issuance of this patent. It appeared in this suit that Henry Ford & Son, Inc., gave an order to the Kokomo Electric Company to make for it some coils. Appellee brought suit against this manufacturer to enjoin the infringement of the patent in suit, and then for the first time did appellant through its officers learn of the existence of the patent.

Upon these facts we have no hesitancy in denying appellee all right to recover damages for past infringement. Every element necessary to establish an estoppel is here disclosed. While silence on the part of one who should speak, yet remains mute, may be sufficient to support a defense of estoppel in certain instances, the facts in the record before us go much further. Appellee not only did not protest when it should have spoken, but by actions and by speech it sanctioned appellant's conduct in manufacturing its coils.

It is not hard to gather appellees' motive. It had none of appellant's enormous business in coils. If the so-called Williams coil could be made a part of appellant's standard equipment, its business from that source alone would be enormous and it would be established.

Even though appellant made a part of its own products, appellee's business would be satisfactory. And the results proved the wisdom of its course. Five million coils from 1914-1919, besides an enormous business in replacing parts for retailers and users, resulted.

But, whatever its motive may have been, appellee cannot induce another to act, deal extensively with such other party, sell it a large proportion of material and parts necessary to the production of the completed unit, and then secure damages for the manufacture of such article. Authorities in support of such a conclusion need hardly be cited. A few are herewith collected. 21 Corpus Juris, 1216; 10 Ruling Case Law, 694; 2 Herman on Estoppel, § 1060; Bigelow on Estoppel, 648; Gill v. U. S., 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480; Keyes v. Eureka Consolidated Mining Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929; Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; McClurg v. Kingsland, 42 U. S. (1 How.) 202, 11 L. Ed. 102. Passing by all question of Williams' right under the circumstances to secure a patent, conceding, for the sake of the argument, that the contribution of appellant's engineers was nil, that the changes made as a result of tests in appellant's experiment room in no way bear on the question, the fact remains that appellee consented to appellant's equipment of a department for the manufacture of these coils, consented to appellant's manufacture and sale of these coils, exchanged parts with it, and sold it a large proportion of the parts used in the manufacturing of the completed unit.

Section 4900, R. S. (or section 9446, U. S. Compiled Statutes Annotated, 1916), also stands squarely in the way of appellee's right to recover damages for past infringements. Concededly appellee failed to mark its patented article. It, therefore, must be denied all right to recover damages, unless it can prove that "defendant was duly notified of the infringement and continued after such notice to make, use or vend the articles so patented." The evidence fails to show any such notice.

That part of the decree which requires appellant to account for its profits from the manufacturing of these coils, therefore, cannot stand.

And for the same reasons and others we cannot escape the conclusion that appellee is estopped to challenge appellant's right to manufacture these coils in the future.

Even though the coil be not the joint product of the brains and experiments of Williams and appellant's engineers, the former could, as the inventor and the possessor of the right to exclude all others from manufacturing or using the monopoly, give appellant the right to manufacture and sell the coil. And this concession would result in no financial loss, if as a result of its grant appellant made the coil a part of its standard equipment. The coil was of little commercial value unless the user of Ford cars adopted it. And its most extensive use was obtainable only through its adoption by appellant as a part of its standard equipment. If, to secure such a result, patentee was willing to concede to appellant the right to manufacture and sell these coils, it cannot now complain. Whatever its motive, it cannot encourage a user to expend hundreds of thousands of dollars in the erection of a

department for the manufacture of such coils, it cannot assist by advice and otherwise in the selection of machinery to be used in their manufacture, and later, when as a part of its standard equipment these coils are on millions of cars and their name and value is established through countless agencies and car users, halt the manufacturer's right to continue their production. Few cases can be found that call more loudly for the application of the doctrine of estoppel than the present one. And, while this court recognizes and now adheres to the ruling that a patentee may be denied damages for past infringement and yet be entitled to an injunction restraining future infringement, *Rajah Auto Supply Co. v. Belvidere Screw and Machine Co. et al.*, 275 Fed. 761; *Wolf v. U. S. Slicing Machine Co. (C. C. A.)* 261 Fed. 195, we do not find in the instant case facts which would justify us in applying the rule of these cases.

[2] In the presentation of this appeal appellant submitted its brief in 127 pages. After appellee replied thereto, appellant submitted a reply brief of over 250 pages, covering the same subjects, but far more elaborately than in the original brief. This in turn called for the submission of a brief by appellee, which has been met by still further briefs. We cannot commend appellant's practice of partially presenting an argument in the main brief and reserving for the reply brief its real presentation. For its failure to comply with the rule appellant will be denied all costs in this court.

The decree is reversed, with directions to the District Court to dismiss complainant's bill.

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### LEHIGH VALLEY R. CO. v. SKOCZYLA.\*

(Circuit Court of Appeals, Third Circuit. February 2, 1922.)

No. 2781.

**Master and servant** ⇐288 (15)—Assumption of risk by workman using defective wrench held for jury.

A workman tightening nuts on a railroad bridge was given a wrench, which, as he knew, was worn and defective. He took it to his foreman, showed the defects, and told him it was "no good"; but the foreman without promise of repair or substitution, ordered him back to his work. While using the wrench, it slipped, and the workman fell from the bridge and was killed. *Held*, in an action for his death under Employers' Liability Act, § 1 (Comp. St. § 8657), that whether deceased assumed the risk, or whether he was justified in relying on the judgment of the foreman, was a question for the jury.

In Error to the District Court of the United States for District of New Jersey; John Rellstab, Judge.

Action at law by Frank Skoczyla, administrator of the estate of Paul Kulish, deceased, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Collins & Corbin, of Jersey City, N. J., and George S. Hobart, of Newark, N. J. (Edward A. Markley, of Jersey City, N. J., of counsel), for plaintiff in error.

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\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 463, 66 L. Ed. —.

Frank Hardenbrook and Charles M. Egan, both of Jersey City, N. J., for defendant in error.

Before WOOLLEY and DAVIS, Circuit Judges, and ORR, District Judge.

WOOLLEY, Circuit Judge. On a bridge devoted to both interstate and intrastate commerce, Kulish was tightening nuts with a wrench which he knew was old and worn, and therefore defective. The wrench slipped and he fell from the bridge and was killed.

At the trial of this action, brought by the administrator of Kulish to recover damages for his death, the court submitted the question of assumption of risk and the jury returned a verdict for the plaintiff. By this writ of error the defendant brings here for review the action of the court in refusing to hold, as matter of law, that the decedent had assumed the risk which resulted in his death. Specifying error in this regard, the defendant relies on *Pryor v. Williams*, 254 U. S. 43, 41 Sup. Ct. 36, 65 L. Ed. 120. In that case an employé of the defendant was directed by his boss to use a claw bar with a defective claw. Injury followed. The employé did not know of the defect, nor does it appear that his boss knew of it. The Supreme Court of the United States reversed the Supreme Court of Missouri in its holding that, as the risk was attributable to the master's negligence, the employé had not assumed it, but was guilty of contributory negligence, which, under the Federal Employers' Liability Act (Comp. St. §§ 8657-8665), goes only to damages. By this decision the Supreme Court of the United States sustained, inferentially at least, an intermediate appellate court which had held that as the defect was quite obvious, and as it was equally obvious to the employé and employer, the employé in using the claw bar must be held to have appreciated the danger and have assumed the risks thereof. While there is a similarity between a defective claw bar and a defective wrench, that is the only point of resemblance between the *Williams* Case and the case under review. Here the wrench was defective. In fact, the defect was so obvious that the employé saw it and knew it. The risk of using the wrench was, therefore, equally obvious. If in these circumstances alone Kulish had continued to work with the defective wrench he would, under *Pryor v. Williams* and many other cases, be held, as matter of law, to have assumed the risk and would have been without right to recover for resulting injuries. But he did more. He took the wrench to his foreman, showed him its defects, and told him it was "no good." This clearly was an objection to its further use. The foreman looked at it, and, making no promise of reparation or substitution, ordered him back to his work. Kulish's act of returning to his work under the command of the foreman was, in the mind of the learned trial judge, a circumstance which removed the case from *Pryor v. Williams* and brought it within *N. Y., N. H. & H. R. Co. v. Vizvari*, 210 Fed. 118, 126 C. C. A. 632, L. R. A. 1915C, 9.

In the *Vizvari* Case—also under the Federal Employers' Liability Act—the Circuit Court of Appeals for the Second Circuit sustained the submission to the jury of the question of assumption of risk upon facts

which disclosed that the employé, if he did not fully appreciate the defect of the tool with which he was working when injured, at least doubted its quality and called it to the attention of his foreman. As in this case, the foreman, without promising to repair it, abruptly ordered the employé back to his work, where later he was injured. The court held—though the employé had knowledge of the defect—his election to use the defective tool after making objection to his foreman did not, as matter of law, charge him with assumption of the risk of the defect, and that it was for the jury to say whether, on the foreman's order, the employé voluntarily assumed the risks incident to the continued use of the defective tool, and whether these risks were imminent and such as no man of ordinary prudence would encounter. The facts of the two cases being quite similar, the learned trial judge, in the case at bar, adopting the law of the Vizvari Case, submitted to the jury the question of assumption of risk. In this he is charged with error.

The Vizvari Case was decided in 1913. It was followed by two decisions of the Supreme Court of the United States in *Seaboard Air Line Railway Co. v. Horton*; the first on a writ of error in 1914 (233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475), and the second on a writ of error in 1916 (239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458). In the opinions on these writs the Supreme Court addressed its attention to the subjects of contributory negligence and assumption of risk under the Federal Employers' Liability Act. We cite the case not because of similarity in the facts but for the broad principles of law there announced. The law of the Horton Case was made on a state of facts differing in one particular from those of the instant case. In the Horton Case the injured employé knew the defect in an apparatus, made objection to his foreman and returned to work under his foreman's promise of reparation; while in the instant case, with like knowledge and after like objection, the employé returned to work on the foreman's order without a promise to repair it. Yet in their bearing on this case, the opinions in the Horton Case are instructive in that the court distinguished the risk of known defects assumed by an employé, having made objection or having obtained a promise of reparation, from the risk assumed by an employé working with knowledge of defects without objecting or without obtaining such a promise. Quoting from the opinion rendered on the second writ of error (239 U. S. 595, 597-599, 36 Sup. Ct. 180, 181 [60 L. Ed. 458]), the court said:

"When the employé does know of the defect (arising from the employer's negligence), and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Thus it appears from this language of the Supreme Court that an employé may, in varying circumstances, be relieved from the assump-

tion of risk of known defects when he calls them to the attention of his employer and objects further to use a tool containing them, or obtains from his employer an assurance of reparation. Admittedly, when such assurance is given, the law of the Horton Case applies without question. But where, as here, objection was made without eliciting a promise of reparation, we are of opinion under the language of the Horton Case as well as on authority of the Vizvari Case, the question whether an employé, on returning to his work, voluntarily assumed the risks incident to the use of the defective tool was for the jury, and that the test is whether the conduct of the foreman was such as to justify the employé in relying on the judgment of the foreman rather than on his own in the continued use of the tool, or, on the other hand, whether the danger from the defect in such continued use was so imminent that no man of ordinary prudence would hazard it.

As the charge of the court embodied this submission, it was free from error.

The judgment below is affirmed.

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PAULSON, LINKROUN & CO. v. BIDWELL.

(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2787.

**Sales** ⇐183(1)—Issue in action by seller for breach of contract.

In an action by the seller for breach of a contract for the sale and purchase of cotton cops, to be delivered in installments, where defendant, claiming that the cops delivered were not of a size called for by the contract, or a size which could be used in his mill, refused to pay for the same, and also canceled the contract and refused to accept further deliveries as authorized in such case by a state statute, *held*, that plaintiff's right to recover depended solely on the question of fact whether the cops delivered complied with the requirements of the contract, and that such question was properly submitted to the jury.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action at law by Paulson, Linkroun & Co., a corporation, against John A. Bidwell. Judgment for defendant, and plaintiff brings error. Affirmed.

David G. McConnell and Frank R. Savidge, both of New York City, for plaintiff in error.

Hutchinson & Hutchinson, of Trenton, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, a corporate citizen of New York, brought suit against the defendant, a citizen of Pennsylvania, to recover damages for breach of contract. On trial, the jury found for defendant, and, on entry of judgment, plaintiff took this writ of error.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

After a review of the record and consideration of the assignments, we find no error, and therefore affirm the judgment. The evidence in the case tended to prove that plaintiff contracted in writing with the defendant to sell and deliver 10,000 pounds of cotton cops, which latter are used in spinning, and which by the terms of the contract were to be "1¼ inches in diameter, 10 inches long." They were to be billed and shipped "May, June, and July, 1920, from mill." The contention of the plaintiff was that it delivered or tendered delivery of the cops contracted for, that defendant received, used, and refused to pay for those delivered, and declined to receive the balance. The contention of the defendant was that the cops delivered were not the cops contracted for, in that, instead of being 10 inches in length and an inch and a quarter in diameter, they were but 9 inches long and less than an inch in diameter, and that he was unable to use the latter size of cops in the shuttles in his mill. His contention is that he called the attention of the plaintiff to these facts, and, there being no substitution or offer to replace these cops with those of the correct size, he canceled the contract and refused to accept further deliveries.

The court below submitted the case to the jury in two different aspects. As to the cops delivered, there was a conflict of testimony; that produced by the defendant tending to show that a considerable part of them were not in compliance with the contract, while that of the plaintiff was that the cops were suitable for use, fulfilled the contract, and that defendant failed to prove any such examination of the delivered cops as would warrant the jury in finding they were not in accordance with the contract requirements. This issue of contract requirement and fulfillment the court submitted to the jury, saying:

"The question upon which you will decide this case will be whether there was substantial compliance with the contract, which called for cops 10 inches long and 1¼ inches in diameter. \* \* \* Now, was that a compliance with the contract? This is the gist of this whole case. If it was not compliance with the contract, the plaintiff is not entitled to his money; if it was compliance with the contract, the defendant owes the money."

Upon this issue of fulfillment or nonfulfillment the jury found for the defendant. As to the later deliveries, which the defendant refused to receive, on the ground that the defective character of previous shipments justified him in repudiating the contract, the case fell within the provisions of the Sale of Goods Act of New Jersey (4 Comp. St. N. J. 1910, p. 4657, § 45, subd. 2), quoted in the margin.<sup>1</sup> If the verdict of the jury established the defective noncompliance of the previous installment, as in point of fact it did, then the applicable part of the court's charge was:

<sup>1</sup> "Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract, and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

"If those first shipped did not comply with the contract, then you would consider this further question with respect to the second shipment, if they did comply, and that is whether, because of the defect, if you should so find it, in the first shipment, the defendant was justified in repudiating the entire contract. If he were, irrespective of what the condition of the second lot was, then you would find for the defendant as to all counts."

This issue the jury also found in favor of the defendant. We find no fault either in the fact of submission or in the manner thereof. Contract performance was the issue on which the right of the plaintiff to recover depended, and nonperformance the fact on which the right of the defendant to defeat recovery turned. Therefore that issue was for the jury, and it remains only to inquire whether error was made by the court in its language in submitting it. The only error alleged which need be referred to is the omission of the court to embody in its charge a point of the plaintiff which read:

"The jury may inquire into the good faith of the defendant in rejecting the delivery of the yarn."

The court did not deny the point; it simply read it and others, and seems to have simply taken no action upon them. No exception was taken to such omission, and consequently there is no basis for an assignment of error.

But assuming, for present purposes, the assignment was based on a timely exception, we see no harm done the plaintiff by the omission of the court to so charge the jury. The issue, as we have said, was contract fulfillment or nonfulfillment. That was a fact. If the contract requirements were met, that was a fact which warranted recovery by the plaintiff; if they were not met, that warranted recovery by defendant. If they were met, the plaintiff was entitled to recover, even though the defendant acted in perfect good faith. If they were not met, the defendant was entitled to recover, without reference to any other element. Indeed, the issue was one of fact, namely, whether the cops met, or did not meet, contract requirements, and this issue, fairly submitted, the jury determined in defendant's favor.

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THE HURON.

(Circuit Court of Appeals, Third Circuit. February 1, 1922.)

No. 2717.

**Maritime Lien** ¶23—A boom to replace an efficient one already on a dredge held not a "necessary."

A "necessary," the furnishing of which gives the right to a lien, must be something required for the proper equipment of the vessel, and a boom furnished to a dredge on order of the charterer to take the place of a shorter one with which the dredge was then equipped, and which was equally efficient for her use, held not a "necessary," entitling the furnisher to a lien under Act June 23, 1910, § 1 (Comp. St. § 7783), though under the charter party the charterer may have been required to equip

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the vessel with a longer boom before she was returned, to place her in the same condition as when received.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessary.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in admiralty by the Delanco Shipbuilding Company against the barge Huron; the Thompson-Lockhart Company, owner. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 271 Fed. 781.

Willard M. Harris, of Philadelphia, Pa., for appellant.

Lewis, Adler & Laws, of Philadelphia, Pa. (Otto Wolff, Jr., of Philadelphia, Pa., of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns the furnishing to a dredge of a derrick boom at the instance of the charterer. The libelant claims a lien by virtue of section 1 of the act of Congress of June 23, 1910 (Comp. St. § 7783), which gives one to "any person furnishing repairs, supplies, or other necessities," etc. The question here involved is one of fact, namely, whether under the circumstances of the case, the derrick boom furnished was a necessity to the dredge, for, as said by the Supreme Court in a case arising under this statute (Piedmont Coal Co. v. Seaboard Fisheries Co., 254 U. S. 9, 41 Sup. Ct. 1, 65 L. Ed. 97), "because the ship's need was the source of the maritime lien, it could arise only if the repair or supplies were necessary." In *The Plymouth Rock*, Fed. Cas. No. 11,237, it was said by Mr. Justice Hunt, "'Necessity' is a relative term;" and by Judge Benedict in the same case at nisi prius (No. 11,235):

"In order to bring an article within the description of necessities for a vessel, it need not appear that the voyage could not by any possibility be made without such article. It is sufficient, if the article form part of the natural and reasonable outfit of a vessel for the business in which she is engaged."

Applying these recognized legal admiralty principles to the present case, we inquire: "Was the derrick boom furnished by the libelant a necessity to the dredge?" As a general proposition, unquestionably so, for a derrick is necessary to the operation of a dredge, and a boom to the use of a derrick. But, while this is the general fact, it is the further fact in the present case that, when the libelant furnished this boom, the dredge had a derrick, and the derrick also had a boom suitable for dredge operation, and the uncontradicted testimony is the derrick provided with this boom had been operated for some 11 months. What the libelant did was to replace the old boom, and take its fittings and use them on the new boom, which it furnished. There is no dispute as to the fact that the second or 45 to 50 foot boom had been in use on the dredge for about 11 months, nor any testimony or even suggestion that the dredge's efficiency was in any way lessened by such length of boom, it would therefore seem the court below was justified in finding, as it did, that the new boom was not a dredge necessity.

This dredge necessity libellant attempts to establish on the theory that the new boom was a necessity, not from the standpoint of the efficiency of the dredge, but from the standpoint of the obligations of the charter party of the dredge as to the condition in which the charterer was bound by his contract to return it to the owner. This all-important difference of lien foundation is clear from the circumstances of the case. When the dredge was delivered to the charterer in May, 1918, its derrick was equipped with a boom 63 or 65 feet long, and the charterer agreed to—

"accept said dredge in her present condition and to return her to the party of the first part in as good a condition at the termination of the charter as when delivered hereunder, and further agrees to be responsible for and make good any and all loss or damage, partial or total, occurring to said dredge from any cause whatsoever, perils of the sea and rivers and accidents not excepted, until her redelivery to the party of the first part upon the termination of this charter as hereinafter provided."

Ten or 11 months thereafter this 63 or 65 foot boom was broken, and the charterer then replaced it with a boom 45 or 50 feet long. While, of course, this new boom was shorter, and to that extent lessened the former reach of the longer boom, it is not contended that it rendered the dredge inefficient. Presumably it did not, for it was used for about 11 months, and bade fair to be equally effective as a proper dredge equipment in the future. From the standpoint, therefore, of necessary derrick equipment, the dredge was under no necessity to have this second or working 45 or 50 foot boom taken out and replaced by a longer one. The necessity for it arose from the charterer's quoted covenant to return the barge in its original condition. But this contract obligation, and therefore contract necessity, was not a need of the vessel as a vessel, and while, as between the owner and the charterer, the contract necessity compelled the charterer to replace the working 45 or 50 foot boom with a boom as long as the original boom, it did not create a vessel necessity on the part of the vessel to require such a replacement in order to make the dredge effective.

Such being the case, the furnishing of this extra boom was not a necessity of the dredge, but was a nonnecessity so far as making the dredge efficient was concerned.

Finding no basis of boom necessity upon which to create a lien, the court below rightly dismissed the libel.

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### NIVOIS v. METAL PRODUCTS CO.

(District Court, D. Rhode Island. December 8, 1918.)

No. 87.

Patents  $\Leftrightarrow$  328—1,232,073, for cigarette case, held valid and infringed.

The Nivois patent, No. 1,232,073, for a cigarette case, held valid and infringed.

In Equity. Suit by Victor Nivois against the Metal Products Company. Decree for complainant.

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$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  
278 F.—25

Fitzgerald & Higgins, of Providence, R. I., and J. Granville Meyers and Richard B. Cavanagh, both of New York City, for plaintiff.

Alexander P. Browne, of Boston, Mass., and Arthur M. Allen, of Providence, R. I., for defendant.

BROWN, District Judge. Infringement is charged of letters patent No. 1,232,073, July 3, 1917, to Victor Nivois, for cigarette case. Claims 1, 2, 3, and 4 are in issue. The defense is that limitations must be read into the claims, and that, so limited, the claims are not infringed.

The patent relates to a special type of cigarette case, having two outer case sections and an inner "article holder" located between them, which is exposed to view in an upstanding position when the outer case sections are opened.

The specification states that in prior cases of this type the article holder has been positively or immovably held in an upstanding position, so that any pressure against the holder toward one or the other of the case sections would result in bending, distorting, or breaking the positive holding means.

The patentee states that he overcomes this by providing means that will permit of the holder being readily moved bodily toward and into nested relation with either of the case sections, without bending, straining, distorting, or breaking any of the connections.

The patentee also provides his case with a holder which embodies a pair of plates or walls, each with vertically arranged parallel grooves, the grooves of one wall being opposite those of the other wall, to provide individual cigarette pockets and to protect the cigarettes. The patentee also states that the corrugated plates or walls of the holder may be movable and separable relative to each other, so that each plate is adapted to be nested in its adjacent case section, or the two plates may be permanently connected at their side edges, so that they are at all times preserved in their substantially parallel relation.

Whether the plates are separable or permanently connected, the holder as an entirety is so supported when in upright position that it may be shifted bodily toward and into nested relation with either of the case sections, without liability of imparting breaking or bending strains to the sections or connecting parts.

A further feature is provision for quick and convenient filling of the holder with cigarettes.

The defense of noninfringement is based principally upon the contention that the expressions "yieldingly held," "movably supported," "movably held," and "yieldingly supported," which, in the claims in suit, respectively precede the words "in an upright position when the case sections are opened out," must be limited to the particular feature of construction described in the specification, to wit, holding or supporting in such manner that "the holder can be unseated" from its support, or, in other words, an article holder which is demountable from its support, and can be swung over toward either of the case sections by disengaging the lower edge of the holder from recess 25, as shown in Fig. 7.

Nothing in the file wrapper seems to require such limitation, or to amount to an admission by the patentee that this feature of unseating

the holder from groove 25 was an essential feature of his invention, or a qualification of claims made in broader language well adapted to cover this and equivalent forms of construction for making the holder "yieldably" held, instead of rigidly held, as in the prior Pedersen patent, No. 890,703, June 16, 1908.

The Examiner's objection that "the specification does not state how the holder can be unseated from groove 26" seems to have been completely answered, by reference to the specification itself—a mere matter of explanation. I find no suggestion of a required limitation of claims acceded to by the applicant.

The defendant's holder is movably or yieldably supported by a spring, and thus may be given the same movements as plaintiff's holder. It has also all other features of the claims in suit.

The defendant has produced, as prior art, defendant's Exhibit A, "the Friedrich or German case," which is a case comprising two outer covers and an inner holder spring, supported so that, as a whole, it may be swung to either side, toward one of the sides of the cover. The holder, however, is of one-piece construction, and does not have opposite wall members pivoted for relative movement toward and from each other, either member capable of being nested within its associated case section.

Objections are made to the sufficiency of the proof of the exhibit; but it is unnecessary to consider these objections specifically, for, assuming for the purposes of the argument the sufficiency of proof of the exhibit, it neither anticipates the claims in suit nor requires them to be so construed that they are not infringed. This exhibit does not show a holder with relatively movable walls, and does not justify the defendant's appropriation of features of plaintiff's device not present in the exhibit.

The claims in suit are for combinations in which the movable support is but one element, and it is an insufficient defense to a combination claim to show that any or all of the elements are old, if the combination as an entirety is new.

The validity of these claims is not disputed.

In my opinion nothing in the file wrapper, or in the prior art as represented by the Pedersen patent, or the Defendant's Exhibit A (assuming merely for the purposes of the case that its priority is duly proved), or by other exhibits, requires that the claims be limited to a combination having, as one element, an article holder that is demountable or removable from its support. Interpreted according to the natural meaning of these terms, the claims in suit are, in my opinion, valid, and are infringed by the defendant's structure.

A draft decree for the complainant may be presented accordingly.

## UNITED STATES v. CAMAROTA et al.

(District Court, S. D. California, N. D. February 6, 1922.)

No. 493.

1. Intoxicating liquors  $\S$  249, 255—Apparatus properly seized on premises by officer searching for intoxicating liquors, and will not be ordered returned or destroyed.

An officer, searching premises under a search warrant authorizing a search for intoxicating liquors, had a right in the performance of his general duty to prevent the commission of crime to seize articles designed to manufacture intoxicating liquor found on such premises, and, no trespass having been committed, they would not be ordered returned or destroyed, though they were not mentioned in the warrant.

2. Intoxicating liquors  $\S$  249—Occupant cannot avoid effect of search warrant by absenting himself.

The occupant of premises for the search of which a prohibition warrant is issued cannot avoid the effect of the search warrant by absenting himself from the premises.

3. Intoxicating liquors  $\S$  249—Search warrant need not name any person.

Under Act June 15, 1917, tit. 11, § 6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496 $\frac{1}{2}$ ), it is not necessary that a search warrant authorizing a search for intoxicating liquors shall name any particular person; the name of the place to be searched being sufficient.

Criminal prosecution by the United States against Joe Camarota and another. On motion by the defendant named for the return or destruction of certain property taken without a search warrant. Motion denied.

Joseph C. Burke, U. S. Atty., by Herbert N. Ellis, Asst. U. S. Atty., of Los Angeles, Cal.

H. L. Meyers, of Fresno, Cal., for defendants.

TRIPPET, District Judge. The defendant Camarota moves the court in this case to return or to destroy certain property taken by a prohibition officer without a search warrant, and upon his motion he states the facts and the grounds for his motion to be as follows:

"On the 18th day of August, 1921, the federal agent, T. J. Nicely, obtained a search warrant from the United States commissioner at Fresno, California, which search warrant authorized him to search the private premises at 1607 E street, in the city of Fresno, county of Fresno, California, and the property to be searched for named in the warrant was intoxicating liquor; that on the evening of the same day the state federal agent entered the premises known as 1607 E street, in said city, while no one was in possession of said premises, and after searching the same took therefrom the following articles: One 10-gallon copper still and coil complete; one 3-gallon keg moonshine brandy, four 5-gallon demi-johns mash; one 50-gallon barrel grape mash. Copy of said search warrant was served on defendant Allamprese, who was sitting in the yard in the rear of said premises. Defendant Camarota was not present when the search was made, and no warrant was served or shown to him, and theretofore no complaint was filed against Camarota. That on the next day, after having obtained the articles mentioned hereinabove, the said T. J. Nicely swore out a complaint for the arrest of said defendant Joe Camarota, charging him with possessing certain articles designed to manu-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

facture intoxicating liquor, and maintaining a common nuisance at his residence, and also charged him with manufacturing intoxicating liquor. \* \* \* That thereafter, in November, 1921, an information was filed against the said defendants charging them with violation of sections 8, 21, and 25 of title II of the National Prohibition Act of October 28, 1919. \* \* \* That no warrant was issued or complaint filed against defendant Camarota until after the entry upon his premises under the search warrant and seizure of the articles named. That no search warrant, or copy thereof, was served or shown to the defendant Camarota at any time. That search warrant issued to search defendant Camarota's premises authorized the federal agent to search only for intoxicating liquor. That the name of the defendant Camarota did not appear in the search warrant. \* \* \* Upon the above statement of facts defendant Camarota filed a petition in the above-entitled court, praying for the return or destruction of all of the property taken under such search warrant from defendant Camarota's residence, except the intoxicating liquor, which said petition is based upon the following principles of law: That the said seizure is in violation of defendants' rights guaranteed them by the Fourth and Fifth Amendments to the United States Constitution. That said seizure is in violation of the law governing search warrants."

This question is governed by the principles announced in the following cases: *Adams v. New York*, 192 U. S. 585, 595, 24 Sup. Ct. 372, 48 L. Ed. 575; *Weeks v. United States*, 232 U. S. 383, 398, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 391, 40 Sup. Ct. 182, 64 L. Ed. 319.

[1-3] Under the ruling in the case of *Adams v. New York*, supra, there is no question that the motion should be denied. The last two cases, however, are in conflict with the case of *Adams v. New York* in some particulars. I take it, however, that in neither of the last two cases does the court take the position that property obtained without the officer having committed a trespass should be destroyed or returned. The officer in the case before the court did not commit a trespass. The defendant Camarota certainly could not avoid the effects of a search warrant by absenting himself from the premises. It is not necessary that the search warrant name a particular person; the name of the place to be searched is sufficient. Act June 15, 1917, tit. 11, § 6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496 $\frac{1}{4}$ f); *U. S. v. Borkowski* (D. C.) 268 Fed. 408.

The officer, having entered upon the premises without having committed a trespass, and thus being lawfully there, and seeing a crime being committed, had a perfect right, and it was his plain duty, to seize the articles which were being used in committing the crime. In making such seizure, the officer could not do so by virtue of the search warrant, but in the performance of his general duty to prevent the commission of crime. *United States v. Fenton* (D. C.) 268 Fed. 221; *Ex parte Morrill* (C. C.) 35 Fed. 261, 267; 20 Stat. at Large, 341, § 9 (Comp. St. § 1676); *United States v. Welsh* (D. C.) 247 Fed. 239.

The motion will be denied.

## In re FRANK.

(District Court, D. Montana. January 23, 1922.)

No. 2449.

1. **Bankruptcy** ⚡372—Court has power to reopen estate on any equitable ground.

Under Bankr. Act, § 2(8), being Comp. St. § 9586, authorizing the court to reopen estates when not fully administered, and the final clause of said section, providing that nothing therein shall be construed to deprive the court of any power it would possess, were certain specific powers not enumerated, a court is not limited, in reopening estates, to cases where new assets are found, but may reopen an estate for the benefit of the bankrupt, where equity requires it.

2. **Bankruptcy** ⚡32—Amendments may be permitted in furtherance of justice.

A court *held* to have power to permit an amendment of the bankrupt's schedules, after the estate had been closed, to correctly state the name of the payee of a note scheduled.

In Bankruptcy. In the matter of David Frederick Frank, bankrupt. On petition of bankrupt to amend schedules. Granted.

C. W. Buntin, of Lewistown, Mont., for bankrupt.

BOURQUIN, District Judge. Adjudication was made October 22, 1921. Then followed, in order, reference, trustee, report of no assets, discharge of trustee, referee's report, proceedings concluded, and now the bankrupt, who has not been discharged, petitions to amend schedules to change the name of a creditor payee of a promissory note.

[1] If this requires reopening the estate, it is believed that the court has power to do so. The bankruptcy proceedings are primarily for the benefit of the bankrupt, and secondarily for the benefit of creditors. Administration of the bankrupt estate is to determine his creditors, and to relieve him from further obligations to them, as well as to distribute his property amongst them. It is a narrow construction of paragraph 8 and the final clause of section 2 (Comp. St. § 9586) to hold closed estates can be reopened only when new assets are discovered, reopened only for the benefit of creditors. Both the spirit of the law and the rules and principles of equity are otherwise. These latter authorize amendments at any stage consistent with equity, and reopening proceedings or rehearings to that end. See General Order 11 (89 Fed. vii, 32 C. C. A. xv) equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii), In re Sayer (D. C.) 210 Fed. 397, *contra*.

[2] But to permit the amendment does not require the estate to be reopened. No assets, and the trustee and referee having performed their duties, the proceedings are now limited to the court, wherein is power to amend. If, after amendment made, or otherwise, new assets are found, the estate can be reopened to administer them in connection with claims of creditors. If none are found, there will be no occasion to reopen the estate.

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Amendment will be made, the clerk will issue notice thereof to the creditor of the amendment, and he may show cause, if any he have, why the estate should be reopened.

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THE TONAWANDA.

(District Court, S. D. Florida. February 3, 1922.)

**Admiralty ¶29—Suits in rem against vessel and in personam against owner may be joined.**

Under new admiralty rule 14 (268 Fed. xl), providing that "in all suits for pilotage or damage by collision the libelant may proceed in rem against the ship and/or in personam against the master and/or the owner," the ship and the owner may be joined as respondents in a single libel for collision.

In Admiralty. Suit by the Brooks-Davenport Corporation against the Tonawanda and J. B. McDonell, owner. On exception to libel. Overruled.

E. O. Locke, of Jacksonville, Fla., for libelant.

L. W. Strum, of Jacksonville, Fla., for defendants.

CLAYTON, District Judge. This cause comes up for a hearing on the exception that there is an improper joinder of defendants, in that it is sought to hold the vessel libeled for the collision and for judgment of condemnation, and also for damages against the owner in his own proper person. The objection is that the libelant cannot proceed both in rem and in personam in the one libel but that he should bring separate libels.

The libelant asserts that there should be but one libel in order to avoid multiplicity of suits, and that this contention is supported by the principles and practice governing admiralty cases. The question must be considered with reference to the new admiralty rule 14 (267 Fed. x), which became effective March 7, 1921, and is in this language:

"Pilotage—Collision—Remedies.

"In all suits for pilotage or damage by collision, the libelant may proceed in rem against the ship and/or in personam against the master and/or the owner."

Of course this rule is a combination of and supersedes the old rules 14 and 15 (29 Sup. Ct. xl), adopted January 7, 1884. Their language is:

14. "In all suits for pilotage the libelant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone in personam."

15. "In all suits for damage by collision, the libelant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam."

I do not think that under the old rules above quoted there could be a joinder of a cause in rem with a cause in personam. Nor do I think that there is any settled authority that action ex delicto may be joined

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with those *ex contractu* in the same libel. But Parsons on Maritime Law, vol. 2, § 6, p. 672, seems to hold that such can be done and the author proceeds to say:

The "reason given for it is that no regard is paid to the names and forms of actions \* \* \* the evidence may be of the same nature in both cases and this great expense and delay is saved."

See *Borden v. Hiern*, Fed. Cas. No. 1,655, Blatchf. & H. 293-297.

The same authority seems to hold that action for freight brought in rem and in personam was sustained in *The Zenobia*, Fed. Cas. No. 18,-208, Abb. Adm. 48, and on page 692 the author says:

"If the suit be both in rem and in personam one process combining the two appropriate processes may issue and the marshal execute his process in the two, if separate, or each process may issue simultaneously;" that is, against the vessel and the person, "or as each, is wanted."

But whatever may have been held under the old rules cannot be controlling now. Admittedly this new rule 14 was made under the act of Congress and it has the force and effect of law—it is the law—under which the question here presented by the exceptions must be determined. This new rule plainly declares that suits for pilotage or damage by collision may be in rem against the ship and/or in personam against the master and/or the owner. To take any other view of the question would destroy any possible office of the conjunction "and" used in the rule.

I do not think that what is said in Benedict's Adm. (4th Ed.) § 294, and in section 319, in regard to joinder proceeding in rem and in personam, in regard to misjoinder, can have any bearing on this case, for I think the question here must be considered with reference to new rule 14 only. It appears to be not controvertible that this rule was intended to be in derogation of the old rules. I think it means that the different actions may be joined—the one against the vessel itself and the other against the owner.

The connection of the words "may proceed in rem against the ship" by use of the conjunctive "and" and before the words "the owner," leaves no room for doubting that the intention was to permit such joinder as the one here objected to. If it be said that process runs against the vessel different from the process against the owner, the answer is that all such details, if not now fully provided for, can be taken care of by the appropriate moulding of the decree.

It appears to me that the sum of \$1,500 is a sufficient amount for the bond for the release and restitution of the vessel to the owner, as the vessel the *Tonawanda* is probably not worth more than that sum, and therefore such bond is fixed in that amount, to be conditioned and executed as required by law and the rules governing in such cases.

It is ordered that 10 days, excluding this day, are allowed for the filing of the answer. Therefore I hold that the action here, combining a claim for damages against the accused colliding vessel with a person-al action against the owner, must be sustained.

The exceptions are overruled.

**LACKS v. MITCHELL, Federal Prohibition Director.**

(District Court, N. D. California, Second Division. December 29, 1921.)

No. 646.

**1. Intoxicating liquors ⇐72—Local prohibition director only necessary party to proceeding to compel issuance of permit.**

Under National Prohibition Act, tit. 2, § 1, subd. 7, providing that any act authorized to be done by the Commissioner may be performed by any assistant, or any one designated by him for that purpose, the local prohibition director, who refused an application for a permit, is a proper party defendant and the only necessary party to a proceeding in equity under section 6 to review the decision.

**2. Intoxicating liquors ⇐138—Cannot be withdrawn from bonded warehouse for beverage purposes.**

In view of the distinction made by the National Prohibition Act between liquor in bond and liquor out of bond held for private purposes, as manifested by title 2, § 3, of that act, providing that nothing therein shall prohibit the sale of warehouse receipts covering spirits in bonded warehouses, no liquors can be withdrawn for beverage purposes from a bonded warehouse, though an owner can remove his own liquor from a private warehouse for such purposes.

In Equity. Suit by Joseph M. Lacks against E. F. Mitchell, as Federal Prohibition Director, to review a decision of the Commissioner of Internal Revenue, refusing an application for a permit to withdraw intoxicating liquor from a government bonded warehouse for beverage purposes. Petition denied.

Ed. F. Jared, of San Francisco, Cal., for plaintiff.

John T. Williams, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal., for defendant.

RUDKIN, District Judge. This is a proceeding in equity under section 6 of title 2 of the National Prohibition Act (41 Stat. 310) to review a decision of the Commissioner of Internal Revenue refusing an application for a permit to withdraw intoxicating liquor from a government bonded warehouse for beverage purposes.

Two questions are presented for decision: First, may such a proceeding be instituted against the local prohibition director in the district where the application is made and refused? And, second, may intoxicating liquor in a government bonded warehouse be withdrawn therefrom for beverage purposes where the liquor was owned by the applicant at the time the National Prohibition Act took effect and was held by him for his private use?

[1] The act is silent on the questions of venue and jurisdiction, but subdivision 7 of section 1 of title 2 provides as follows:

"Any act authorized to be done by the Commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the Commissioner may be filed with an Assistant Commissioner or other person designated by the Commissioner to receive such records."

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In view of this provision, I am inclined to the opinion that the local prohibition director, who refused the application for a permit, is a proper party defendant, and the only necessary party. Any other construction of the act would compel litigants to resort to the District of Columbia, where the Commissioner of Internal Revenue resides, and I do not think that any such hardship was contemplated by Congress.

[2] A solution of the second question depends upon a construction of the National Prohibition Act and the decision of the Supreme Court in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548. The question for decision in that case was thus stated by the court:

"May a warehousing corporation lawfully permit to be stored in its warehouse, after the effective date of the Volstead Act, liquors admitted to have been lawfully acquired before that date and which are so stored, solely and in good faith, for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or bona fide guests?"

The question thus stated was answered in the affirmative. That case was decided more than a year ago, and soon thereafter the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, prescribed a regulation forbidding the withdrawal of intoxicating liquor in bond for beverage purposes. So far as I am advised, the validity of this regulation is now brought in question for the first time, and while the ruling of executive officers is not controlling upon the court, I think its validity has been very generally acquiesced in by the public. The act itself makes a plain distinction between liquor in bond and liquor out of bond held for private purposes. Thus section 3 of title 2 contains the following proviso:

"That nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

I am convinced, therefore, that Congress never intended that intoxicating liquor should be withdrawn from bonded warehouses for beverage purposes after the effective date of the National Prohibition Act.

The petition is accordingly denied.

In re KELLER.

(Court of Appeals of District of Columbia. Submitted January 12, 1922. Decided February 6, 1922.)

No. 1467.

**Patents ¶66—Rejection of claims as obvious changes of construction under previous patent affirmed.**

Rejection by the Patent Office of two claims for an auxiliary automobile windshield to be adjusted to the side frame of an ordinary windshield consisting of an improvement over a similar windshield shown in a previous patent to applicant, on the ground that the claims represented obvious changes in the construction shown in the patent, *held* correct

Appeal from the Commissioner of Patents.

Application for a patent by Clarence D. Keller. From a decision of the Patent Office refusing two claims, the applicant appeals. Affirmed.

A. B. Cushman and John J. Darby, Jr., both of Washington, D. C., for applicant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. This appeal is from a Patent Office decision refusing two claims for an auxiliary automobile windshield adapted to be adjusted to the side frame of an ordinary windshield, and constituting in some respects an improvement over a similar windshield shown in a patent issued to applicant. The Patent Office rejected these claims as representing obvious changes in the construction shown in the patent.

For the reasons stated in detail by the tribunals of the Patent Office, which we need not restate here, the decision is affirmed.

Affirmed.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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DOSENBACH v. WEBSTER.

(Court of Appeals of District of Columbia. Submitted January 18, 1922. Decided February 6, 1922.)

No. 1477.

**Patents ¶91(4)—Evidence held to show one party to interference did not conceive essential feature of invention.**

In interference proceedings involving an invention of a process for concentrating copper ores, evidence *held* to show that the essential feature of the invention was the precipitation of copper in a metallic state to be thereafter separated by some known process, so that a party who, before the conception of the other, had conceived only the idea of separating the metallic copper from the ore by flotation, did not show a conception of the invention in issue.

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Appeal from the Commissioner of Patents.

Interference proceedings between Benjamin H. Dosenbach and Milton F. Webster. From a decision of the Commissioner of Patents awarding priority to Webster, Dosenbach appeals. Affirmed.

John M. Coit and James A. Watson, both of Washington, D. C., and J. Edgar Bull, of New York City, for appellant.

Archibald Cox and Harry A. English, both of New York City, and William G. Henderson, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is in an interference proceeding in which the tribunals of the Patent Office concurred in awarding priority of invention to appellee Webster.

The invention in issue is set forth in eleven counts, the following two of which are illustrative:

"1. A concentration process comprising the operations of leaching the ore, precipitating the dissolved metal in the metallic state in the ore, and separating such precipitated metal from the ore by flotation.

"7. The process of extracting copper from its ore, comprising comminuting the ore, mixing the ore with a copper solvent, and precipitating the copper from the solvent in the form of metallic copper; and separating the metallic copper from the ore pulp by concentration."

The invention is described in the opinion of the Assistant Commissioner as follows:

"The subject-matter of this interference is a process for treating copper ores and particularly those known as oxide ores which are not susceptible of concentration by the flotation process commonly used with sulphide ores. The process consists in grinding the ore, treating the ground material with sulphuric acid to dissolve the copper values present in the ore, introducing metallic iron which combines with the copper sulphate, forming iron sulphate and precipitating the copper, and in separating the precipitated copper by concentration by gravity or by flotation."

Appellant Dosenbach claims to have conceived and reduced the invention to practice in November, 1914, while Webster claims to have conceived the idea of concentrating the ores and precipitating the dissolved metal into the pulp in October, 1914. The parties, however, seem to differ as to the real gist of the invention here involved. Dosenbach's conception seems to have been limited to the idea of separating the metallic copper from the ore by flotation, while Webster seems to have directed his energies toward the process of precipitating the copper in a metallic state to be separated by some known process. On this point we agree with the Commissioner that precipitation is the essential step in the invention and that "flotation might be replaced by some other method of concentration without destroying the process in issue."

We think, therefore, that Dosenbach has failed to show even conception of the essential feature of the invention in issue on the dates claimed by him. On the other hand, Webster's dates are well corroborated and his efforts were directed to the development of the invention of the issue. Indeed, the present contention of Dosenbach that separation by flotation constitutes the chief feature of the invention is not con-

sistent with his original specification wherein he seems to treat the matter of flotation as a secondary feature. In his specification he states:

"My process is not restricted to the use, or nonuse, or the use of any particular floating agent, and includes the operation regardless of whether the flotation be affected by the addition of frothing agents or by the properties imported to the pulp by the various salts formed in the leaching operation."

He also refers in his specification to affecting flotation "in any of the well-known forms of apparatus \* \* \* or by means of jets" as illustrated in the prior art.

Without stopping to review the testimony, we are of the opinion that Webster, as unanimously found by the tribunals below, has clearly established his claim to priority.

The decision of the Commissioner is affirmed.

Affirmed.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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DOSENBACH v. WEBSTER.

(Court of Appeals of District of Columbia. Submitted January 13, 1922. Decided February 6, 1922.)

No. 1478.

1. Patents ¶91(4)—Evidence held to show prior conception of invention in issue.

In interference proceedings involving an invention of a process for concentrating copper ores where sulphide and nonsulphide ores were mixed, evidence that the experiments of the prior inventor were conducted with ore from the mine which produced a mixture of sulphide and nonsulphide ores held to establish the conception of the invention in issue, though there was nothing in the record to show he conceived the idea of applying the process to such mixed ores.

2. Patents ¶112(4)—Issuance of patent gives no advantage in interference between co-pending applications.

A patentee is entitled in interference proceedings to no advantage from the issuance of his patent where the interfering applications were co-pending in the Patent Office.

Appeal from the Commissioner of Patents.

Interference proceedings between Benjamin H. Dosenbach and Milton F. Webster. From a decision of the Commissioner of Patents, awarding priority to Webster, Dosenbach appeals. Affirmed.

John M. Coit and James A. Watson, both of Washington, D. C., and J. Edgar Bull, of New York City, for appellant.

Archibald Cox and Harry A. English, both of New York City, and William G. Henderson, of Washington, D. C., for appellee.

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VAN ORSDEL, Associate Justice. This appeal is from the decision of Commissioner of Patents awarding priority of invention to appellee Webster.

The interference is between a patent to Dosenbach issued June 11, 1918, on an application filed March 7, 1918, and an application of Webster, filed January 23, 1917.

This is a companion interference to No. 1477, — App. D. C. —, 278 Fed. 395, just decided. Dosenbach's application here involved was a division of his application in the companion case. The present interference is submitted on proofs presented in No. 1477. The interference is in two counts, as follows:

"1. A process of concentrating ores containing copper in different chemical compounds, one of such compounds being sulphide of copper, which consists in subjecting the ore to the action of a solvent which causes the nonsulphide copper to go into solution while leaving the sulphide copper substantially unaltered, precipitating the dissolved copper in the metallic state in the mixture of ore and solvent, and then separating the precipitated copper and sulphide copper from the gangue by flotation.

"2. A process for concentrating ores containing sulphide copper and compounds of copper that are convertible in sulphates by the action of sulphuric acid comprising the operations of subjecting the ore to the action of sulphuric acid forming copper sulphate, precipitating the copper in the metallic state in the mixture of ore and acid, and then separating the precipitated copper and the sulphide copper from the gangue by flotation."

The same process is involved in this interference as in the companion case, but in the present case it is applied to ores containing both sulphide copper and nonsulphide, which may be converted into sulphates by the action of sulphuric acid. It is urged by counsel for Dosenbach that there is nothing in the record to show that Webster conceived the idea of applying the process to ores which contained sulphides as well as nonsulphides, and the Examiner and Board of Examiners in Chief held that inasmuch as the record fails to show that Webster conceived the idea of applying the process of the companion case to ores which contain both sulphides and nonsulphides, that he must be confined to his record date, which is subsequent to the original application of Dosenbach.

[1] We are not impressed with this contention, since the evidence discloses that the process was invented by Webster to solve the problem of treating ores from Bullwhacker Mine, at Butte, Mont., and that this ore, while predominantly oxide, contained sulphide copper. It also appears that Webster had made considerable study of the most approved methods of flotation, and that the ores treated by him at the East Butte Mine were sulphide copper.

[2] Dosenbach is entitled to no advantage from the issuance of his patent since the applications were co-pending in the Patent Office. The process described in the claims combine three steps, first, subjecting the comminuted mixture of sulphide and nonsulphide ore to the action of sulphuric acid to dissolve the copper; second, introducing a copper precipitant into the solvent to precipitate the dissolved copper as metallic copper into the pulp; third, floating out the metallic and sulphide copper.

In determining who is the inventor of this process, it is only necessary to consider the new and patentable features of the invention. The first and third steps are old in the art. The invention, therefore, resides in the second step, namely, in precipitating the solvent in the form of metallic copper into the pulp. This is the invention involved in the companion interference in which we have held that Webster is entitled to priority. To award priority in this interference to Dosenbach would be inconsistent with our holding in the other case. As was said by the Commissioner:

"An award of priority of the issue herein gives Dosenbach rights excluding Webster, the winning party in the earlier interference, from using his prior invention on the ores he treated in his experiments which the evidence here considered has been uniformly held to show reduction to practice prior to Dosenbach."

The decision of the Commissioner of Patents is affirmed.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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**In re MUMMERT.**

(Court of Appeals of District of Columbia. Submitted January 12, 1922 Decided February 6, 1922.)

No. 1473.

**Patents** ⇨ 138(1)—Exception to limitation for application for reissue only made where delay is unavoidable.

While the rule requiring an application for reissue to be made within two years after the original issue is not inexorable, it is enforced with strictness, and exception is only made where the excuse for delay is either unavoidable or it is clear that the rejection would result in great injustice, and a showing that a delay of three and one-half years was caused by the ill health of applicant, the death of her husband and the absence of her son in the military service, is insufficient.

**Appeal from the Commissioner of Patents.**

Application by Alice N. Mummert for a reissue patent for dust collecting bag for vacuum cleaners. From a decision of the commissioner of patents rejecting two of the claims in the application, the applicant appeals. Affirmed.

Fred L. Chappell and Otis A. Earl, both of Kalamazo, Mich., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

**VAN ORSDEL, Associate Justice.** This appeal is from a decision of the Commissioner of Patents rejecting the following claims in a reissue application:

9. A dust-collecting bag for a vacuum cleaner formed of crêpe paper, the texture of which permits the passage of air and filters the dust therefrom.

10. A dust-collecting bag for vacuum cleaners formed of paper, the texture

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of which has been opened sufficiently to permit the free passage of air there-through and to filter and collect the dust therefrom.

The claims were rejected upon two grounds:

- (1) Laches or delay in filing the application.
- (2) On the ground that appellant is estopped to make the claims since claims to the same subject had been formerly made by appellant and canceled.

The present application for reissue was filed more than 3½ years after the original patent was granted, and while appellant has attempted to excuse her delay in applying for reissue, on the grounds of ill health, the death of her husband, and the absence of her son in the military service, we agree with the Commissioner that in the light of the record the excuse is not sufficient.

It is apparent that it was not until others had entered the field that appellant appreciated the value of porous paper as a dust-collecting medium. In her original specification she defined the invention as relating "to new and improved dust-collecting bags and vacuum cleaners and more particularly to an improved bag for this purpose which is constructed of a single blank of paper or cloth." In another place cotton flannel and crepe paper are suggested as suitable material. The importance of paper was not suggested in the original claims, but on September 29, 1913, three claims were presented by amendment relating to a bag comprising a paper body, and subsequently on December 12, 1913, by an amendment which called for "crimped" and "crepe" paper. These claims were rejected by the Examiner and the patent was not allowed until appellant had canceled the references therein to "paper," "crepe paper," and "crimp paper." The application was allowed to forfeit, and upon renewal two claims were presented which related solely to a bag for vacuum cleaners made of crepe paper. These claims the Examiner rejected upon certain references, whereupon applicant canceled the claims and inserted two others directed to the form of the bag and the blank from which the bag is made. Nothing further was said relative to the importance of paper. In this condition the patent was granted and accepted. It is therefore apparent that the value of porous paper as a dust-collecting medium was an afterthought, hence this delayed application for reissue.

While the rule that an application for reissue must be made within two years after the issue of the original patent is not inexorable, yet the courts have enforced the limitation with strictness, and exception is only made in cases where the excuse for delay is either unavoidable or it is clear that the rejection of the application would result in great injustice. Without stopping to analyze the facts in this case, we are of the opinion that the Commissioner was justified in rejecting the application. It is unnecessary therefore to consider the question of estoppel.

The decision of the Commissioner is affirmed.

Affirmed.

Mr. Justice HOEHLING of the Supreme Court of the District of Columbia sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

SEVENSMA v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1922.)

No. 3583.

1. Criminal law  $\S$  475—Evidence as to amount of narcotics physicians could reasonably use held admissible.

In a prosecution of a physician for violating the Harrison Anti-Narcotic Law, as amended by Act Feb. 24, 1919, §§ 1006, 1007 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287i), where defendant was duly registered under that act, it was proper to show by expert testimony of a physician, druggist, and revenue agent the usual and ordinary requirements of narcotics by other physicians in their average practice, so that the jury might determine whether the amount purchased and used by defendant was so excessive as to tend to prove the offenses charged in the indictment.

2. Criminal law  $\S$  483—Question as to quantity of narcotics which could be prescribed for person held objectionable.

In the prosecution of a physician for violating the Harrison Anti-Narcotic Law as amended by Act Feb. 24, 1919, §§ 1006, 1007 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287i), a question asked by the defense of a trained nurse as to whether the amount defendant was prescribing in a particular case was necessary was objectionable, as stating no predicate for the necessity to which the question referred, so that the answer might have been based on the amount necessary to satisfy the cravings of an addict.

3. Criminal law  $\S$  846—Purpose of exception is to direct court's attention to error claimed.

The purpose of an exception is to direct the attention of a trial court to a definite proposition of law in reference to which it is claimed that court has erred, to the end that the court may reconsider, and, if convinced, change, its ruling, and thereby obviate a new trial because of an inadvertent error.

4. Criminal law  $\S$  1059 (2)—General exception to charge not considered, unless error is manifest and vital.

A general exception to the charge will not be considered by the reviewing court, except where there is a manifest error on a question vital to the accused.

5. Criminal law  $\S$  1056 (1)—Evidence as to guilt held not to require review of charge without exception.

In a prosecution for violating the Harrison Anti-Narcotic Law, as amended by Act Feb. 24, 1919, §§ 1006, 1007 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287i), evidence for the government held sufficiently substantial to sustain a conviction, even if those sections of the statute were construed as argued by counsel for accused, so that the charge construing the statute will not be reviewed, in the absence of any exception thereto at the time.

6. Criminal law  $\S$  1159 (2)—Appellate court does not determine weight of evidence.

The Circuit Court of Appeals, in reviewing a conviction for crime, has nothing to do with the weight of the evidence, under Rev. St. § 1011 (Comp. St. § 1672).

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Arthur Sevensma was convicted of violating the Harrison Anti-Narcotic Law, and he brings error. Affirmed.

M. Thomas Ward, of Grand Rapids, Mich. (Clapperton & Owen, of Grand Rapids, Mich., of counsel), for plaintiff in error.

Myron H. Walker, U. S. Atty., of Grand Rapids, Mich.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The plaintiff in error, Arthur Sevensma, was indicted at the October term, 1920, of the United States District Court for the Western District of Michigan, Southern Division, for the violation of the Revenue Act of December 17, 1914, commonly known as the Harrison Anti-Narcotic Law, as amended by sections 1006, 1007, of the Revenue Act of 1919 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287i).

The indictment contained six counts. The first, second, and third counts charged Sevensma, a practicing physician in the city of Grand Rapids, Mich., who had been duly registered and had paid the special tax as required by the act above mentioned, with the sale at different dates of quantities of morphine to persons named in the indictment, and to other persons whose names were unknown to the grand jury, such sales not being made upon a written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, and not to a patient of the said Arthur Sevensma in the course of his professional practice only, nor to a patient upon whom the said Arthur Sevensma did personally attend in his capacity as said physician, and that the said Arthur Sevensma then and there kept no record of such drugs, or of any of them, so dispensed and distributed, as required by the statute in such cases. The fourth, fifth, and sixth counts charged Sevensma with procuring at different dates large quantities of morphine for an unlawful purpose, and not for use, sale, and distribution thereof in the conduct of a lawful business in said drug, nor in the legitimate practice of his profession.

At the December term, 1920, a second indictment was returned against Sevensma, which indictment also contained six counts, each of which counts charged the defendant with unlawfully procuring, at different times, large quantities of opium, for unlawful purposes, and not for use, sale, and distribution thereof by the defendant in the conduct of a lawful business in said drug, or in the legitimate practice of his profession.

To both of said indictments, and each count thereof, the defendant Sevensma pleaded not guilty. Prior to the trial, and it appearing to the court that the second indictment was in fact a substitute for counts 4, 5, and 6 of the first indictment, these indictments were consolidated, and the trial proceeded upon the first three counts of the first indictment, and upon all six counts of the second indictment, resulting in a verdict of guilty as charged in the consolidated indictments, and sentence was imposed by the court.

The assignments of error are divided by counsel for plaintiff in error into two classes: First, admissibility of evidence; second, charge of the court.

[1] It is claimed on behalf of the plaintiff in error that the court erred in admitting the testimony of Dr. Whinery with reference to the amount of morphine a physician of average practice in the city of Grand Rapids would use in the course of a year in the legitimate practice of his profession. A similar objection was made to the testimony of C. H. Duda, foreman of a pharmacal company of Chicago, and the witness Ulmer, a revenue agent, in reference to the amount of morphine usually purchased by physicians of average practice.

The government had introduced evidence tending to prove that Sevensma had used a total of about 34,465 grains of morphine in two years and three months' time. In view of the fact that Dr. Sevensma was a practicing physician, duly registered under the Harrison Anti-Narcotic Act, it was entirely proper to show by expert evidence the usual and ordinary requirements of physicians in the average practice of their profession, in order that the jury might determine from this evidence if the amount purchased and used by the defendant was so excessive that that fact, in and of itself, tended to prove the offenses or either of them charged in this indictment. The importance of this evidence more fully appears by the testimony of Dr. Whinery that from 200 to 250 grains would cover the amount that a doctor in the average practice of medicine would use in a year, and by the testimony of Mr. Duda, who it appears was fully qualified to testify on that subject, that the orders given by the defendant were unusual in amounts and very much out of the ordinary. The testimony of the witness Ulmer is to the same effect. The defendant, if he had desired to do so, might have offered evidence tending to prove, either that these witnesses were mistaken as to the average amount used by physicians generally, or that his practice differed so materially from the practice of the average physician that he was required to use, in the legitimate practice of his profession, this large and seemingly excessive amount of this drug. For the reasons stated, there was no error in the admission of the testimony of these witnesses.

[2] During the trial of the case the witness Beatrice Buel was asked the following question:

"Q. I will ask you whether or not, from your experience as a trained nurse, and your knowledge of this sort of cases, if in your opinion 150 grains a week, that Dr. Sevensma was prescribing, was absolutely necessary to this girl?"

To this question the government interposed an objection, which was sustained by the court. This is also assigned as error.

This question was objectionable, for the reason that it states no predicate for the necessity of the person to whom the question referred using this quantity of this drug each week. Therefore any answer the witness might have made to this question might have been based entirely upon the amount of the drug that was necessary merely to satisfy the cravings of this addict, regardless of its need for other purposes. Notwithstanding this objection to this question, the witness did answer, "I think it was." No motion was made to rule out the answer, and it was permitted to stand as given. Not only that, but shortly before this question was asked this witness, she had testified that 150 grains of morphine a week is not considered a large dose by addicts, so that the

defendant had in substance and effect the full benefit of the testimony sought to be elicited by this question.

It is further claimed on behalf of the plaintiff in error that the court erred in its charge to the jury in failing to distinguish between the provisions of the statute relating to the purchase of morphine generally from dealers upon written orders of the purchasers and the requirements and exceptions in sections 1 and 2 of the act (Comp. St. §§ 6287g, 6287h) relating to the dispensing and distribution of drugs by physicians in the course of medical practice, and the sale, dispensing, and distribution of dealers to purchasers of such drugs, and in failing to set forth clearly and to the understanding of the jury the primary purposes of the act, its application to the sale or to the purchase of such drugs, as distinguished from the dispensing and administering of drugs by physicians in their medical practice, and the exemption of such physicians from requirements relating to dealers in the business of selling morphine directly to purchasers, and, further, in connecting the dispensing and administering of drugs by the respondent with the question of good faith.

While a large part of the brief for plaintiff in error is devoted to a discussion and analysis of the amended sections of the Anti-Narcotic Act upon which this prosecution is based, the defendant took no exception whatever to the charge of the court construing these statutes. Therefore this record presents no error of law for review by this court, other than those relating to the admission and rejection of evidence, which have heretofore been considered in this opinion.

[3] The purpose of an exception is to direct the attention of a trial court to a definite proposition of law, in reference to which it is claimed the court has erred, to the end that the court may reconsider, and, if convinced that it has erred, change, its ruling, so that injustice and mistrials due to inadvertent errors may thus be obviated. *U. S. v. U. S. Fidelity Co.*, 236 U. S. 512-529, 35 Sup. Ct. 298, 59 L. Ed. 696; *Tucker v. U. S.*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112.

[4] Even a general exception to a charge will not be considered by the reviewing court, except where there is a manifest error upon a question vital to the defendant. *Gardner v. U. S.*, 230 Fed. 575, 144 C. C. A. 629.

[5] The verdict of the jury is sustained by some substantial evidence tending to establish that the defendant dispensed and distributed morphine other than in the course of his professional practice only, and to persons other than patients upon whom he personally attended in his capacity of such physician, and that he kept no record of such sales.

[6] There is also evidence tending to prove that he had obtained from time to time, and had in his possession, large quantities of this drug, for the purpose of dispensing and distributing the same in the manner and form above stated, and in direct violation of the terms and provisions of these amended sections of the Harrison Anti-Narcotic Law. There is also substantial evidence to the contrary, but with the weight of the evidence this court has nothing to do. Section 1011, R. S. (Comp. St. § 1672).

The credibility of the witnesses, the weight of the evidence, are questions for the determination of the jury, and where there is some substantial evidence tending to support the verdict, this court has no authority to disturb the findings of fact by the jury, even in cases where the sufficiency of the evidence is presented by the record. This record presents no such question.

It appearing from the record that the evidence introduced on the part of the government would, if believed by the jury, sustain a verdict of guilty, even if these amended sections of the statute were construed in line with the construction given them by counsel for plaintiff in error, therefore this is not a case that calls upon a reviewing court to consider the correctness of a charge, challenged for the first time in the motion for a new trial.

Judgment affirmed.

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**LOWTHER v. NEW YORK LIFE INS. CO. et al**

(Circuit Court of Appeals, Third Circuit. February 7, 1922.)

No. 2700.

**1. Courts ⇨276—Objection to district of suit waived by general appearance.**

A defendant, by appearing generally and contesting a motion for preliminary injunction, waives objection to the jurisdiction on the ground that the suit was not brought in the proper district.

**2. Courts ⇨508(1)—In interpleader suit, court may not enjoin prosecution of prior suit in state court.**

The provision of the Interpleader Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991a), authorizing the court in suits thereunder to "issue the necessary writs usual and customary in such cases," does not by implication repeal Judicial Code, § 265 (Comp. St. § 1242), prohibiting federal courts from granting injunctions to stay proceedings in a state court, except in bankruptcy proceedings, but is to be construed with due regard to such limitation, and the court in a suit thereunder is not authorized to enjoin prosecution to judgment of an action in a state court, which was first instituted.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Interpleader suit by the New York Life Insurance Company against Roland B. Lowther and others. From an order granting an injunction, defendant Roland B. Lowther appeals. Reversed.

John N. Platoff, of Union Hill, N. J. (Stanley M. Lazarus, of New York City, of counsel), for appellant.

James H. McIntosh and Richard Hartshorne, both of New York City, for appellee New York Life Ins. Co.

Howard Isherwood, of Newark, N. J., for appellee Pearl B. Lowther.

Before WOOLLEY and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is an appeal from an order of the United States District Court enjoining the appellant from prosecuting

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a suit against the appellee in the Supreme Court of the state of New York. On April 17, 1894, the appellee issued a policy of life insurance on the life of Harry F. Lowther, a resident of the state of Kansas, and agreed to pay the proceeds thereof to Katie Lowther, his wife, or, in the event of her death before his, then to his executors, administrators, or assigns. She died June 7, 1904, and on July 31, 1908, he assigned the policy to Pearl B. Lowther, his then wife, but revoked it 10 years later, September 23, 1918. He assigned the policy October 9, 1918, to Laura W. Lowther, his sister, and revoked it April 8, 1919. On that same day he assigned the policy to Roland B. Lowther. Copies of these assignments and revocations were duly filed with the insurance company. The assignment to Roland B. Lowther purported to be irrevocable, while the others were revocable.

Harry F. Lowther died May 7, 1920. Proof of his death was received and approved by the insurance company, and thereupon it became obligated to pay the proceeds of the policy, amounting to \$2,493, to the person to whom they legally belong. All three assignees, Pearl B. Lowther, Laura W. Lowther, and Roland B. Lowther, claim and have demanded payment of the policy. For the purpose of securing the proceeds, Pearl B. Lowther instituted proceedings against the insurance company in the Supreme Court of the state of New Jersey, and Roland B. Lowther instituted proceedings in the Supreme Court of the state of New York. Laura W. Lowther bases her demand on the assignment made to her, she alleges, "to cover medical care and attention furnished to the insured, Harry F. Lowther," by her.

The insurance company stands ready to pay the proceeds of the policy to the person legally entitled to them, and has been willing to do so ever since the death of the insured, but is unwilling to decide the controversy among the rival assignees. Accordingly it filed a bill of interpleader under the provisions of Act Feb. 22, 1917, 39 Stat. 929 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991a), in the United States District Court for the District of New Jersey, and deposited the amount of the policy with the clerk of the court, praying that the three claimants be served with process and required to interplead, and that they be restrained "from bringing or maintaining any suit or suits against plaintiff (insurance company) on account of said insurance or from instituting and continuing any proceeding or proceedings whatever with that object." Upon preliminary hearing the defendants were enjoined from instituting proceedings or continuing any already begun, and Roland B. Lowther appealed from that order to this court, on the ground that the court was without jurisdiction because proceedings were not instituted in the proper district, and on the further ground that the court exceeded its power in granting the injunction. Section 720 of the Revised Statutes of the United States, re-enacted in section 265 of the Judicial Code (Comp. St. § 1242).

[1] The Act of February 22, 1917, provides:

"That in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership, or where the same has been assigned and written notice thereof shall have been given to the insurance

company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside."

Pearl B. Lowther resides in the district of New Jersey, and Laura W. Lowther and Roland B. Lowther reside in the city of Chicago, Northern district of Illinois, Eastern division. Roland B. Lowther contends that he is the only subsisting assignee of this policy on the books of the plaintiff company. An assignee is a "beneficiary," within the meaning of the act, and, if Roland B. Lowther is the sole beneficiary, suit should have been instituted in the Eastern division of the Northern district of Illinois. *Penn Mutual Life Insurance Co. v. Henderson* (D. C.) 244 Fed. 877; *New York Life Insurance Co. v. Kennedy* (D. C.) 253 Fed. 287.

It should be borne in mind, however, that the other two defendants are attacking the validity of the assignment to Roland B. Lowther, and it might be that on final hearing that assignment might be declared invalid, and the assignment to Pearl B. Lowther or Laura W. Lowther adjudged valid. Our attention has been called to the fact that Pearl B. Lowther, in a suit in replevin in the First district court of Newark, N. J., secured a judgment against Roland B. Lowther for this policy, and a certified copy of this judgment was filed with the insurance company before the bill of interpleader was filed. Furthermore Roland B. Lowther failed to protect his position by entering a special appearance for the purpose of testing the jurisdictional question. Process was served upon him in accordance with the provisions of the act, and he appeared and contested the injunctive proceedings and appealed to this court. He thus became an actor in the cause, and this constituted a general appearance and conferred jurisdiction over him. *Ridgway v. Horner*, 55 N. J. Law, 84, 25 Atl. 386; *Merchants' Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488; 2 Ruling Case Law, 323.

[2] Section 265 of the Judicial Code provides that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The insurance company contends that the above section was repealed by implication by the following provision in the Interpleader Act:

The District Court "shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees."

What is now known as section 265 of the Judicial Code was first enacted March 2, 1793 (1 Stat. 335), and has been the law running through all the decisions from that time. It still stands as the law, unless repealed by this act. *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Simon v. Southern Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Public Service Co. v. Corboy*, 250 U. S. 153, 39 Sup. Ct. 440, 63 L. Ed. 905.

"It tends to prevent unseemly interference with orderly disposal of litigation in the state courts and is salutary." *Wells, Fargo & Co. v. Taylor*, 254 U. S. 183, 41 Sup. Ct. 93, 65 L. Ed. 205.

Courts do not favor the repeal of statutes by implication. A later statute will not be held to repeal a prior one, unless their terms are repugnant, and it becomes necessary so to hold, in order to give effect to the later statute. 25 Ruling Case Law, 918; *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614. The provision of the Interpleader Act is not necessarily repugnant to section 265 of the Judicial Code. "The necessary writs usual and customary in such cases" are such writs as have been usually and customarily issued in interpleader actions generally, with due regard to section 265 of the Judicial Code. The prohibition of the statute is not avoided by enjoining the litigant and not the state court. *Essanay Film Manufacturing Co. v. Kane* (C. C. A.) 284 Fed. 959; *Peck v. Jenness*, 48 U. S. 612, 625, 12 L. Ed. 841.

This statute, however, does not prevent federal courts from: (1) Enjoining the institution in state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States; (2) maintaining and protecting their own jurisdiction properly acquired and still subsisting, by enjoining attempts to frustrate, defeat, or impair it through proceedings in the state courts; (3) depriving a party by means of injunction of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience. *Wells Fargo & Co. v. Taylor*, supra, and cases there cited. The facts as they presently appear do not bring the instant case within any of the above rules. If the appellant should prosecute his case in the Supreme Court of New York to final judgment, whether or not it might become necessary to enjoin him from obtaining the fruits of that judgment we are not now deciding. All that we now decide is that section 265 of the Judicial Code prevents a federal District Court from staying proceedings in a state court before final judgment, where these proceedings were first instituted in the state court, and the injunction is not authorized by any law relating to proceedings in bankruptcy.

The order of the District Court enjoining the appellant will be reversed, and the injunction dissolved.

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**PUBLIC SERVICE RY. CO. v. WURSTHORN et al.**  
(Circuit Court of Appeals, Third Circuit. January 30, 1922.)  
No. 2718.

**1. Negligence §32(1)—Care required of landowner under common law of New Jersey.**

While, under the common law of New Jersey, as settled by its courts, a landowner is not liable for negligence causing injury to a trespasser, that rule does not extend to the case of a licensee, or of one who is upon the land by implied invitation.

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**2. Evidence ¶28—Federal courts take judicial notice of law of state.**

What constitutes the common law of a state is not a question determined by a federal court from the opinions of lawyers, as expert witnesses, but a matter of which it takes judicial notice.

**3. Negligence ¶23 (2)—Injury to child playing with street railway car truck held negligent.**

Defendant street railway company maintained for its use a tract of land in a thickly populated neighborhood, having thereon a car barn and numerous tracks, on which were stored cars, trucks, and pairs of wheels. The tract was inclosed, but there were gates to the adjoining streets, and well-traveled roads and paths across it, which had been used by the public for many years. It was also used as a playground by the children of the neighborhood, who had a ball ground thereon, and the smaller children played with the trucks and wheels by rolling them along the tracks. A truck with four wheels had been left without brake or other fastening on a track near where there was a downward grade in both directions. Children had been playing with it, by rolling it back and forth, for some days, to the knowledge of defendant's employes and without objection, when, pushing it on the incline, it ran down and into a standing car, and plaintiff, a boy eight years old, who was riding on it with another small boy, was injured. *Held*, that a verdict finding that defendant was negligent and a judgment holding it liable for the injury were warranted by the facts.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action at law by Harold Wursthorn, an infant, by his next friend, and Curt Wursthorn, against the Public Service Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lefferts S. Hoffman, Leonard J. Tynan, and Joseph Coult, Jr., all of Newark, N. J., for plaintiff in error.

Edwin F. Smith, of Jersey City, N. J. (Thomas G. Haight, of Jersey City, N. J., of counsel), for defendants in error.

Before WOOLLEY and DAVIS, Circuit Judges, and ORR, District Judge.

WOOLLEY, Circuit Judge. This action was brought by Harold Wursthorn, an infant of tender years, by his next friend, to recover damages for personal injuries, and by Curt Wursthorn to recover for loss of his son's services, occasioned by negligence of the Public Service Railway Company. The plaintiffs had verdicts, and the defendant sued out this writ of error.

Speaking of the parties as they stood in the court below, the facts, shortly stated, are these: The place of the accident is a large rectangular tract of land in Secaucus, New Jersey, owned by the defendant, on which is a car barn, and many tracks used for the movement and storage of cars. The tract of land, situate in a thickly populated district, is bounded on one side by the Hackensack River and fenced on the other sides, with a gate at each of the several abutting streets through which persons, either with vehicles or as pedestrians, and whether on business or pleasure, enter at will passing over roads and well traveled paths and across and along the tracks. Although at

several places on the grounds there are signs reading "Private Property, No Trespassing," the public generally—adults and children alike—had, for twenty years prior to the accident, crossed and recrossed the premises in a manner from which invitation by the defendant might be implied.

On the tract of land was a ball ground used on occasions by semi-professional ball teams and in the intervals by children. A large number of children in the neighborhood had used the property generally as a playground, not confining themselves to the ball field but playing on derricks and on cars which had been stored on tracks, building tents and camps, using the premises as a way to the river for swimming and fishing, and—as bearing directly on the accident in this case—playing with car wheels left on the tracks by rolling them back and forth.

For several weeks prior to the accident the defendant had kept a car truck—made of four car wheels, each pair being connected by an axle and the whole joined together by timbers—standing on a track alongside the car barn at or near a place where the grade descended in both directions. Having neither a brake nor anything else to hold it in place, children, during that time, played with the truck by moving it along the tracks and jumping on and off, in the presence of employees of the defendant and without hindrance by them.

On the day in question several boys, twelve or thirteen years of age, pushed the truck on a slight downward incline toward the river. In its transit it became stalled by the dirt of a road crossing. It was here that the infant plaintiff, then seven years of age, got upon the truck with another small boy for a ride. The larger boys succeeded finally in getting the truck past the crossing, when, gathering speed rapidly on an abruptly descending grade, the larger boys let go and the truck dashed down the track and into a car standing at the bottom of the grade, causing the infant plaintiff the serious injuries of which he complains in this action.

At the close of the trial the defendant moved for a directed verdict on the ground that the infant plaintiff was a trespasser to whom it owed no duty of care save to refrain from willful injury. Refusing the motion, the court submitted the case on the law of implied invitation based on the doctrine of attractive nuisances and held the defendant to a degree of care such as an ordinarily prudent person would exercise to prevent injury to a child of little discretion who had been enticed upon his premises by objects which were alluring and dangerous. The law which the defendant moved the court to apply was the common law of the State of New Jersey as interpreted by it in the case of *Friedman v. Snare & Triest Co.*, 71 N. J. Law, 603, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, 2 Ann. Cas. 497 (1905). The law which the court charged was the law applicable by a federal court to a case arising in the State of New Jersey as found by this court in *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367 (1909). This difference in the law enforceable in New Jersey as regarded by the defendant and as found by this court arose out of the fact that there were two cases of *Snare*

& Triest Co. v. Friedman brought and tried in different courts. At the trial in the state court, the defendant here contends, the doctrine of the turntable cases (*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745) was invoked and repudiated, while at the trial in the federal court, it is conceded, the same doctrine was invoked and sustained.

This court, at the federal trial of *Snare & Triest*, having before it the record of the state trial of *Snare & Triest* and the state authorities on which that decision was rested, found there was no such settled rule of law (repudiating the doctrine of the turntable cases) established by the decisions of the New Jersey tribunal of last resort as would be binding upon the United States Circuit Court or that would relieve it from the duty of forming an independent judgment as to what the unwritten or common law of New Jersey required of the defendant in the premises. It is important here to note that no statute of the state was involved. This court arrived at the conclusion that the law announced by the Supreme Court of the United States in *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and *Union Pacific R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, commonly known as the doctrine of the turntable cases, was the law applicable to the case. The federal case of *Snare & Triest* is so close to the instant case that the law of that case is applicable to this case, unless the defendant should prevail in its request that we depart from *Snare & Triest*, decided on the then unsettled law in New Jersey, and follow the law of New Jersey which, it urges, has since become firmly settled, by three decisions repudiating the doctrine; one by a trial court of New Jersey, another by the court of last resort of New Jersey, and still another by the Supreme Court of the United States. On the question thus raised we shall not review *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367, but shall accept the judgment of this court in that case and the reasoning that moved it to its judgment as the starting point for the new phase of the law now invoked.

[1] Assuming it to be true that at the time of the decision of this court in *Snare & Triest Co. v. Friedman* the law of New Jersey with respect to the duty which one owes a child invited upon his premises was not settled, and, therefore, warranted this court, in its concurrent jurisdiction with the state courts, in exercising an independent judgment of what that law was, the one question now before us is whether, since that decision, the law has by a settled course of state decisions become established as a rule of property and conduct which it would be our duty to follow. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171.

To prove that the law has become established, the defendant relies upon expressions by courts of New Jersey, such for instance as "The rule that denies to a trespasser a duty on the part of others to observe care toward him is not changed by the fact that he is an infant. This principle was applied in the so-called 'turntable cases.'" These expressions are found in the opinions in cases, which, on close investigation,

turn out to be cases of trespass pure and simple, where no questions of implied invitation or license were involved. No one doubts that unless saved by circumstances, as by invitation or license, a child can be a trespasser equally with an adult.

The first of these cases is *Sutton v. West Jersey & Seashore R. Co.*, 78 N. J. Law, 17, 73 Atl. 256, decided by the Supreme Court of New Jersey in 1909. In this case a boy, crossing a meadow through which the electric railway of the defendant was constructed, came into contact with a charged third rail and was killed. The court, on demurrer, held the child a trespasser and entered judgment for the defendant. And properly so, we think. For there was nothing in the case that divested the child of the character of trespasser. There was no evidence that children frequented the premises or were likely to be attracted to the premises by alluring objects. In fact, there was no evidence that the owner had done anything to invite the child to the premises or anything to impose upon itself a greater duty or care than that to be exercised toward a trespasser whatever his age. The *Sutton Case*, having to do with a trespasser, not with one on the premises of another by his invitation, express or implied, has already been held by this court to contribute nothing toward settling the common law of New Jersey on the question under consideration. In *Riedel v. West Jersey & Seashore R. Co.*, 177 Fed. 374, 101 C. C. A. 428, 28 L. R. A. (N. S.) 98, 21 Ann. Cas. 746, where "the facts were practically the same" as in the *Sutton Case*, this court, citing the *Sutton Case* with approval, very carefully distinguished the law of the *Sutton Case* and the *Riedel Case* from the turntable law of *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

We are of opinion, therefore, that the *Sutton Case* left the law of New Jersey where it was at the time of the trial of the *Snare & Triest Case*.

*Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law, 425, 78 Atl. 166, 31 L. R. A. (N. S.) 1064, decided by the Court of Errors and Appeals of New Jersey in 1910, is the next case relied on by the defendant as a state decision dispositive of the common law of New Jersey. There a boy stole a ride on a moving wagon. Upon the driver flicking his whip at him he fell and was injured by a passing car. The appellate court said that "the declaration in this case is not strictly for negligence, but for a wilful and malicious act, with unnecessary force and violence, causing sudden fear and panic" resulting in the injury complained of. The trial court entered a judgment of nonsuit on the ground that the boy was a trespasser and the judgment was sustained on writ of error because of the plaintiff's failure to produce evidence from which a jury might properly infer a wilful and intentional injury or an exhibition of force calculated to, or which in fact did, result in loss of the plaintiff's self control. Indeed, it is doubtful whether this was a case of negligence at all. In any event, as in the *Sutton Case*, there was nothing in the *Hoberg Case* by way of attractive or alluring objects left open to the curiosity of children, or evidence that the child was likely to steal a ride and thereby put him-

self on the defendant's property in a place of danger. There was nothing in this case to relieve the child of the character of trespasser or invest him with the character of one on the wagon by the owner's invitation. In other words, the law of implied invitation based on the doctrine of attractive nuisances was in no way involved. Therefore, we find in this case nothing which throws any more light on the law of New Jersey than there was when this court decided the Snare & Triest Case.

The remaining case on which the defendant relies in asking us to adhere no longer to the law of Snare & Triest is *Erie R. Co. v. Hilt*, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. Ed. 1003. This was an action for personal injuries tried in the District Court for the District of New Jersey. The plaintiff, a boy less than seven years of age, had been playing marbles near the defendant's railroad siding. While reaching under a car for a marble with his foot the car backed and crushed his leg. A statute of New Jersey provides that:

"If any person shall be injured by an engine or car while walking, standing or playing on any railroad, \* \* \* such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad." General Railroad Law (8 Comp. St. 1910, p. 4245) § 55.

The trial court allowed the plaintiff to go to the jury and obtain a verdict. The judgment was affirmed by this court on the same theory by which, evidently, the trial judge was controlled. 246 Fed. 800, 159 C. C. A. 102. This theory was that the boy, considering his tender years, was not chargeable with contributory negligence, as a matter of law, under the cited New Jersey statute, in the absence of a decision by the highest court of the state construing the statute, but that, under the decisions of this court—and until the Court of Errors and Appeals of New Jersey shall have spoken—the question of his negligence was for the jury. *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; *Erie R. Co. v. Swiderski*, 197 Fed. 521, 117 C. C. A. 17; *Chesko v. D. & H. Co.*, 218 Fed. 804, 134 C. C. A. 492.

The words of the statute had, however, been given their literal meaning and had been construed by the Supreme Court of New Jersey in *Barcolini v. Atlantic City & Shore R. Co.*, 82 N. J. Law, 107, 81 Atl. 494, to be broad enough to include an infant younger than the plaintiff. In this situation the Supreme Court of the United States, on certiorari, reversed this court on a holding that the Supreme Court of the State of New Jersey, although not the highest court in the state, is a tribunal of sufficient importance to be followed by the courts of the United States. In not following the decision of the Supreme Court of New Jersey on an interpretation of a state statute—not on the unwritten or common law of the state—this court was found to have erred. This, in our opinion, is all the Supreme Court of the United States decided in the *Hilt* Case. But in discussing the statute there in question, the court in its opinion went farther and said:

"The statute seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some

other states, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises *without license*, he is not bound to provide for the *trespasser's* safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

The defendant urges that this is a pronouncement by the Supreme Court of the United States that, by its common law, New Jersey has repudiated the doctrine of the turntable cases. We do not find this to be the view of the Supreme Court. Were such a view expressed on the question under consideration in the Hilt Case, it would, we venture the thought, be obiter. We understand from the opinion that the Supreme Court of the United States regarded the New Jersey statute in question as directed to persons coming upon the premises of another *without license*, and as declaratory of the common law of New Jersey with respect to trespassers. We find nothing in the language of the Supreme Court of the United States from which we can gather its view of the common law of New Jersey as to the care a landowner is required to exercise toward one he has invited upon his premises, that is, toward one coming upon his land *with license*. With respect to such the Supreme Court carefully refrained from expressing an opinion by pointing out that "there is [in this case] no ground for the argument that the plaintiff was *invited* upon the tracks."

We are of opinion, therefore, that the Sutton, Hoberg and Hilt Cases leave the common law of New Jersey where this court found it in *Snare & Triest Co. v. Friedman*, and that, under authority of that decision, the trial court committed no error in submitting the case to the jury.

[2] At the trial the defendant produced a witness, learned in the law, and offered to prove by his testimony the common law of New Jersey here in question. The court's refusal to admit his testimony is assigned as error. The witness was offered not to prove the happening of a fact but the existence of a law with reference to which this court was called upon in *Snare & Triest Co. v. Friedman*, *supra*, and again in the instant case, to form its independent judgment. The process by which its judgment is reached is not on the testimony of one or many lawyers giving their opinion of what the law is, but is the notice which the court itself takes of the law of a state or territory. *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; *Gerling v. Baltimore, etc., R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; 23 *Corpus Juris*, 127.

Of the remaining assignments of error, we shall discuss briefly only those which bear on questions of negligence.

[3] The defendant contends that, even assuming the infant plaintiff was on the land of the defendant by right, there was (a) no evidence of negligence on the part of the defendant, or (b) if there was, the proximate cause of the injury was the negligence of the boys who moved the truck away, and that, in consequence, the trial court committed error in refusing its motion for a directed verdict.

Leaving the truck—admittedly a dangerous thing when in motion—

at a point on the track at or near a place where the grade descended in both directions without providing a brake, block, or other means to prevent its movement by children permitted to play with it was evidence from which, we are of opinion, a jury could validly find lack of care amounting to negligence. *Railroad v. Stout*, supra. But the defendant claims that, even so, its negligence stopped with leaving the truck on the track and that the plaintiff's injury was due to the negligence of an intervening agency, the act of the boys in moving it away, who, if of sufficient age and intelligence to understand the danger, relieved the defendant of liability for its own negligence. In this contention there is implied a limitation of the defendant's negligence which we think is not sound. Its negligence in leaving the truck where, to its own knowledge, boys of different ages customarily played with it and moved it about, extends to its failure to anticipate and prevent what those boys had been doing and what they were likely to do. That the boys this time moved the truck farther than at other times did not relieve the defendant of its duty to provide against their moving it at all. This is not the case in *Rhad v. Duquesne Light Co.*, 255 Pa. 409, 100 Atl. 262, L. R. A. 1917D, 864, where the defendant's chauffeur set the brakes and left the car standing at a curb on a down grade and a boy, rattling the brakes, released them so that the car started off and struck the plaintiff. In that case there was no question of an invitation to the boy to interfere with the brakes and the court held that the boy's interference was the proximate cause of the injury and that the defendant, even if negligent, was not liable. Rather, the instant case falls within the text of *Shearman & Redfield on Negligence* (3d Ed.) p. 10.

"Negligence, however, may be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible even though his negligent act was not the nearest cause in the order of time."

With such a distinction readily to be made in the rule of proximate cause, we are of opinion that the trial court committed no error in submitting the case on the issue of negligence.

The judgment below is affirmed.

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### SINGER v. UNITED STATES.\*

(Circuit Court of Appeals, Third Circuit. January 27, 1922.)

No. 2783.

1. *Intoxicating liquors* ⇐238(3)—Evidence not insufficient as matter of law to show liquor sold as "whisky" was intoxicating.

Evidence that defendant by separate agreements contracted to sell two barrels of whisky, delivered it as whisky, and received the price of two barrels of whisky, and that the purchaser, an admitted connoisseur, after drinking some of it, declared it was whisky, was not insufficient

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 257 U. S. —, 42 Sup. Ct. 272, 66 L. Ed. —.

as matter of law to show that it was intoxicating, though there was no analysis, as whisky is a well-known intoxicating liquor of high alcoholic content, and the word, whenever used, has a definite and specific meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Whisky.]

2. Criminal law § 789 (17), 829 (18)—Definition of “reasonable doubt” held sufficient, and requested instruction properly refused.

Where the court charged that defendant’s guilt must be proven beyond a reasonable doubt, and defined a “reasonable doubt” as a doubt founded in reason and arising from the evidence, and not a mere hesitation of the mind to pronounce guilt because of the punishment that might follow, or a mere capricious doubt or hesitancy of the mind, but a doubt founded in reason and arising from the evidence, the instruction was sufficient, and a requested instruction defining a reasonable doubt was properly refused.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

3. Criminal law § 561 (1)—Reasonable doubt must arise from evidence, or want of evidence.

The reasonable doubt contemplated by the law must arise from the evidence, which includes want of evidence, and can arise from no other legitimate source.

4. Criminal law § 507 (1)—“Accomplice” defined.

An “accomplice” is an associate in guilt in the commission of a crime, a participant in the offense as principal or accessory.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

5. Criminal law § 507 (1)—Purchaser of liquor not accomplice of seller.

As it is no crime to purchase whisky, the purchaser is not a participant in the seller’s offense, and is not an accomplice, where the seller is charged only with illegal selling and transportation, and not with conspiracy to violate the Volstead Act.

6. Criminal law § 561 (3)—Points that evidence of character witnesses, if believed, was sufficient to raise reasonable doubt, properly refused.

The court properly refused to affirm points asserting that the evidence of character witnesses, if believed, was sufficient to raise a reasonable doubt, as this would have been equivalent to saying that the establishment of a good reputation entitled defendant to an acquittal.

7. Indictment and information § 114—Prior conviction under Volstead Act for selling, etc., must be pleaded.

The provision of Volstead Act, tit. 2, § 29, that it shall be the duty of the prosecuting officer to plead prior convictions, applies to the offense of manufacturing or selling in violation of the statute, as well as the offenses for which no special penalty is prescribed, covered by the same paragraph in which the provision in question appears.

8. Criminal law § 1202 (1)—Second offense under Volstead Act not committed until there has been a judgment on prior verdict; “conviction.”

In a legal sense, a “conviction” is a judgment on a plea or verdict of guilty, and a second offense, carrying with it a more severe sentence, cannot be committed until there has been a judgment on the first; and while in common parlance a verdict of guilty is said to be a conviction, a verdict in another prosecution will not support a sentence under the Volstead Act as for a second offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Convicted—Conviction.]

**9. Indictment and information §114—Indictment charging second offense must set forth prior conviction.**

An indictment charging accused of being a second offender, under a statute making a second offense a distinct crime carrying with it heavier penalties, must set forth the fact of the prior conviction, as it is an element of the offense in the sense that it aggravates the offense and authorizes increased punishment.

**10. Criminal law §1202(2)—Prior conviction and identity of accused must be established in prosecution for second offense.**

When the indictment charges a prior conviction under a statute providing heavier penalties for a second offense, questions of fact are presented as to the prior conviction, and the identity of accused as the same person in each prosecution, and such facts must be established at the trial.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Samuel Singer was convicted of the illegal sale and transportation of whisky, and he brings error. Sentence set aside, and cause remanded.

James Mercer Davis, of Camden, N. J., and Eugene Schwinghammer, of Atlantic City, N. J., for plaintiff in error.

Elmer H. Green, U. S. Atty., and Fredk. M. P. Pearse, Asst. U. S. Atty., both of Newark, N. J.

Before BUFFINGTON, Circuit Judge, and WITMER and THOMSON, District Judges.

THOMSON, District Judge. The defendant in error was convicted on an indictment containing four counts; the first and third counts charging illegal sales, and the second and fourth counts illegal transportation of whisky, in violation of the Volstead Act (41 Stat. 305). A general verdict of guilty was rendered, a motion in arrest of judgment was overruled, and the defendant sentenced on the third count of the indictment, to pay a fine of \$2,000 and undergo imprisonment in the penitentiary at Atlanta, Ga., for the term of three years. In imposing sentence, the court said, after addressing the defendant:

"I am going to sentence you on the third count of the indictment, on which you were convicted, and I am not at this time going to sentence you on the other charges which are standing against you in this court, and the sentence is that you serve a term of three years, on the third count of the indictment against you, on which you were convicted, in the Atlanta penitentiary, and that you further pay a fine of \$2,000.

"Mr. Cutley: Your honor, it seems to me that the sentence which you impose finds no justification.

"The Court: Section 29 of the Volstead law justifies the imposition of a fine not to exceed \$2,000 and imprisonment of not more than five years for a second offense, and I am imposing this penalty because this was a second offense."

The legality of the sentence so imposed was objected to by defendant's counsel, an exception granted in his favor, and from the judgment so entered this writ of error was taken.

[1] In all, 17 assignments of error were filed, a few only being pressed at the argument. The first, fifteenth, sixteenth, and seventeenth

assignments relate to the judgment, and will be treated together. The second assignment asked for a directed verdict for the defendant, which was properly refused. The third, fourth, fifth, and sixth assignments bear on the proposition that the government's proof was not sufficient to establish that the liquors sold and transported were intoxicating liquors, within the meaning of the National Prohibition Act.

We are of opinion that there was ample evidence to establish this fact. It is true there was no analysis of the liquors sold and transported, but this was unnecessary. Whisky as a well-known intoxicating liquor of high alcoholic content, and, when the word is used in an act of legislation or elsewhere, it has a very definite and specific meaning. In certain liquids, the presence of alcohol or other ingredient may be determinable only by a chemical analysis. Not so with whisky. Alcohol is its chief ingredient. It is defined by the United States Pharmacopœia to be:

"An alcoholic liquid obtained by the distillation of the mash of fermented grain, \* \* \* with a specific gravity [designating it] corresponding approximately to an alcoholic strength of 44 to 50 per cent. by weight, or 50 to 58 per cent. by volume."

The defendant, by separate agreements, contracted to sell two barrels of whisky, delivered it as whisky to the purchaser, and received the price of two barrels of whisky. The purchaser, an admitted connoisseur in that line, after emptying the liquid into demijohns and drinking some of it, declared it was whisky. With these facts in evidence, and nothing to contradict them, the court could not possibly have held as a matter of law that the proof of their intoxicating character was insufficient. These assignments are therefore overruled.

[2] The seventh assignment alleges error in the court's refusal to define reasonable doubt as set forth in the first request for charge. The court's refusal was based on the fact that the same had been covered in the general charge. In this we think there was no error. The court had definitely instructed the jury that the defendant is presumed to be innocent until he is proven guilty, and that the defendant's guilt must be proven beyond reasonable doubt; that the presumption of innocence continues until it is overcome by the burden of proof beyond reasonable doubt. He then defined reasonable doubt as:

"A doubt founded in reason and arising from the evidence, not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow, not a mere capricious doubt or a hesitancy of the mind to say, 'This man did so and so,' but it must be a doubt founded in reason and arising from the evidence."

We deem this instruction entirely sufficient. It is substantially in accordance with the charge in *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; and which was held adequate. The court in that case, took occasion to say that the court is not bound to adopt the language which counsel employs in framing instructions, nor to repeat instructions already given in different language.

[3] Clearly, the reasonable doubt contemplated by the law must arise from the evidence, which includes, within the term, want of evidence, and can arise from no other legitimate source. The seventh assignment of error is overruled.

[4, 5] The eighth, ninth, tenth, and eleventh assignments are based on the erroneous assumption that Maynard, the purchaser of the liquor, was an accomplice in the defendant's crime. An accomplice is an associate in guilt in the commission of a crime, a participant in the offense as principal or accessory. The offenses here were the selling and transportation of whisky. It is a crime to sell, but not a crime to purchase. Hence the purchaser was not a participant in the offense, either as principal or accessory. It is possible that the purchaser might be indicted with the seller for conspiracy to violate the Volstead Act, but no such offense is charged in this indictment. Not being an accomplice, the requests were not applicable, and were rightly refused.

[6] The twelfth and thirteenth assignments allege error because the court refused to affirm that the evidence of character witnesses, if believed, is sufficient to raise a reasonable doubt. To have affirmed these points would have been equivalent to saying that the establishment of a good reputation entitles the defendant to an acquittal. This is very far from being the law. The court was right in refusing to affirm the points as requested.

The fourteenth assignment cannot be sustained, as it seems to be based on the theory that the government's case rested solely on the testimony of Maynard, which is incorrect. The weight to be given to Maynard's testimony was fully covered by the court in its charge, as appears on page 89 of the record. There being sufficient evidence to sustain the jury's finding, and no error appearing in the trial, the verdict should not be disturbed.

The first, fifteenth, sixteenth, and seventeenth assignments raise the question of the legality of the sentence; that is, the judgment pronounced by the court upon the verdict. The sentence imposed was for the second offense, which carries with it, under the act, a much severer penalty. It appeared at the argument that the facts were these: An information against the defendant charged an illegal sale of liquors on July 3, 1920, upon which charge he was convicted on March 8, 1921. On this last date the present indictment was returned against defendant, charging sales on July 21 and September 7, 1920; defendant being convicted thereon on March 17, 1921. No sentence had been imposed; that is, no judgment had been entered on the verdict of March 8th, at the time the indictment was found, nor when the defendant was convicted under it, nor did the indictment charge a former conviction.

[7] In section 29 of the Volstead Act are prescribed the various penalties for violation of title 2 of the act. It prescribes for the first offense of manufacturing or selling in violation of the title a fine of not more than \$1,000 or imprisonment not exceeding six months, and for a second or subsequent offense a fine not less than \$200 nor more than \$2,000 and imprisonment not less than one month nor more than five years. In the next paragraph of the same section it is prescribed that any person violating any provision of the title, for which offense no special penalty is prescribed, shall for the first offense be fined, for a second offense fined or imprisoned, and for any subsequent offense fined and imprisoned within certain designated limits therein set forth. Then follows this provision:

"It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment."

[8-10] As the two paragraphs of section 29 together define the penalties for the various violations of title 2, and as each prescribes a severer penalty for a second or subsequent offence, it is reasonable to assume that Congress intended that the provision requiring a former conviction to be pleaded should apply to the offenses designated in both paragraphs. But, even if this is not true, the result is the same. While in common parlance a verdict of guilty is said to be a conviction, it must be given its strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties. The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; second, a second offense, carrying with it a more severe sentence, cannot be committed in law until there has been a judgment on the first; third, the indictment, charging the accused of being a second offender, must set forth the fact of the prior conviction, as that is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment.

When the prior conviction is charged in the indictment, two questions of fact are presented, namely, the prior conviction, and the identity of the accused as the same person in each prosecution, and these facts must be established at the trial. Among the numerous authorities sustaining these propositions, may be cited *Commonwealth v. McDermott*, 224 Pa. 363, 73 Atl. 427, 24 L. R. A. (N. S.) 431; *State of Iowa v. Smith*, 129 Iowa, 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023; *Commonwealth v. Harrington*, 130 Mass. 35; *People v. Sickles*, 156 N. Y. 541, 51 N. E. 288; *Wood v. People*, 53 N. Y. 511; *State v. Findling*, 123 Minn. 413, 144 N. W. 142, 49 L. R. A. (N. S.) 449.

In this case there was no former conviction, no first offense in law, nor was a former conviction either pleaded or proved. It follows that the sentence imposed by the court for a second offense was erroneous. The sentence imposed by the court on the third count of the indictment, to wit, that defendant serve a term of three years in the Atlanta penitentiary, and that he further pay a fine of \$2,000, is therefore set aside, and the cause is remanded for imposition of sentence in accordance with law.

LEWINSOHN v. UNITED STATES.\*

(Circuit Court of Appeals, Seventh Circuit. November 29, 1921. Rehearing Denied January 17, 1922.)

No. 2916.

1. Injunction  $\S$  219—Defendant must obey order until modified, and cannot assert, as defense that it was improvidently entered.

Where defendant was served with a restraining order, which was within the jurisdiction of the court, it was his duty to obey it until modified, and he cannot, in defense of a contempt proceeding instituted against him for violating the order, be heard to assert that the court improvidently entered it.

2. Intoxicating liquors  $\S$  274—Complaint in injunction suit need not allege criminal conviction.

In a suit in equity under Volstead Act, tit. 2,  $\S$  21, 22, 24, for an injunction abating a liquor nuisance, where the complaint described the location of the nuisance with particularity, and fully and fairly set forth the connection of the various defendants therewith, it was unnecessary to allege that one of such defendants had been prosecuted and convicted of a similar criminal offense; it being the purpose of the statute to supply a more prompt, effective, and efficient means of abating nuisances than the institution of criminal actions.

3. Intoxicating liquors  $\S$  275—Not necessary in all cases to prove repeated sales, in order to show common nuisance.

In a suit under Volstead Act, tit. 2,  $\S$  21, 22, 24, to abate a liquor nuisance, it is not necessary in all cases to prove repeated sales, in order to justify a finding of a common nuisance.

4. Evidence  $\S$  483(1)—Witness familiar therewith can testify that beverage was whisky, etc., and give opinion as to alcoholic contents.

One who has drunk whisky, wine, or beer, and who is familiar with its taste and smell, can give opinion evidence as to whether a beverage sold and drunk was whisky, wine, or beer, and give his opinion as to the presence of an alcoholic content exceeding one-half of 1 per cent.

5. Intoxicating liquors  $\S$  275—Presumed that one ordering whisky, and paying the price asked for whisky, received it.

Where a purchaser of liquor, on entering the place of sale, inquired the price of whisky, put his money on the bar, and asked for whisky, and was given a beverage by defendant, it is presumed that he received what he ordered and paid for.

6. Intoxicating liquors  $\S$  279—Service of writ of injunction held to support charge of violating injunctional order.

Though, in a suit under Volstead Act, tit. 2,  $\S$  21, 22, 24, to abate a liquor nuisance, it was not proper practice to serve a writ of injunction, instead of the injunctional order, on a defendant, where the writ signed by the clerk contained all the recitals of the order of injunction and the order abating the nuisance, and fully and completely apprised defendant of the contents of the restraining order, he could not, when charged with contempt in violating such order, assert ignorance of its contents.

7. Constitutional law  $\S$  312—Intoxicating liquors  $\S$  259—Provisions of Volstead Act for abatement of nuisance in equity do not deny due process of law.

Volstead Act, tit. 2,  $\S$  21, 22, 24, providing for the abatement of liquor nuisances by a suit in equity and the granting of an injunction, do not take property without due process of law, as the jurisdiction of equity to abate nuisances is of ancient date.

\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 463, 66 L. Ed. —.

**8. Jury  $\S$  13(21)—Volstead Act not unconstitutional, because denying jury trial for violation of liquor injunction.**

Volstead Act,  $\S$  24, authorizing summary punishment as for contempt for violation of an injunction granted under that title for the purpose of abating nuisances, is not unconstitutional, because denying the right of trial by jury.

**9. Criminal law  $\S$  162—Provisions for punishment of violation of injunction as contempt do not violate double jeopardy provisions of Constitution.**

Volstead Act,  $\S$  24, providing for punishment as for contempt of violations of liquor injunctions thereunder, does not violate the double jeopardy provisions of the Constitution, though the commission of the acts condemned also authorizes criminal prosecutions.

**10. Intoxicating liquors  $\S$  259—Volstead Act prevails over general statutes or court rules as to time injunction may remain in force.**

The specific provisions of Volstead Act,  $\S$  22, relative to temporary and permanent injunctions against liquor nuisances, prevail over any general statute or court rule limiting the time during which a temporary restraining order granted ex parte, may remain in force.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit for injunction by the United States against Ike Lewinsohn. Defendant was adjudged guilty of contempt, and he brings error. Affirmed.

Francis Borrelli, of Chicago, Ill., for plaintiff in error.

C. W. Middlekauff and Jacob I. Grossman, both of Chicago, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The parties will be named as they appeared below. On November 26, 1920, an injunctive order was entered upon a verified bill of complaint and supporting affidavits providing, among other things, that the defendant and others—

"are hereby restrained individually, or in combination with others, from conducting or permitting the continuance of a public and common nuisance upon the first floor—i. e., the ground floor—of the building at 410 South Wabash avenue, and from removing or in any way interfering with the liquor or fixtures or other things upon said premises used in connection with violation, constituting said nuisance, and that said nuisance be abated, and that this order shall continue in force until revoked or modified by further order of the court in that regard."

Thereafter on December 15, 1920, the government filed its sworn information, charging defendant with a violation of the injunctive order. Upon the trial, which was without a jury, certain government investigators testified to the purchase of whisky and beer from defendant on the premises declared a nuisance by the injunctive order. Defendant offered no evidence, and the court found that the injunctive order hereinbefore quoted in part had been violated, and that the defendant was guilty of contempt, and pronounced a prison sentence, in addition to imposing a fine.

Numerous errors are assigned to support the writ, among them being these: (a) Insufficiency of the evidence to support the original re-

—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

straining order; (b) failure of proof to show such restraining order was ever served upon defendant; (c) insufficiency of evidence to support the order adjudging defendant in contempt; (d) errors in permitting witnesses to testify concerning alcoholic content and character of beverage sold; (e) unconstitutionality of sections 21 and 22 of title 2 of the Volstead Act (41 Stat. 314); (f) failure of the court to limit the first restraining order to 10 days. The various assignments will be discussed at length, because of their bearing upon numerous pending writs of error involving the same or similar questions.

[1] It is first urged, and much reliance placed upon this contention, that the evidence upon which the original order was granted was insufficient to justify its issuance. In assigning this error, counsel overlooked or ignored the distinguishing fact that this writ of error is directed, not to the original restraining order, but to the order punishing defendant for violation thereof: Where defendant has been served with a restraining order, the entering of which was within the jurisdiction of the court, and which order the defendant has violated, he cannot, in defense of a contempt proceeding instituted against him, be heard to assert that the court improvidently entered the original order. *In re Coy*, 127 U. S. 731, 758, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Watkins*, 3 Pet. 193, 203, 7 L. Ed. 650; *Ex parte Tyler*, 149 U. S. 164, 170, 13 Sup. Ct. 785, 37 L. Ed. 689; *People v. McWeeney*, 259 Ill. 161, 170, 102 N. E. 233, Ann. Cas. 1916B, 34, 15 R. C. L. 835, 838. It is his duty, until the restraining order is modified, to respect it and obey its commands.

[2] While this might well dispose of defendant's contentions in respect to the original order, we have, because of its bearing upon other similar cases, considered the evidence and the pleadings, as well as the objections thereto, to ascertain whether the same supports the injunctive order as issued. The criticisms directed to the sufficiency of the complaint are evidently based upon the theory that defendant considers it necessary in these proceedings for the pleader to follow the rules governing the drafting of a criminal indictment, and to aver in addition some fact, such as a statement that the defendant had been previously prosecuted and convicted for making illegal sales of liquor, in order to justify the court in granting equitable relief.

In these criticisms counsel for defendant has utterly failed to appreciate the purpose and scheme of these sections of the Volstead Act. Unquestionably Congress, by these sections (21, 22, and 24), intended to supply a more prompt, effective, and efficient means of abating nuisances than the institution of criminal actions. These sections read:

**Sec. 21.** Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and

may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Sec. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any state or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than \$500 nor more than \$1,000 payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Sec. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

The purpose of the injunctive order in the instant case was to abate a nuisance such as is defined by section 21 of the act. It was not directed primarily at defendant. The injunction as to him was incidental to the main order—the abatement of the nuisance. The pleader followed section 22 as closely as possible. The language of the complaint follows the language of the statute. The location of the nuisance is described with particularity and the connection of the various defendants (owner, tenant, and proprietor of the business conducted thereon) are all fairly and fully set forth. It was unnecessary to allege that the defendant had been prosecuted and convicted of a similar criminal offense in order to invoke the jurisdiction of a court of equity.

Nor can any hard and fast rule be announced to determine whether the building is in fact a common nuisance.

[3] Counsel stresses the necessity of proving repeated sales in order to justify a finding of a common nuisance, citing *U. S. v. Cohen* (D. C.) 268 Fed. 420. But such a test is neither an accurate nor an exclusive one. The court might well conclude from evidence of a single sale that the room or the building was a common nuisance and that it was a place where liquor was "being manufactured, sold, kept or bartered" in violation of the statute. No doubt repeated sales of the same beverage on other occasions and under other circumstances might justify greater certainty in the trier's mind as to the use to which the building was being put. There could be, however, an almost irrefutable conclusion drawn from a single sale, provided the facts surrounding such sale warranted the inference that it was one of the ordinary and usual incidents of the business there conducted. To illustrate: Assume A., B., and C. as strangers enter a room, having the appearance and equipment of a saloon, and well occupied by customers, and approach the bar and, openly and in such a tone as to be heard by all, ask the price of a drink of whisky, are informed that it is 75 cents a drink, and thereupon pay the money. The whisky is poured out and there drunk, all in plain sight of those present. Could there be any question that such evidence would support a finding that the premises were being used as a common nuisance within the definition of section 21 of the act? In fact, such evidence might be much more persuasive and conclusive than several gifts or sales of liquor made secretly and by one other than the proprietor; also it might be more persuasive than the mere discovery under a search warrant of a considerable quantity of liquor contained in bottles, duly sealed, unaccompanied by any evidence that such liquor had been brought to the premises since the passage of the Volstead Act.

[4] Criticism is also made of the character of the evidence received in support of the original bill and in support of the application to punish the defendant for violation of the restraining order; the defendant's contention being that witnesses were permitted to testify to the character and alcoholic content of the beverage sold over the bar on the various occasions described. So far as whisky or wine is concerned, this court disposed of this question in the case of *Sabutis v. U. S.*, 270 Fed. 209. But counsel contends that this decision was modified by this court in *Berry v. U. S.*, 275 Fed. 680. When carefully read, there is no conflict between these two cases. In the *Berry Case* it was not even ordinary beer that was under consideration, and the witness in no way attempted to qualify himself. In the *Sabutis Case* the beverages sold were whisky and wine, and moreover, the witnesses qualified themselves as to their acquaintance with and use of whisky and wine.

No extraordinary or unusual rule of evidence or exception to any rule is presented for our consideration in disposing of this assignment of error. Before one can give opinion evidence he must show his qualifications. One who has drunk whisky, who is familiar with its taste and smell, can give opinion evidence as to whether the beverage sold

and drunk was whisky. If it appears that whisky has been sold, it would require no stretch of the law of judicial notice to conclude that whisky contains more than one-half of 1 per cent. of alcohol. However, such witness, thus qualified, could unquestionably give his opinion as to the presence of an alcoholic content exceeding one-half of 1 per cent. 23 Cyc. 265; *Merkle v. State*, 37 Ala. 139, 141; *Pennacchio v. U. S. (C. C. A.)* 263 Fed. 66, 67; *Shaneyfelt v. State*, 8 Ala. App. 370, 373, 62 South. 331; *People v. Mueller*, 168 Cal. 526, 143 Pac. 750; *Terr v. Pratt*, 6 Dak. 483, 494, 43 N. W. 711; *State v. Miller*, 53 Iowa, 84, 88, 4 N. W. 838; *Comm. v. Owens*, 114 Mass. 252, 253; *Comm. v. Dowdican*, 114 Mass. 257, 258; *Burrell v. State*, 25 Neb. 581, 41 N. W. 399; *Feddern v. State*, 79 Neb. 651, 655, 113 N. W. 127; *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184. A recent decision in support of this conclusion is *Rose v. U. S.*, 274 Fed. 245, decided by the Circuit Court of Appeals for the Sixth Circuit July 19, 1921.

The same reasoning applies with almost equal force to wine. As to beer, undoubtedly the court should be more careful; but with a proper showing of qualification we see no reason why the witness should not give his opinion that the beverage sold and drunk was or was not beer.

[5] But in the present case there was more than the testimony of the witnesses who stated that the beverage sold was whisky and beer and contained more than one-half of 1 per cent. of alcohol. The purchaser, upon entering the place, inquired about the price of the whisky, put his money on the bar, and asked for whisky. Defendant poured out some beverage and gave it to the customer. Presumably the purchaser received what he ordered and paid for. 23 Cyc. 265; *State v. Cloughly*, 73 Iowa, 626, 35 N. W. 652; *Burrell v. State*, 25 Neb. 590, 41 N. W. 399; *State v. Marks*, 65 N. J. Law, 87, 46 Atl. 757.

Moreover, we think there is a vast difference between the question propounded to the witnesses who gave the opinion attacked and the questions which defendant's counsel now argue are not the legitimate subjects of expert opinion. For a witness to give it as his opinion that a certain beverage contains alcohol is one thing. To attempt to give the exact alcoholic content is quite another matter. Users of whisky might not be able to tell within 20 per cent. the alcoholic content of such a drink, and yet could safely and truthfully say it contained far more than one-half of 1 per cent. And the same may apply to the alcoholic content of beer. The difference in its effect as well as its taste might, we think, well make the presence of more than one-half of 1 per cent. of alcoholic content a subject for illumination by opinion evidence. Like all other evidence, its admissibility cannot be determined by its weight. The cross-examination might greatly weaken its persuasiveness; but we are here dealing only with the question of its admissibility.

[6] Referring to the error dealing with the service of the injunctive order, it appears that the pleader in all of these cases confused his knowledge of the common law with the practice under the Code.

Instead of serving the injunctive order, he served what might be called a writ of injunction. This writ, signed by the clerk, contained all the recitals of the injunctive order and the order abating the nuisance, and fully and completely apprised the defendant of the contents of the restraining order. Defendant knew that the premises occupied by him had been condemned as a nuisance, and that he was restrained from selling liquor thereon in the manner and to the extent shown by the part of the order heretofore quoted.

It might be added that the question is not squarely raised on this writ of error, because the record here warrants the finding that, in addition to serving this writ of injunction, the restraining order was also served upon defendant. We make reference to the practice, because of the presence of the same question in other cases, and hold (without approving the practice) that defendant, being fully informed of the contents of the injunctive order by service of this writ, and also having heard the pronouncement of the judge in open court, cannot assert ignorance of the contents of the order he is charged with having violated.

The constitutionality of these three sections, 21, 22, and 24, is attacked on the ground that they violate (a) the due process clause; (b) the provision for trial by jury; and (c) the double jeopardy provisions of the Constitution. While conceding that the question of the constitutionality of the Volstead Act generally is now closed (*National Prohibition Cases*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946), and that the provision defining intoxicating liquors is constitutional (*Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260), defendant relies upon the language of Justice McReynolds in the first-cited case, where he stated:

"It is impossible \* \* \* to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive."

Subsequently, in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548, the court seems to have given added finality to its determination that the Volstead Act is constitutional. Section 33 of the act alone was there construed, however, and we have approached this question upon the assumption that the sections under consideration were not included in any of the Supreme Court decisions referred to, and, as to them, the question is open.

[7] The attack upon these sections, based upon the ground that property was being taken without due process of law, must fail, we think, because of the decision of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, where the court said:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to pre-emptures upon public rights and property. \* \* \* In case of public nul-

sances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction.' 2 Story's Equity, §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

[8] The objection that defendant is deprived of right of trial by jury, and that, therefore, these sections are unconstitutional, possesses, we think, less merit. This question is also closed by at least two decisions of the Supreme Court. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801, and *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154. In the former case cited we find this language:

"The contention of these parties is that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

"If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

[9] Equally conclusive are the decisions of the court supporting the power of the court to punish for contempt notwithstanding there are statutes authorizing criminal prosecutions for the commission of the acts condemned. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *In re Chapman*, *supra*; *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680; *Mobile v. Louisville & Nashville Railroad Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342. In the case of *In re Debs* the court said:

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here the acts of the defendant may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings."

[10] The contention that the temporary injunctive order expired in 10 days from its entry, because granted *ex parte*, is without merit.

Neither a court rule nor a general statute can overthrow the specific provisions of section 22 of this act. The rule of construction, "Generalia specialibus non derogant," applies, and the specific provision of the Volstead Act must prevail over any general enactment referring to the period of time during which a temporary restraining order granted ex parte may remain in force.

The judgment is affirmed.

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ALLEN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 2949.

1. Injunction  $\S$ 219—When court has jurisdiction, temporary injunction must be obeyed, regardless of sufficiency of bill.

Where the court has jurisdiction over the subject-matter, the measure of the required observance of a temporary injunction order is not the bill filed, but the order itself, and defendant must yield obedience thereto, whether or not a cause of action is technically or sufficiently stated by the bill.

2. Injunction  $\S$ 129(1), 163(1)—Defendant may move to dismiss bill or dissolve a temporary injunction, if bill insufficient.

In a suit for an injunction, if the bill is not sufficient, defendant may move to dismiss, or may move to dissolve the temporary injunction issued under it.

3. Injunction  $\S$ 230(3)—On contempt hearing, proceedings in suit properly admissible to show suit pending and service of injunction.

On the hearing of a contempt charge, based on violation of a temporary injunction restraining defendant from conducting or permitting a public nuisance contrary to the Volstead Act, the original pleadings and other files, including affidavits filed with the bill, were properly admitted to show that an action was pending, and that defendant had been served with an injunctive order.

4. Injunction  $\S$ 231—On contempt hearing, court could not have been confused or misled by admission of moving affidavits, on which injunction granted.

On the hearing of a contempt charge, based on violation of a temporary injunction against conducting or permitting a public nuisance, in violation of the Volstead Act, as the issue had reference only to occurrences after the injunction issued, while the affidavits filed with the bill were of facts whereon the order was issued, the court, trying the cause without a jury, could not have been confused or misled by such affidavits, which evidently were admitted, not as proof of their allegations, but only as a part of the moving papers in the cause.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the United States against William Allen. Order finding defendant guilty of contempt, and he brings error. Affirmed.

J. P. Klein, of Chicago, Ill., for plaintiff in error.

E. J. Brundage, Atty. Gen., and C. W. Middlekauff, U. S. Atty., and Jacob I. Grossman, both of Chicago, Ill., for the United States.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ALSCHULER, Circuit Judge. The writ of error is prosecuted from an order of the District Court finding plaintiff in error guilty of contempt of court, through his violation of the terms of a temporary injunction order made November 26, 1920, restraining him from conducting or permitting a public nuisance upon the premises described, pursuant to a bill and affidavits filed under the provisions of the Volstead Act (41 Stat. 305). Most of the questions raised have been considered and disposed of by this court in the recently decided case of Lewinsohn v. United States, 278 Fed. 421.

[1, 2] It is objected that the bill filed does not properly charge that a public nuisance was being conducted on the premises. Where the court has jurisdiction over the subject-matter, the measure of the required observance of a temporary injunctive order is not the bill filed, but the injunctive order itself. To this the defendant in the action must yield obedience, regardless of whether or not a cause of action is technically or sufficiently stated by the bill. If the bill is not sufficient, defendant may move to dismiss it, or may move to dissolve the temporary injunction issued under it. Here the bill was answered.

[3, 4] It is further objected that, upon hearing of the contempt charge, the original bill and answer and other files, including affidavits filed with the bill, were admitted in evidence. Evidently the primary purpose of these was to show that there was an action pending, and that plaintiff in error had been served with an injunctive order. This was, of course, not improper or erroneous. There was no error in admitting the affidavits. They had no bearing on the issue of contempt. The affidavits were of facts whereon the injunctive order was issued. The issue in the contempt proceeding was the violation of the injunctive order, and had reference only to occurrences after the injunction had issued. Surely the court, which without jury tried the cause, was not confused or misled by these affidavits, which evidently were admitted, not as proof of the irrelevant allegations therein, but only as a part of the moving papers in the cause.

As to alleged contempt, consisting of alleged open sales of intoxicating liquors in the premises subject to the injunction, there was oral testimony, which was heard by the court, which, if true, was sufficient to justify the finding of contempt. There is nothing inherent in the evidence wherefrom we would be warranted in disturbing the conclusions of fact reached by the District Court, which had better opportunity than we have to pass upon the credibility of the witnesses and the weight of conflicting evidence. There is a slight discrepancy in certain dates appearing in an early order in the cause, but this had no bearing upon the rights of the parties.

No reversible error appearing from the record, the judgment of the District Court is affirmed.

**MAHER v. CHICAGO, M. & ST. P. RY. CO.**

(Circuit Court of Appeals, Seventh Circuit. December 29, 1921.)

No. 3009.

1. **Railroads** ⇨282(2)—**Variance between pleading and proof as to consignee's work when injured held not fatal.**

In a consignee's action for injuries caused by a car door becoming partially detached and striking him, there was no fatal variance between an allegation that he was injured when unloading the car and proof that he was injured while attempting to close the door after partially unloading it, where by the custom of the parties the unloading was not a continuous process, and the question of variance was not raised in the trial court, so that plaintiff was given no opportunity to amend.

2. **Railroads** ⇨282(2)—**Variance between pleading and proof as to cause of fall of car door held not fatal.**

In a consignee's action for injuries from a defective car door, there was no fatal variance between an allegation that the door became partially detached as the direct and proximate result of its dangerous condition and proof that it fell because of plaintiff's exertion in attempting to close it, where the question of variance was not made in the trial court.

3. **Railroads** ⇨275(1)—**Duty to deliver car reasonably safe.**

It was a railroad company's duty to deliver to a consignee a car in reasonably safe condition to be unloaded.

4. **Railroads** ⇨282(9)—**Negligence in failing to furnish reasonably safe car held for jury.**

In an action for injuries sustained by a consignee when a car door which he was attempting to close came off the iron rail supporting it, held, that the railroad company's negligence in failing to furnish a door in reasonably safe condition to use as doors are intended to be used was a question for the jury.

5. **Evidence** ⇨591—**That plaintiff's witnesses did not entirely corroborate him, or differed from him, did not preclude recovery.**

In an action for injuries from the alleged defective condition of the door of a railroad car, plaintiff was not precluded from recovering because his witnesses differed from him in some particulars, and with respect to others did not remember, since, though plaintiff may have vouched for their integrity, he did not vouch for their powers of observation, or the completeness and accuracy of their memories in every particular.

6. **Trial** ⇨139(1)—**Question on motion for directed verdict for defendant is whether plaintiff has produced substantial evidence.**

On a motion for a directed verdict for defendant, the question is whether plaintiff has produced substantial evidence in support of every material averment in his declaration, and not whether some of the evidence may be in conflict with other evidence.

7. **Railroads** ⇨279—**Defective car door proximate cause of injury.**

Where a consignee's injury from a car door coming off the rail supporting it as he was attempting to close it would not have been inflicted, but for the defective condition of the door, the defect was the proximate cause of the injury, though the injury would not have been incurred, if plaintiff had not touched the door.

8. **Negligence** ⇨122(1)—**Contributory negligence affirmative defense.**

Under federal law, contributory negligence is a defense which must be affirmatively established by defendant.

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⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**9. Negligence** ¶136 (26)—Contributory negligence question for jury.

To warrant a directed verdict, the defense of contributory negligence must be conclusively established.

**10. Railroads** ¶282 (9)—Contributory negligence of consignee held question for jury.

Whether a consignee of a carload of ice was negligent in failing to discover the conditions which permitted the door to come off the rail supporting it and injure him as he was attempting to close it, or in failing to suspend delivery of ice to his customers until the carrier repaired the door, *held* a question for the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Edward Maher against the Chicago, Milwaukee & St. Paul Railway Company. Judgment on a directed verdict for defendant, and plaintiff brings error. Reversed, with directions.

James C. McShane, of Chicago, Ill., for plaintiff in error.

Carl S. Jefferson, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. At the conclusion of plaintiff's evidence, defendant having introduced none, the court directed the jury to return a verdict for defendant, and this writ of error challenges the resulting judgment.

Relationship of parties was that of consignee and common carrier by railroad. Plaintiff had been accustomed for some time to ship ice into Chicago on defendant's railroad in carload lots. Defendant would place the car on one of its sidings; and plaintiff would place in front of the door in the side of the car a platform, of a height to come slightly below the level of the car floor, so that ice could be transferred from the car to the platform and thence to the wagons of plaintiff's customers.

[1, 2] I. *Variance*. Plaintiff alleged:

"The defendant delivered to the plaintiff a carload of ice, and in so delivering it placed the car in which it was contained on the said track, at the said platform, for the purpose of having the ice removed therefrom by the plaintiff on the said platform; that in order that the said car might be unloaded with an ordinary degree of safety by the plaintiff, it was necessary that the said car should be in an ordinary safe condition for the plaintiff to unload, and by reason of the premises it then and there became and was the duty of the defendant, in delivering the said carload of ice as aforesaid, to exercise ordinary care to furnish a car which was in a reasonably safe condition for the plaintiff to unload; yet the defendant, not mindful of its duty in this regard, and with utter disregard of the safety of the plaintiff in unloading the said car, carelessly and negligently used and furnished a car which was in a dangerous condition for the plaintiff to unload, in that the appliances by which the door of the said car which was on the side of the said car which was nearest to the said platform, was attached to the said car and held in its position on the said car, were so loose and otherwise out of repair, and in such defective condition, that the said door was likely to fall upon and injure the plaintiff, when he was unloading the said car; and while the plaintiff with all due care and diligence for his own safety was unloading the said car, and in so doing was standing on the said platform, the said door, as the direct and proximate result of the said dangerous condition, became partially

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

detached from the said car, and struck against the plaintiff and knocked him from the said platform on which he, the plaintiff, was then and there standing, and he, the plaintiff, was then and thereby knocked from the said platform to and upon the ground there, and thereby he was then and there greatly injured."

Proofs show that the car arrived on August 11th; that on the 12th plaintiff removed ice for several customers; that between deliveries to customers he closed the car door; that he noticed certain defects in the door (as stated in the next paragraph hereof); that in continuing the process the next morning, the door, while he was endeavoring to close it, came off of the rail on which it was hung, and injured him. The first point of variance is that the averment is that he was injured "when he was unloading said car" and the proof is that he was injured during an attempt to close the car door. But according to the proven custom of these parties, the unloading was not a continuous process, and the opening and closing of the car door was a proper incident or part of the unloading. The other point is that the door did not fall as the direct and immediate result of its own defects, but because of plaintiff's muscular exertion in attempting to close it. But a door is intended to be used; and allegations with respect to a defective door (or any defective appliance or machine designed for human use) should not be construed to exclude a proper use thereof by the injured party. At all events the question of variance was not made in the trial court and plaintiff was not given an opportunity to amend as he might possibly have desired to do if the point had been raised.

[3-8] II. *Defendant's Negligence.* It was defendant's duty to deliver a car that was in a reasonably safe condition to be used for the purpose intended. Rld. Co. v. Freppon, 134 Ky. 650, 121 S. W. 454; Corbett v. Rld. Co., 215 Mass. 435, 102 N. E. 648; Rld. Co. v. Hummel, 167 Fed. 89, 92 C. C. A. 541. Before the injury plaintiff observed the following defects: The car door, about 6 feet wide and 6 or 7 feet high, was constructed of boards about 6 inches wide placed perpendicularly, and was held together only by a cleat across the top; the door was supported on a horizontal iron rail secured to the car above the doorway; it hung upon the rail by means of two iron hooks or hangers, one at each end of the door; there were no supports at the bottom of the door; above the rail was a canopy or guard of sheet metal which, as plaintiff understood the construction, was to keep rain from getting in at the top of the door and to prevent the hangers from getting off of the rail; there was no handle with which to pull or push the door open or shut; plaintiff found it hard to open or close the door; if he pulled on one edge of the door, the board on that edge would come away from its fellows; if he pushed, the door had something of a scissors action. After the injury, in trying to see why the hanger at one end had come off from the rail while he was endeavoring to close the door in the same manner he had succeeded in doing the day before, plaintiff observed that at the point of derailment the rail was sagged about half an inch, the canopy was arched up 3 or 4 inches, and the hanger had worn down about 1 inch. This evidence would justify a finding that defendant had failed to furnish a door

in a reasonably safe condition to use as doors are intended to be used. But defendant argues that the evidence should not be so taken, because plaintiff produced two witnesses who failed to support him throughout. In some particulars they corroborated plaintiff; with respect to others they did not remember; and as to some they gave a different version. By producing the witnesses plaintiff may be said to have vouched for their integrity; but he should not be held to have vouched for their powers of observation and the completeness and accuracy of their memories in every particular. Psychological tests have shown astonishing variations in the capacity to observe. It is a common experience to find that of many joint observers of an occurrence no two are able to give conterminous versions. A party may be justly criticized for suppressing testimony; but he should not be prejudiced in his right to have the truth of his case passed on by the triers of facts because he produces all the credible witnesses of whom he has knowledge. On a motion for a directed verdict the question is whether plaintiff has produced substantial evidence in support of every material averment in his declaration, not whether some of the evidence may be in conflict with other evidence. *Payne, Director General of Railroads, v. Colvin*, 276 Fed. 15 (this circuit).

[7] III. *Proximate Cause*. Defendant urges that the proximate cause of the injury was plaintiff's muscular exertions in closing the door. In one direction this contention verges upon the question of variance, already considered, and in another direction upon contributory negligence, which will next be taken up. Of course plaintiff's injury would not have been incurred if he had not touched the door. The same thing can be said of any injury received while using any sort of defective appliance; but that fact does not change the other fact, that without the defect the injury would not have been inflicted.

[8-10] IV. *Contributory Negligence*. Under federal law this is a defense which must be affirmatively established by defendant. To warrant a directed verdict it must be established conclusively. This defense may be drawn from the plaintiff's evidence; and in the present case the only evidence bearing on the subject came from plaintiff himself. He testified that before the injury he had observed the general ramshackle condition of the door and its fan-like or scissors-like action; but not until after the injury had he observed the sag in the rail, the arch in the canopy, and the worn-down condition of the hanger. These latter things he undoubtedly could have discovered by inspection. They were the things which, in the rickety condition of the door, permitted the hanger to jump off of the rail. He did not discover them. He was a merchant, not a car inspector. Was it negligence for him not to have discovered them and thereupon to have suspended delivery of ice to his customers (in midsummer) until on his complaint defendant had repaired the door? During all of the necessary occasions on the 12th he opened and closed the door without injury. "It worked hard," but it worked. And even if his retina had registered a photograph of the rail, the canopy, and the hanger, that would not be enough. For him to have apprehended the danger it would have been necessary for him mentally to have followed the ap-

plication of force on the edge of the door, to and through the boards held together only at the top, to and through the hanger in its relation to rail and canopy, and to have realized the likelihood or possibility of the hanger's being forced from the rail as it came to the enlarged space between the rail and the canopy. Compare *Hawley v. C., B. & Q. Rld. Co.*, 133 Fed. 150, 152, 153, 66 C. C. A. 216. Would a reasonably prudent man under the circumstances have realized that he must quit using the door for its intended use or take upon himself the consequences of its further use? In our opinion reasonable and fair-minded men might differ in their answers, and the question should therefore have been submitted to the jury.

The judgment is reversed, with the direction to grant a new trial.

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**FRANKLIN BRASS FOUNDRY CO. et al. v. SHAPIRO & ARONSON, Inc.**

(Circuit Court of Appeals, Third Circuit. December 21, 1921.)

No. 2715.

**1. Patents § 222—Mark on patented article must state day of patent issue.**

To comply with Rev. St. § 4900 (Comp. St. § 9446), the mark on a patented article must state the day, as well as the month and year, the patent was granted.

**2. Patents § 222—Notice of infringement of article not marked must be as specific as required statutory mark; "due notice."**

To constitute "due notice" of infringement of an unmarked patented article, which will entitle the patentee to recover damages for the infringement, under Rev. St. § 4900 (Comp. St. § 9446), the actual notice must be as specific as that required by the statute to be marked upon the article, and a mere statement to a defendant by a person unknown to him that his article is an infringement of a patent is not sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Notice.]

**3. Patents § 222—"Damages," in Rev. St. § 4900 (Comp. St. § 9446), includes profits.**

In Rev. St. § 4900 (Comp. St. § 9446), providing that, where the patented article has not been marked and no notice of infringement given, "no damages shall be recovered by the plaintiff," the word "damages" includes profits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

**4. Patents § 322—Where no infringement is found prior to filing of bill, there can be no accounting for damages or profits.**

Under Rev. St. § 4921 (Comp. St. § 9467), providing that, "upon a decree being rendered \* \* \* for an infringement," plaintiff shall be entitled to recover profits and damages, a decree finding infringement is a prerequisite to an accounting, and where by reason of failure to mark the patented article or to give notice as required by Rev. St. § 4900 (Comp. St. § 9446), no actionable infringement can be found prior to the filing of the bill, an accounting may not be directed for subsequent infringement.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

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§ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit in equity by Shapiro & Aronson, Inc., against the Franklin Brass Foundry Company and A. Slotko. Decree for complainant, and defendants appeal. Modified and affirmed.

For opinions below, see 268 Fed. 551; 272 Fed. 176.

Hector T. Fenton, of Philadelphia, Pa., for appellants.

Dodson & Roe, of New York City (E. Hayward Fairbanks and J. Bonsall Taylor, both of Philadelphia, Pa., of counsel), for appellee.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. Shapiro & Aronson, Inc., by its bill of complaint filed January 26, 1920, charges the defendants, Franklin Brass Foundry Company, a corporation, and A. Slotko, with infringement of complainant's letters patent No. 5,296 for a design for a lighting fixture arm, and prays an injunction and an accounting. The joint and several answer of the defendants alleges, in part, that the plaintiff made and sold quantities of the arm without fixing thereon notice of the patent, as required by R. S. § 4900 (Comp. St. § 9446), and without, in the alternative, giving to the defendants, prior to the filing of the bill, any legally sufficient actual notice of the infringement. The court below found the patent valid and infringed, and "that the defendants were given actual notice of the patent and their infringement in 1919, and continued to sell after said notice." A decree was entered, granting an injunction and directing an accounting of profits from February 4, 1919, the date of the patent, and an accounting of damages "since defendants received notice of the patent." The defendants here challenge the findings of notice and subsequent infringement, and the decree in so far as it directs an accounting.

[1] R. S. § 4900, made it the duty of the complainant herein to give sufficient notice to the public of its patent by fixing upon the arm the word "Patented," together with the day and year the patent was granted, and directs that—

"In any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

The marking fixed upon the patented arm by the complainant specified the month and year, but not the day, the patent was granted. The complainant does not contend that such marking meets the requirements of the statute. The court below held it insufficient, and we concur in that view. *Hawley v. Bagley*, Fed. Cas. No. 6,248.

[2] The evidence upon which rests the findings that the defendants were given actual notice of the patent, and that after such notice they continued to infringe, consists only of the testimony of the defendant Slotko, called, as under cross-examination, by the complainant. His testimony as to notice is very meager. It is in substance that a man called upon him and told him that the arm being sold by him (Slotko) was an infringement of a patent. It does not appear from the evidence that the man gave his name, stated for whom he was acting, or indi-

cated, either by its number, or the day and year it was granted, or by the name of the patentee, or by the character or subject-matter of the patent, what patent Slotko was charged with infringing. The statement made by the stranger to Slotko was, according to the latter's testimony, in our opinion no more than a mere accusation. If the actual notice given to Slotko was more complete than is shown by his testimony, the burden of so proving rested upon the complainant. This burden it did not meet. Actual notice must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact, and we think that a defendant is not "duly notified," within the meaning of the statute, unless the facts with which he is supplied would, if fixed upon the patented article, constitute "sufficient notice." *N. Y. Pharmica Ass'n v. Tilden* (C. C.) 14 Fed. 740.

Nor do we find proof that the Foundry Company, the remaining defendant and the manufacturer of the arms sold by Slotko, was better notified than the latter. Here, again, the only evidence is the testimony of Slotko. It is limited to the statement that, after the stranger called upon him, he wrote to the Foundry Company. The letter was not introduced in evidence, nor were its contents otherwise proved. It may not be presumed that the information therein contained went beyond that given by the stranger to Slotko. Consequently the evidence, as we understand it, fails to show that prior to the filing of the bill of complaint either form of notice prescribed by the statute was given to either defendant. Manifestly, then, there is no opportunity to find that, prior to the filing of the bill, either defendant continued after notice to make, use, or vend the patented article.

[3] How do these findings affect the decree for an accounting? Under the express provisions of R. S. § 4900, the absence of notice, constructive or actual, to the defendants prevents recovery by the complainant of "damages" from either defendant for any act done by the latter—at least prior to the filing of the bill of complaint. If, however, the word "damages," as used in that section of the Revised Statutes, does not include "profits," the plaintiff is entitled to a decree directing an accounting of "profits" from February 4, 1919, the date of the patent; but if "damages," as there used, does include "profits," then it is plain that recovery of "profits" is likewise prohibited for any act done by either defendant—at least prior to the filing of the bill. Hence it becomes necessary to determine whether the word "damages," as used in R. S. § 4900, includes or excludes profits. The decisions of the District Courts upon this point undoubtedly show much contrariety in their views, thereby shrouding the question in some doubt. To remove the question from its present uncertainty, so far as that may be done by the deliberate judgment of this court, and to reach a satisfactory judgment, it will be necessary to review the course of legislation and judicial decisions, so far as it bears upon the matter, from the beginning, first observing, however, that the provisions of R. S. § 4900, denying damages to a complainant under the conditions there specified, had their origin in section 13 of the Patent Act of March 2, 1861 (12 Stat. 246), that courts of equity were at the time

of the passage of that act without jurisdiction to award to a complainant in a patent suit damages in addition to profits, and that the right of a complainant to recover in a court of equity damages in addition to profits, now provided for in R. S. § 4921 (Comp. St. § 9467), was first conferred by section 55 of the Consolidated Patent Act of 1870 (16 Stat. 198 [Comp. St. § 9467]).

The history of the jurisdiction in equity of the federal courts over patent suits was reviewed in *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975. Jurisdiction of cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions was first expressly conferred by Congress upon the Circuit Courts of the United States in equity by the Act of February 15, 1819 (3 Stat. 481, c. 19). Theretofore Congress had passed three statutes in execution of the power granted to it by the Constitution to promote the progress of science and useful arts. Each of those acts dealt only with actions at law. The first, passed April 10, 1790 (1 Stat. 109), made the infringer of a patent liable to forfeit and pay to the patentee such damages as should be assessed by a jury, and, moreover, to forfeit to the person aggrieved the infringing thing. The second, or Act of February 21, 1793 (1 Stat. 318), fixed the damages the infringer should forfeit and pay at a sum equal to three times the price for which the patentee had usually sold or licensed the use of the invention. The third, enacted April 17, 1800 (2 Stat. 37), again changed the rule, and required the infringer to pay to the patentee "a sum equal to three times the actual damage sustained by such patentee."

Mr. Justice Livingston, in the year 1811, sitting at circuit, in *Livingston v. Van Ingen*, 1 Paine, 45, Fed. Cas. No. 8,420, held that, Congress having confined the remedy for a breach of patent rights to an action at law, a Circuit Court of the United States sitting as a court of equity could not entertain cognizance of a bill to restrain the infringement of a patent, where both parties were citizens of the same state, and dismissed the bill. Congress supplied that defect of jurisdiction by the Act of February 15, 1819 (3 Stat. 481), which provided:

"That the Circuit Courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries: and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

In 1825 Mr. Justice Thompson had occasion to consider, in *Sullivan v. Redfield*, 1 Paine, 441, Fed. Cas. No. 13,597, the nature of equity jurisdiction in patent suits and the effect of the act of 1819. He said:

"The equity jurisdiction exercised by the court over patents for inventions is merely in aid of the common law, and in order to give more complete effect to the provisions of the statute under which the patent is granted."

Referring to the act of 1819, he added:

"This act does not enlarge or alter the powers of the court over the subject-matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this act it had been held that a citizen of one state could not obtain an injunction in the Circuit Court for a violation of a patent right against a citizen of the same state, as no act of Congress authorized such suit. \* \* \* This act removed that objection, and gave the jurisdiction, although the parties were citizens of the same state. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent rights, the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this act."

The Supreme Court, in *Stevens v. Gladding et al.*, 17 How. 447, 15 L. Ed. 155, said:

"There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected. The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief. The right to an account of profits is incident to the right to an injunction in copy and patent right cases. *Colburn v. Simms*, 2 Hare, 554; 3 Dan. Ch. Pr. 1797. And this court has held, in *Watts et al. v. Waddle et al.* 6 Pet. 389, that where the bill states a case proper for an account, one may be ordered under the prayer for general relief. See also 2 Pet. 612; 14 Pet. 156; 16 Pet. 195; 9 How. 405."

The act of 1819 was embodied in section 17 of the Act of July 4, 1836 (5 Stat. 117), the latter act making the jurisdiction of the courts of the United States in patent causes exclusive.

It now becomes important to learn from what aspect the Supreme Court has viewed profits as awarded in a court of equity. *Seymour et al. v. McCormick*, 16 How. 480, 14 L. Ed. 1024, decided in 1853, was an action at law. The court below had instructed the jury that a plaintiff, having established his right to a verdict against an infringer, was entitled to the "actual damages" he had sustained by reason of the infringement, and that such damages might be determined by ascertaining the profits which in its judgment he would have made had the infringer not interfered with his rights. In *conceding* the assignments of error directed at the charge to the jury, the Supreme Court, after citing some hypothetical cases of infringement, said:

"In such cases the profit of the infringer may be the only criterion of the actual damage of the patentee. \* \* \* It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss."

*Dean v. Mason et al.*, 20 How. 198, 15 L. Ed. 876, decided at the December term, 1857, was a case of a bill for an injunction and account. It was there expressly held that the amount of profits, in general, is the *damage* done to the owner of the patent and that under certain circumstances the court has power to increase *the damages*. The court said:

"The decree was entered, on the report of the master, for the estimated amount of profits which the defendant, with reasonable diligence, might have realized; not what, in fact, he did realize. This instruction was erroneous. The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the *damage* done to the owner of the patent. It takes away the motive of the infringer of patented rights, by requiring him to pay the profits of his labor to the owner of the patent. Generally, this is sufficient to protect the rights of the owner; but where the wrong has been done, under aggravated circumstances, the court has the power, under the statute, to punish it adequately, by an increase of the *damages*," (*Italics ours.*)

It is not without significance that the Congress, within three years after the decision in *Dean v. Mason*, embodied in the Act of March 2, 1861, § 13 (12 Stat. 246), the provision that—

"on failure of which [the marking of the article or the labeling of the package], in any suit for the infringement of letters patent by the party failing so to mark the article the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice to make or vend the article patented."

We think it a reasonable presumption that the word "damage," found in the act of 1861, was there used in the same generic sense as in *Dean v. Mason*. But we need not rest on this presumption. After the passage of the act of 1861, but before the passage of the act of 1870, authorizing a court of equity to award "damages" to a plaintiff, the case of *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566, was considered by the Supreme Court. That was a suit in equity in which, it having been decided before the passage of the act of 1870, profits, only, and not damages, could be awarded by way of pecuniary relief. After quoting the thirteenth section of the act of 1861, the court (9 Wall. at page 801, 19 L. Ed. 566) said:

"It is said that the bill contains no averment on this subject [notice], and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence, it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendants to raise the point before the master. They were concluded by and previous silence, and must be held to have waived it. It cannot be considered here."

It was there held that the point of notice was waived by the pleadings. A waiver presupposes the existence of a right. The court assumed, without question or intimation of doubt, that the statute applied to a suit in equity, in which "profits" only were involved. A like assumption by the same court is found in *Sessions v. Romadka*, 145 U. S. 29, 49, 12 Sup. Ct. 799, 36 L. Ed. 609. That case arose after the passage of the act of 1870 conferring upon a complainant the right to recover in equity damages in addition to profits, as now provided in R. S. § 4921, but the point raised therein was that the plaintiff should not recover profits, owing to a noncompliance with the requirements of R. S. § 4900. The court overruled the contention of the defendant

upon the ground that it was not properly raised by the answer, but again gave no intimation that R. S. § 4900 was not applicable to profits. It cited with approval both *Rubber Co. v. Goodyear*, supra, and *Allen v. Deacon*, 10 Sawy. 210, 21 Fed. 122. In the latter case the court, referring to R. S. § 4900, said:

"I think, however, the fair construction of the provision of the statute is that *the recovery shall not be had upon infringements occurring while the infringer is ignorant of the patent under the conditions stated in the statute, but shall be limited to the infringements arising after notice.*" (Italics ours.)

In the case of *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860, apparently begun before the passage of the act of 1870, exception was taken to the allowance of interest upon the profits found by the master to be due to the plaintiff. Mr. Justice Strong, speaking for the court (14 Wall. at page 653, 20 L. Ed. 860), said:

"We add only that in our opinion the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. *Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages.*" (Italics ours.)

This rule was followed in *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54, and in other cases. In *Birdsall et al. v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802, it was held that prior to the passage of the act of 1870 the owner of a patent, whose rights had been infringed, had his election between two remedies, namely, he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the patent as respects such gains and profits, or he might sue at law and recover as damages compensation for the injury without regard to the infringer's gains or losses. That the recovery in each instance was considered by the Supreme Court as "damages" was, however, made clear. Referring to the recovery at law it said:

"\* \* \* The measure of damages in such case being not what the defendants had gained, but what the plaintiff had lost."

And with respect to the recovery in equity added:

"Gains and profits are still the proper measure of damages in equity suits.  
\* \* \* (Italics ours.)

The same court in *Root v. Railway Co.*, 105 U. S. 189, 214, 26 L. Ed. 975, dealing with the contention that the infringer of a patent right is by construction of law a trustee for the patentee of the profits derived from his wrong, and that a court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief, and after referring to cases cited by counsel apparently sustaining this contention, made it plain that the infringer is not a trustee and that profits constitute merely a measure of damages. It was there said:

"It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establish-

ing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrongdoer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrongdoer had realized a pecuniary profit from his wrong. All that was meant in the opinions referred to was to declare according to what rule of computation and measurement the compensation of a complainant would be ascertained in a court of equity, which, having acquired jurisdiction upon some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action."

As hereinbefore stated, R. S. § 4900, had its origin as section 13 of the act of 1861, and became section 38 of the Consolidated Patent Act of 1870 (Comp. St. § 9446). R. S. § 4921, had its origin as section 55 of the latter act. The word "damages," as used in R. S. § 4921, unquestionably means damages of a compensatory character. *Birdsall et al. v. Coolidge*, 93 U. S. 64, 69, 23 L. Ed. 802. And we think that, if the use of the word "damages" in section 38 and again in section 55 gives rise to a presumption that the word is used in the same sense in each section, that presumption is more than overcome by the history of the two sections and the decisions of the Supreme Court.

In view of what has been hereinbefore said, we see no escape from the conclusion that the word "damages," as used in R. S. § 4900, includes profits. We think this conclusion in accord with prior decisions of this court. In *American Caramel Co. v. Thomas Mills & Bro.*, 162 Fed. 147, 89 C. C. A. 171 (C. C. A. 3), in which no proof was made that the complainants marked their machines, or otherwise notified the defendants as required by the statute (R. S. § 4900), "an account for anything preceding the filing of the bill" was refused, and the infringement prior to notice declared to be "presumptively innocent." This case was followed in *Maimen v. Union Special Mach. Co.*, 165 Fed. 440, 91 C. C. A. 384 (C. C. A. 3). The Circuit Court of Appeals for the Second Circuit, in *Gibson v. American Graphophone Co.*, 234 Fed. 633, 148 C. C. A. 399, sustained the court below in refusing an accounting because of the failure of the complainants to comply with the requirements of section 4900 of the Revised Statutes regarding the giving of notice. There are many other cases bearing upon the question in hand, some of which are in accord with the views here stated, but we think it unnecessary to review them.

[4] The conclusion that no recovery either of profits or of damages of a compensatory character may be had for infringements occurring while the infringer is without one or the other forms of notice prescribed by the statute, and the findings that in this case the defendants were without notice of either kind, at least until the bill of complaint was filed, would put an end to the question of accounting, were it not for the fact that it has been held that the filing of a bill of complaint is actual notice under the statute, and that profits and damages may be recovered in such suits for infringements, if any, occurring

subsequent to the filing of the bill. It was so ruled by this court in *Maimen v. Union Specialty Co.*, supra. It was likewise so decided in the Second Circuit in *Westinghouse Elec. & Mfg. Co. v. Condit Elec. Mfg. Co.* (C. C.) 159 Fed. 154, and in *Underwood Typewriter Co. v. Elliott-Fischer Co.* (C. C.) 171 Fed. 116. Such a right was denied by Judge Dallas in *Matthews & Willard Manufg. Co. v. National Brass & Iron Works* (C. C.) 71 Fed. 518, and by Judge Mayer in *Gibson v. American Graphophone Co.*, affirmed on appeal in 234 Fed. 633, 148 C. C. A. 399. We think, however, that the question has long been settled by the Supreme Court in *Marsh v. Nichols, Shepard & Co.*, 128 U. S. 605, 616, 9 Sup. Ct. 168, 172 (32 L. Ed. 538), where it was said:

"The position that an accounting for profits earned subsequently could be claimed in this suit is not tenable. An accounting for such profits after suit can be demanded only where the infringement complained of took place previously and continued afterwards."

So far as we have been able to discover, the rule there laid down has not been annulled or modified by that court, and, in view of our finding that the evidence does not show infringement after notice prior to the filing of the bill, that case authoritatively denies to the complainant herein a right to a decree for an accounting for profits. It is manifest, from the express language of this court in *Maimen v. Union Specialty Co.*, 165 Fed. 440, 441, 91 C. C. A. 384, that the case of *Marsh v. Nichols, Shepard & Co.* was not called to its attention, and we assume that other courts whose opinions coincide with that of this court in the *Maimen* Case were also without the benefit of the decision in the *Marsh* Case. It seems clear that in general no distinction can be made between the right to recover subsequent profits and the right to recover subsequent compensatory damages under like circumstances, and that, consequently, a denial of a decree for an accounting for compensatory damages, if any, sustained after the filing of the bill, could be safely rested upon the ruling in *Marsh v. Nichols, Shepard & Co.*, supra; but there is also another ground upon which such denial may here be placed.

The right to recover compensatory damages in a court of equity rests solely upon R. S. § 4921, and that section makes the entry of a decree of "infringement" a prerequisite to the recovery of damages. In a case where R. S. § 4900, is not involved, infringement, as so used in R. S. § 4921, means, of course, any infringement prior to the filing of the bill, and, an account being ordered, it may include, not only infringements prior to the filing of the bill, but those (at least of the same kind) up to the date of the filing of the master's report. But, as said by the learned judge in the court below, in his opinion upon the motion for a reargument:

"When there is a controversy, however, with respect to a compliance with R. S. § 4900, two facts must be found by the court. One is that the notice, constructive or actual, required by the statute has been given, and the other, that acts of infringement followed the notice. The duty of making neither of these findings can be delegated to a master. The finding is a judicial act, which cannot be delegated. Both facts are in controversy."

We think this a correct statement of the law, and that it necessarily implies that the word "infringement," as used in R. S. § 4921, means, when R. S. § 4900, is involved, "infringement after notice," and this is a conclusion to which we are likewise led by *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, *Lowell Manuf'g Co. v. Hogg* (C. C.) 70 Fed. 787, *American Caramel Co. v. Thomas Mills & Bro.*, 162 Fed. 147, 89 C. C. A. 171 (C. C. A. 3), and many similar cases, which hold in effect that, in order to recover damages for infringement prior to the filing of the bill, there being no waiver, express or implied, the complainant must allege that the articles sold by him were marked as required by the statute or that actual notice of infringement was given to the defendant. Clearly, then, under such allegations, the only infringement alleged, and, consequently, the only infringement for which a decree may be rendered for an accounting for compensatory damages for acts of the defendant occurring even prior to the filing of the bill, is an infringement after notice. As no act of infringement after notice occurred in this case prior to the filing of the bill, and as under the express provisions of R. S. § 4921, a decree for infringement is a prerequisite to the recovery of compensatory damages, there is no evidence in this case to support a decree for infringement, and consequently there may be no decree for an accounting for compensatory damages.

The soundness of the decree, in so far as it directs the issuance of the writ of injunction, was not questioned. As the answer of the defendants denied the validity of the patent, we think that there was no error in admitting the depositions, and that the stage of the case at which they should be admitted was within the discretion of the trial court.

For the reasons herein stated, we are of the opinion that the complainant was not entitled to recover either profits or compensatory damages, and that the decree should be so modified.

**CHENEY TALKING MACH. CO. v. VICTOR TALKING MACH. CO.**  
**VICTOR TALKING MACH. CO. v. CHENEY TALKING MACH. CO.**

(Circuit Court of Appeals, Sixth Circuit. December 15, 1921.)

Nos. 3534, 3535.

1. **Patents** ¶328—814,786, claim 42, for talking machine, held not infringed.  
The Johnson patent, No. 814,786, for a talking machine, claim 42, which relates to the sound conveyor, consisting of a constantly tapering sound tube and the horn proper coupled thereto, construed in the light of the specification, held not infringed.
2. **Patents** ¶328—814,848, claims 7 and 11, for talking machine horn, held not infringed.  
The Johnson patent, No. 814,848 for horn for talking machines claims 7 and 11, held not infringed.

Appeal and Cross-Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Victor Talking Machine Company against the Cheney Talking Machine Company. From the decree, both parties appeal. Affirmed on complainant's appeal, and reversed on defendant's appeal.

For opinion below, see 275 Fed. 444.

Wm. Houston Kenyon, of New York City (John D. Myers and George T. Bean, both of Camden, N. J., Loyd H. Sutton, of Washington, D. C., and Theodore S. Kenyon, of Washington, D. C., on the brief), for plaintiff.

Edward Rector, of Chicago, Ill. (George L. Wilkinson, of Chicago, Ill., on the brief), for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. This is the usual infringement suit brought by the Victor Company against the Cheney Company, based upon claims 42 of patent No. 814,786, and 7 and 11 of patent No. 814,848, both issued March 3, 1906, to E. R. Johnson, and assigned to the Victor Company. The District Court held that claims 7 and 11 were not infringed, but that claim 42 was valid and infringed. Both parties appeal.

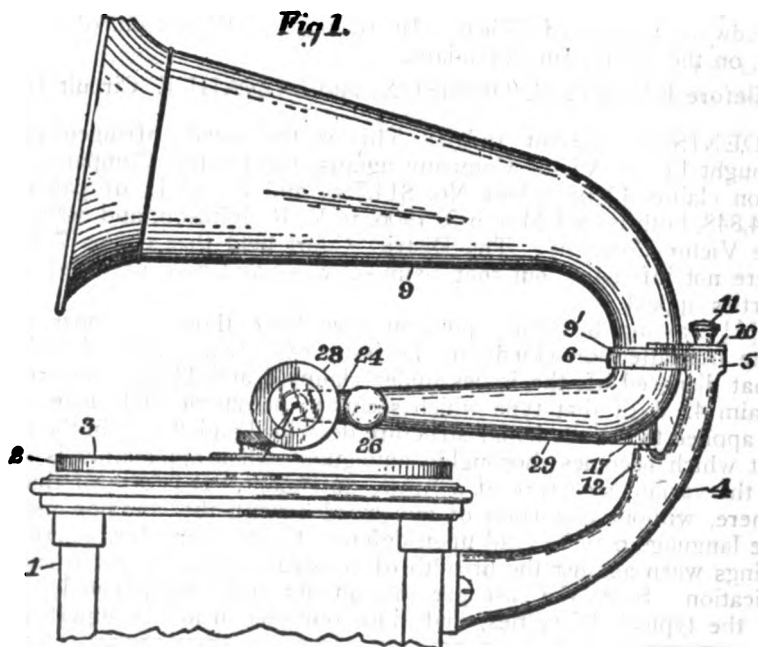
[1] Passing by other questions, we have thought proper to devote our attention chiefly to the issue of infringement of claim 42. That disposed of, the issues under claims 7 and 11 give less trouble. Claim 42 is of that type which seems to be simple and clear enough as applied to the particular structure described and shown in the patent, but which becomes thoroughly ambiguous when application is sought to the variant structure of a future defendant. It is also of that type where, without distortion of any word beyond the common meaning, the language may be read upon defendant's structure, but where many things warn against the breadth of construction necessary to such application. Since the case presents an unusually complicated instance of the typical difficulties, and since our conclusion is superficially—

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

though we think not substantially—not in accord with some results reached in other courts, it seems fitting to discuss the issue more in detail than we commonly do.

In 1903 there were two classes of sound recording and reproducing machines. One, which may be called the Edison type, used a record of cylindrical form, and the stylus followed a spiral path around the surface of the revolving cylinder by reason of a positive mechanical feed which caused relative motion longitudinally of the cylinder between it and the stylus-carrying parts. The other, which may be called the Berliner form, used a flat disc, upon the upper surface of which the stylus traveled in a spiral path. In reproducing, the stylus point would tend to remain in the prepared groove, and thus to cause the stylus and its attached parts to travel from the outside of the disc towards the center. Each form was provided with a diaphragm operated by the stylus and communicating with an amplifying horn.

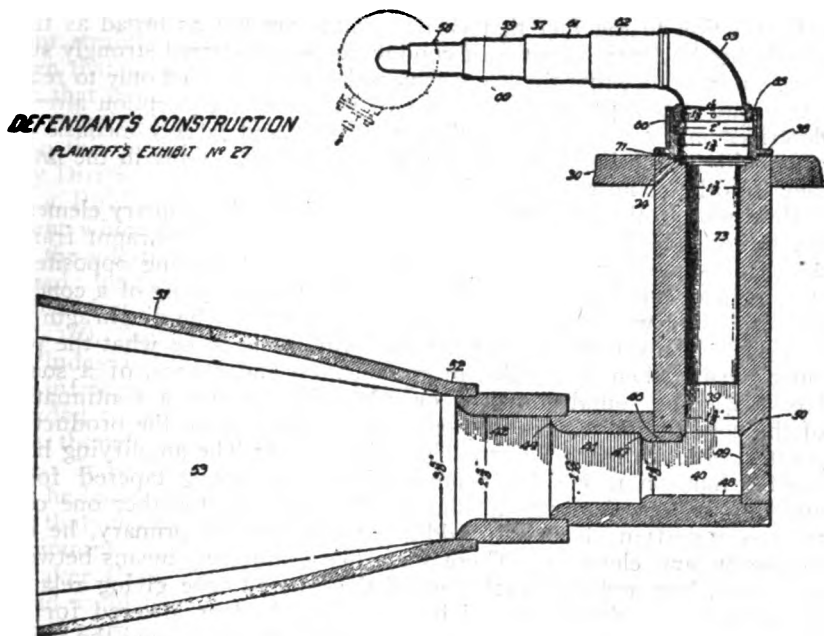
Johnson devised a sectional horn, the preferred and illustrated form of which was adapted particularly for use in the Berliner machines. He filed his application February 12, 1903, upon a talking machine. In February, 1904, using identical drawings and generally the specification of the first application, he filed a divisional application directed to the amplifying horn. Both patents issued on the same day, the one based upon the original application being No. 814,786, and the one based upon the divisional application being No. 814,848. The structure is shown in the following sketch, which is Fig. 1 of the drawings of each patent:



Claim 42 reads as follows:

"A talking machine, comprising a tapering sound-conveyor, means for attaching sound-reproducing means to the small end thereof, and horn-coupling and supporting means with which the other end of said conveyor is movably connected."

The defendant manufactures a form fully enough shown by the following sketch:



As we approach the question whether claim 42 may, consistently with its validity, have a reading broad enough to cover defendant's form, we do so in an atmosphere colored by two unusual things. The first is that plaintiff declined defendant's offer to submit its machine to plaintiff soon after it came on the market, so as to be advised whether plaintiff would consider it an infringement of any patent, but later brought and prosecuted an infringement suit substantially the same as the present one, yet, when that suit was about to be heard, voluntarily discontinued it without prejudice to a new suit, and some three years later brought the present action. In this course of conduct we do not find the estoppel which defendant urges; but plaintiffs do not commonly take such action in clear cases, and its presence here strongly suggests that the right to recover in the first suit was doubted by the plaintiff.

The other colorful thing is that this patent application was prosecuted by skillful counsel for nearly three years, through repeated rejections and through the presentation and urging of about 100 varying claims, resulting in a final sifting by which 40 claims were agreed upon

between examiner and solicitor as covering the varying aspects of the invention, all before any claim occurred to the solicitor which would reach defendant's structure. Just as the case was ready for issue claims 41 and 42 were added. This suit is not planted on claim 41, although it is broader than 42. We do not suggest that the applicant may not, at any time before issue, broaden his claims in any way justified by his disclosure and by the state of the art; indeed, matters which develop during the period of prosecution often demonstrate or call attention to the fact that earlier claims are not as broad as they should be; but such a course of conduct as here occurred strongly supports an inference that the claim thus added was intended only to reach some anticipated, possible variations of the general conception already described and claimed, rather than a distinct and largely inconsistent conception which had never so far been suggested. Only in the latter view can the claim reach the defendant here.

Returning to the patented structure, we see that its primary elements are three: (1) The stylus with its diaphragm and diaphragm frame, which, in some form, is drawn down to a central opening opposite to the center of the diaphragm and constituting the beginning of a conduit for the sound waves which have been produced by the diaphragm vibrations. These parts, grouped in this way, seem to be what the patentee means when he speaks, in specification and claims, of a sound box. (2) The sound conveyor or tube which forms a continuation of the conduit and carries the sound waves away from the production point in order to reach the amplifying horn. (3) The amplifying horn itself. Johnson makes his conduit (2) of expanding tapered form, and thus causes elements (2) and (3) to constitute together one continuous amplifying horn. In addition to these three primary, he has two secondary, elements. These are: (4) Connecting means between the sound box and the small end of the tapered tube giving relative movability, whereby the sound box can be raised or lowered for replacing a needle or starting or stopping and without moving the tapered tube. (5) Supporting and connecting means applied to the joint between the large end of the tapered tube and the small end of the horn proper, whereby either the tube or the horn may swing horizontally, and yet the weight of both is carried, and the two are coupled together into a unitary horn.

In order to reach the defendant's form, elements 4 and 5 must be considered to cover all known means of operative connection between (1) and (2) and between (2) and (3). Defendant attaches its sound box to the small end of its sound tube by a bayonet joint. There is detachability but no adjustability of any kind. No method of attachment has been suggested which would escape the claim, if this one does not. At the other end of the sound tube defendant, who uses the now familiar cabinet style, supports the horn by permanently and rigidly fastening to the cabinet top, depending therefrom, another sound tube which at its other and lower end rigidly carries the horn proper. The member which serves for coupling the two parts of the horn (if there is any such coupling at the movable joint), does not support the horn. Seemingly, any form of supporting the horn and the tube so that they

effectively communicate, but with relative motion, would respond to the claim, if this one does. In substantial effect, plaintiff says that claim 42 is for "a talking machine comprising a tapering sound conveyor, carrying at the small end sound-reproducing means, and at the large end communicating with a suitably supported horn and having a jointed connection therewith." With this—necessary for this suit—construction, the claim reads absolutely upon Baynes and Jensen of the prior art, save that their sound tubes were cylindrical, and not tapered. We therefore meet the questions whether there was any invention in this mere change from straight tube to tapered tube, and whether claim 42 should be given that breadth of construction which can rest only on the proposition that there was invention in this mere change.

Upon these questions we have no precedent in any earlier decision upon this patent. The opinions of Justice Warrington, in the Chancery Division, and of the judges in the Court of Appeal (*Graphophone Co. v. Ruhl*), indicate that no great breadth was accorded to the English patent which has the same drawings as both the patents here in suit; but the question of broad invention, as we have stated it, was not discussed; indeed, the English patent contained no claim of such scope; its broadest claim was like 7 of 814,848. In the *Lindstrom Case*, 279 Fed. 570, Judge Learned Hand states the question broadly enough and concludes that there was invention, but though claim 42 was sued upon and infringement thereof was found, yet defendant's machine there responded to several other claims and would have infringed claim 42, even though construed narrowly enough not to reach the defendant here. It is fairly consistent with what Judge Hand says to conclude that he had in mind, not the mere change from straight tube to tapered, but that change associated with Johnson's chief declared object—a continuously amplifying horn from sound box to mouth. In the *Wanamaker Case*, 275 Fed. 448, claim 42 was also sued upon and was found valid by Judge Augustus Hand; but here, again, several other claims were infringed, and the validity of the claim to the tapered tone arm, in combination with improvements at both ends which Johnson devised and which that defendant used, was the real question involved.

For the purposes of this opinion at least, we will assume that there was invention broadly in this mere change, and that Johnson would have been entitled to a claim like the one we have supposed. It does not follow that claim 42, as issued, was intended to have, or can receive, this construction. Here, again, we have no precedent in the previous litigation. The claim has received no special attention and has not been applied, except in cases where there was no question of infringement, beyond that involved in defining "tapering sound conveyor."

In determining the scope, intended or appropriate, we cannot overlook *Cannavel*.<sup>1</sup> Our foregoing assumption of validity implies also

<sup>1</sup> French, of May 4, 1901, German, of 1901, filed February 28. *Cannavel* has not been mentioned in previous decisions, save in the *Ruhl* case. The French drawing seems to indicate horizontal as well as vertical motion at the tube-horn joint, but it is not described. Any effort to carry the Johnson invention back of *Cannavel* is not substantial.

that Cannavel is not a complete anticipation; but he has a bearing on the scope. He used an Edison, rather than a Berliner, machine; but this cannot be controlling, since the Johnson specification does not suggest that his invention fails to reach both classes, and many of his claims, including 42, are as appropriate to one class as to the other. Cannavel showed the complete sound box of Johnson, consisting of a stylus, a diaphragm, and a diaphragm frame drawn in back of the diaphragm so as to leave a small central opening opposite the diaphragm center. He then conducted the sound away from this central opening through an expanding taper tube toward the horn. This tube turns and extends parallel to the diaphragm a substantial distance beyond the diaphragm edge, but it is relatively short, it is made integral with the primary sound box and as a development thereof, and Cannavel calls it a diaphragm box. This first tube (*e* in the German, *c1* in the French) is then attached by slip connection to a second tube (*g* in the German, *e* in the French) which continues the progressive taper expansion. At the other and larger end this second tube enters the base member of the horn proper (*i* in the German, *f* in the French), where it is pivoted, and through which the progressive expansion of the sound waves continues. Cannavel distinctly discloses, by his specification and drawings, the same meritorious thought which is at the base of the Johnson invention, as it is now claimed to be formulated in claim 42, viz. that the expansion in the sound tube should continue in unbroken progression from the immediate vicinity of the diaphragm on through into the main horn, and that there should be a jointed connection between the sections of this expanding horn which would permit the sound box to have the necessary play while the horn itself was otherwise supported.<sup>2</sup> Cannavel's *c* constitutes Johnson's sound box and sound tube combined, save that the tube is so short that it may be thought dominantly a sound box only. Cannavel's *g* is Johnson's tapering sound tube movably connected with the horn at the large end and carrying sound-reproducing means at the small end, save that it is so short that its coupling function may be thought to dominate its function as a tube (Cannavel calls it "a short tube which constitutes a ball joint"); but it was tapered, it was a sound conveyor, and it was as long as necessary to reach from the sound box to the horn. However, we pass Cannavel by with the conclusions that, conceding invention in lengthening his intermediate tube coupling member, the field is narrow, and that, where we find this tube claimed in combination with other novel elements which Johnson had devised, the presence in the claim of the latter creates limitations which cannot be minimized by the thought that the tapered tube was a revolutionary invention.

Referring to the small end of the tapered tube, the claim calls for sound-producing means and the means for attaching the latter to the

<sup>2</sup> He says (French patent): "The characteristic and essential point of my invention is that the successive channels *c1*, *e*, and *f* widen after leaving the [sound box] orifice, *c2*. \* \* \* In no case does there exist in one point of the channel a part not widening. \* \* \* This point is very important, and this employment of a channel which widens in a continuous manner from the orifice," etc.

tube. If in plaintiff's machine we substitute defendant's means for attaching these two parts, the machine becomes inoperative; and this is sometimes taken as the test of equivalency. It is not a true test, to disprove equivalency, because the inoperativeness may be overcome by compensatory changes at another place which may be within the skill of the ordinary mechanic, and we think that would be true here; hence infringement is not thus escaped by the difference at this point, and we see no reason for limiting "means for attaching" so as not to include defendant's bayonet joint.

Coming to the large end of the tapered tube, we find that the structure of the patent provides a curving arm extending out and up from the main frame. This arm carries, rigidly attached and extending therefrom, a horizontal bracket, 4, in the form of a flat-topped ring, 9<sup>1</sup>, with an annular flange rising and a sleeve, 6, depending therefrom. The ring also carries a transverse central bar. The upper surface of the ring supports and carries the main horn positioned by the flange. The large end of the tapered tube enters this depending sleeve, which thus serves as a coupling, and is supported there by a pivot post which, in turn, is supported by the frame arm, but the tapered tube is not supported by the coupling. In many places the horn is considered as a complete unit, with two sections, but in this claim Johnson clearly differentiates between the tube and the horn, and when he says "horn" he means what he sometimes calls the "horn proper," or main horn. We thus find a group of means (arm and ring, with flange and sleeve) specially devised by Johnson, which constitute a combined coupling between the horn sections and support for the large one, and which, when united in composite form, constitutes one means for both functions. We think the fair interpretation of claim 42 calls for such composite unit, though its form might be much varied. Six prior claims had specified means for the coupling and means for the supporting functions; some of them very specifically and some of them broadly. When Johnson wanted to call for all means which would couple or all means which would support, he knew how to do so. In claim 6 he said, "said horn and tube being independently supported." In claim 10 he said, "said horn and tube being supported to move." The language of claim 11 aptly describes the coupling and supporting functions with the scope which plaintiff now seeks to give to claim 42. Claim 41 calls, by implication, for the supporting function in the broadest way. The language of claim 1, omitting the sound box connection limitation, was admirably suited for the construction now claimed for the very different language of 42, which specifies "horn-coupling and supporting means."<sup>3</sup> This seems to us, as we have said, to imply the conception of a means, beyond the mere frame of the machine, which, as a composite element or as a group of elements, should both support the horn and couple it and the tube. Defendant does not have any such

<sup>3</sup> Plaintiff's witness Hunter describes the difference between claims 41 and 42 by saying of 42 that "it is specifically stated that the horn coupling also acts as a supporting means with which the other and larger end of the tapered sound conveyer is connected, whereas in claim 41 the coupling is not stated to act also as the "support."

element, unitary or compound. Its horn, if the horn extends back to this point at all, is of wood and supported by the wooden cabinet top or frame from which it depends, and is held there by an ordinary cabinetmaker's glue joint. The large end of the taper tube rests indirectly upon, and is supported by, the same top or frame. The sleeve or coupling member (if coupling there is in the patent sense) also rests upon the same frame member. It is not supported by, nor does it in any degree, directly or indirectly, support, the main horn, though it does immediately support the tapered tube. We cannot find this "horn-coupling and supporting means" in defendant's structure. The same result will follow if the call of the claim is thought to be for means for supporting and coupling both tube and horn.

There is another difference which is not clear as a matter of words, but is substantial and vital as a matter of substance. The claim calls for a "coupling" between the two parts of the horn. This requires that the two should come together so that they can be coupled. Johnson intended that the two parts of this horn, coupled together, should constitute one amplifying horn, without substantial lack of continuity in the amplification. This will be further pointed out. In defendant's sound tube we take the step by step enlargement (58-58) to be the equivalent (for the purpose of claim 42) of Johnson's unbroken taper, and this brings substantially progressive enlargement until the passage has curved downward and has come to tube 73. Here there is a reduction in the cross-section area of nearly 40 per cent. At the bottom of 73 (39) there is a change from round to square form and consequent enlargement which approximately compensates for the 40 per cent. constriction above; then the passageway makes a square turn through a cubical chamber with first an enlargement and then a further constriction of about 15 per cent. in passing through what Cheney calls his mechanical throat. Then, and then only, comes the other and larger section of the amplifying horn. The net result is that from the reproducing means the passage is continuously amplifying for a certain distance, then it is very substantially constricted and turns a square corner, all for a distance substantially the same as the length of the first tapered tube, and then only is permitted to expand more freely. This treatment is in the teeth of the teachings of the patent, and upon theories antagonistic to anything which can happen in the structure shown by the drawing.

The specification continually points out the advantages of the invention upon which a monopoly is sought. Collating these statements and omitting those which refer to subordinate features not involved in claim 42, we find:

"By locating the small end of the horn in this manner so that the sound-conducting tube or horn flares outwardly practically from the sound box, I have found that it allows the sound waves to advance with a regular, steady, and natural increase in their wave fronts, in a manner somewhat similar to that of the ordinary musical instruments, thus obviating the well-known disadvantages due to long passages of small and practically constant diameter. \* \* \* It is also desirable to avoid abrupt turns in the sound-conducting tube or passage. \* \* \* It is therefore the object of my invention to provide a talking machine with an amplifying horn meeting these requirements. \* \* \* I provide, in effect, an amplifying horn that extends,

(378 F.)

practically, from the sound box. \* \* \* It consists of two sections, one of which is the tapering, hollow sound-conducting horn \* \* \* mounted upon the machine, while the other section is the \* \* \* horn proper. \* \* \* The advantage of this is that I secure the requisite length of a constantly flaring or tapering horn which gives the desired result in quality and volume of reproduction. \* \* \* The horn proper forms only a portion of the sound-conducting tube. \* \* \* I have avoided to the greatest degree any abrupt turns. \* \* \* I have produced, in effect, a sectional horn, tapering from end to end."

In the progress of the application through the Patent Office the applicant made repeated arguments and discussions pointing out the advantages of his invention and the distinctions over the art cited. Every instance of these claims for merit or for invention, whether stated in the specification or in the arguments, is in such terms as to exclude defendant's construction. With this history, the alleged broad language of the claim should be very clear to justify finding infringement.

We have little hesitation in saying that defendant's horn proper, as that part is intended by the specification, does not extend up through the tube 73 to the cabinet top to be there coupled to the tapered tube, nor in also concluding that the tube 73 does not itself constitute the coupling member which unites the two sections of the horn. The 10-foot section of an ordinary gas pipe which is interposed between two other similar sections and fastened to both truly enough couples them together, but it is not commonly spoken of as a coupling; on the contrary, it is a spacer which holds them apart; and an interposed member or element which destroys the theory of operation and of advantage claimed for the invention cannot be that coupling which the patent calls for in order to carry out the invention.

Previous decisions do not throw much light on the question of infringement. The breaks in progressive amplification have been, or have been said to be, unsubstantial, and the limitation to "horn-coupling and supporting means" has never been interpreted. Infringement of claim 42 has not been essential to justify any injunction that has been granted; it has never been worth while to determine its scope carefully.

These considerations require a reversal of the decree and a dismissal of the bill as to patent No. 814,786.

[2] As to the other patent, No. 814,848, where the court below held there was no infringement, the views already stated require an affirmance. Claim 7 calls for an amplifying horn which is—"comprising"—a continuously tapering tube with a joint between the two parts thereof. Claim 11 does not, in set words, require that the horn shall be a continuously tapering tube, but it describes the horn as "a tapering curved tube," and this reference and description are to the tube as a whole, and not to any part. Such description does not aptly apply to a tube the central one-third of which is not tapered, but is parallel-sided and is very substantially constricted. As to these two claims, the decree is affirmed.

**CURTISS AEROPLANE & MOTOR CORPORATION et al. v. JANIN et al.**

(Circuit Court of Appeals, Second Circuit. December. 14, 1921.)

No. 21.

**1. Patents ¶114—Suit in equity to obtain patent.**

In a suit in equity, under Rev. St. § 4915 (Comp. St. § 9460), complainant assumes a heavy burden of proof, and if the facts are seriously in dispute must adduce new and persuasive testimony not submitted to the administrative tribunal.

**2. Patents ¶90(5)—“Reduction to practice.”**

The ultimate test of the reduction to practice of an invention is whether the inventor has shown operative means to the man skilled in the art, either by drawings, written or oral description, or by the construction and trial of the thing itself.

**3. Patents ¶90(5)—Application as reduction to practice.**

To constitute a constructive reduction to practice, a patent application must be sufficient to enable a person skilled in the art to construct an operative machine, which will accomplish the intended purpose, without the further exercise of the inventive faculty.

**4. Patents ¶328—Claim 8, of Janin patent, No. 1,312,910, for hydro-aeroplane, awarded to Glenn H. Curtiss.**

The granting to Janin of claim 8 of patent No. 1,312,910, for a hydro-aero machine, held erroneous, and the claim adjudged to Glenn H. Curtiss, whose application for a patent for a hydro-aeroplane was in interference, on the ground, not only that Curtiss was first to reduce the invention to practice by actual successful flight in his machine, but also that the application of Janin was not a constructive reduction to practice, because the structure described therein was not operative, and could be made so only by the exercise of invention in the construction of the boat element, described therein only as a “hull-like body.”

**5. Words and phrases—“Hydro-aeroplane” defined.**

A “hydro-aeroplane” is a machine that floats on water, rises therefrom to fly, descends again to water, and is capable of indefinitely repeating the operation.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by the Curtiss Aeroplane & Motor Corporation and Glenn H. Curtiss against Albert S. Janin and the Janin Company, Inc. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 267 Fed. 198.

Suit is brought under Rev. Stat. § 4915 (Comp. St. § 9460), and is in substance a complaint by one inventor (Curtiss) that the Commissioner of Patents has refused to him and granted to another inventor (Janin) a certain “patent on an application,” meaning thereby that a claim was, after interference proceedings, awarded to Janin over the objection of Curtiss.

The history of a very prolonged litigation is set forth in the opinion below (267 Fed. 198), and the decision of the Court of Appeals of the District of Columbia, which resulted in the issuance of a patent to Janin containing the claim demanded by Curtiss, is found in Janin v. Curtiss, 45 App. D. C. 362.

Janin's patent, granted August 12, 1919, is No. 1,312,910. The application therefor was filed July 31, 1913, which, however, was “a substitute for an earlier (and abandoned) application filed January 26, 1911.” 45 App. D. C. 364. The disclosure of that earlier specification has been held throughout previous litigation to be “Janin's constructive reduction to practice of the inven-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion in issue," and it may be summarily stated that he has never made or effected any other reduction to practice.

Curtiss filed his application on August 22, 1911, and therein demanded a patent for "improvement in flying machines." It has (we think) been held throughout the previous litigation that Curtiss reduced his invention to practice by constructing a machine capable of floating on water, rising from the water, flying in the air, and then descending again to the water, and used this machine publicly on January 26, 1911.

The issue in interference became by the above referred to decision of the Court of Appeals the eighth claim of Janin's patent as issued, and is as printed in 267 Fed. at page 208. It is admitted that what the claim calls a hydro-aero machine means the same thing as does hydro-aeroplane, and it is enough, in stating the controversy on this appeal, to say that both Curtiss and Janin claimed to have invented an hydro-aeroplane; that claim 8 describes with accuracy, though in general terms, such hydro-aeroplane; that Janin has hitherto obtained the claim, and Curtiss brings this suit to demand it. The bill was dismissed below, and the Curtiss party appealed.

Frederic P. Fish, of Boston, Mass., and S. Mortimer Ward, Jr., of New York City, for appellants.

Thomas A. Hill, of New York City, for appellees.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The principal plaintiff herein is a patent seeker, exercising his statutory right of demanding from a court of equity what the regular administrative bureau has refused. Such a party is very properly compelled to assume a heavy burden of evidence. Not only must his case carry thorough conviction by the character and amount of evidence (*Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657), but, if facts are seriously in dispute, he must adduce in his equity suit new and persuasive testimony not submitted to the administrative tribunal (*Gold v. Newton*, 254 Fed. 824, 166 C. C. A. 270).

Curtiss has sought to meet this burden by new, and, in our opinion, conclusive, evidence as to when he first reduced a hydro-aeroplane to practice by flying in one, and his counsel have not failed to point out that the Patent Office result was reached by a majority only of the District Court of Appeals, reversing the decision of Commissioner Ewing. We think that at the close of testimony in the District Court this case was ready for decision upon a record new in several senses, and, as to the trial court's liberty to reach its own conclusions, closely resembled *Laas v. Scott* (C. C.) 161 Fed. 122.

All discussion of the matter at bar, or of the previous litigation is unfruitful, until a clear understanding is reached of what each party says he invented, which is the same thing as interpreting the claim in suit. Here we agree with the District Court of Appeals in saying that it "is not a combination claim, calling for elements in combination with a hydro-aeroplane, but for a hydro-aeroplane containing certain elements."

As was pointed out in *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502, it is the duty of the court, in proceedings under Rev. Stat. § 4915, not only to decide priority as between rival claims to invention, but to ascertain whether the parties or either of them has

made a patentable invention. Each of these parties asserts that he has invented an hydro-aeroplane; they agree that the same claim language defines their several inventions, yet the two hydro-aeroplanes are different; wherefore our next inquiry is: In what do they differ, and why was Janin preferred over Curtiss?

All patentable inventions are defined by claims, but described, explained and disclosed by specification. The element of a hydro-aeroplane, about which this contest rages, is in claim language "a main water-borne central boat structure"; but, as the specifications show, there is a great distinction between Curtiss' "boat structure" and that of Janin, and the vital questions, not only in this equity suit, but ever since interference began in the Office, is whether this obvious distinction entails a legal difference.

[2] The reason hitherto successfully urged, for preferring Janin to Curtiss, is that Janin first "reduced to practice"—a phrase of which the full meaning is also vital. Reduction to practice is not merely a matter of construction, building and trial, but may consist in the disclosure of the idea by any kind of description, pictorial, verbal, or written, which will enable one skilled in the art to make and use that which is disclosed. We think a drawing may possibly be a sufficient reduction to practice, and an experimental machine insufficient, for the question is one of degree, and the ultimate test is always whether the inventor has shown operative means to that theoretically omnipresent person, the man skilled in the art. *Macomber*, p. 68. But see *Automatic, etc., Co. v. Pneumatic, etc., Co.*, 166 Fed. 288, 92 C. C. A. 206, and *McCreery, etc., Co. v. Massachusetts etc., Co.*, 195 Fed. 498, 115 C. C. A. 408.

Curtiss proved before this suit that he reduced to practice by flying in a hydro-aeroplane on January 26, 1911, at San Diego, Cal.; and we agree with the court below that he has in this suit proved that he did the same thing with the same machine, but for shorter flights, several days earlier—as early as January 24th. In his specification of August 22, 1911, he describes the boat body of this reduction to practice, which was confessedly operative.

Janin's was admittedly a "constructive reduction to practice," consisting of filing his specification on the same January 26; but, as (according to the District Court of Appeals) he had "conceived" his hydro-aeroplane as early as 1907, to him was awarded the invention. Some consideration of these words and phrases seems necessary. We agree with Mr. *Macomber* (page 785) that—

"The Patent Office rule that the filing of an allowable application is a constructive reduction to practice is only the expression in another form, of the thought that the application for a patent, if it sufficiently describes the invention, is conclusive evidence that the invention was made at least as early as that date."

As for the word "conceived," it means that the inventor "formed a distinct and correct notion of" whatever he thought he invented (*Cent. Dict.*), and its value in patent causes is fully stated by *Lurton, J.*, in *Standard, etc., Co. v. Peters, etc., Co.*, 77 Fed. 630, 645, 23 C. A. 367.

In this case, however, we feel sure that defendant's constructive reduction to practice receives no assistance from any previous conception on his part; and this is true, even if full credence be given to defendant's evidence as to his early drawings, models, and experiments and no weight be attached to plaintiff's testimony tending to show Janin as one unworthy of belief.

[3] The reason for this holding is that whatever Janin conceived prior to January 26, 1911, whatever experiments or models he made, it is admitted that the ripe fruit of all that he had done was contained in the specification he then filed. Let it be admitted that defendant had many and early conceptions of invention; they all related to a hydro-aeroplane, and he disclosed everything that he had conceived in his original specification. If, therefore, that specification does not enable the man skilled in the art to construct without further exercise of the inventive faculty an operative hydro-aeroplane, there has been no reduction to practice, constructive or otherwise. *Standard, etc., Co. v. Peters, etc., Co.*, supra. Indeed, the whole doctrine of conception, as differing from reduction to practice, is excellently set forth in *Christie v. Seybold*, 55 Fed. 69, 76, 5 C. C. A. 33, 40, by the present Chief Justice when Circuit Judge, in saying that he who—

"first conceives, and in a mental sense first invents, a machine, art, or composition of matter, may date his patentable invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part, so that they are substantially one continuous act."

Therefore, if it be admitted that defendant Janin had for years been conceiving hydro-aeroplanes, the question remains whether the device he disclosed on January 26, 1911, was something that would or could rise out of the water and fly; for we again agree with the District Court of Appeals in holding that—

"The law is well settled that where an invention is designed to perform a definite purpose, a construction embodying it must be capable, when operated, of performing that purpose."

[4, 5] Thus the fundamental inquiry is this: Did Janin on January 26, 1911, and by filing his specification disclose an operative hydro-aeroplane? It is imperative to answer this question, for the subject matter of the claim in suit is a hydro-aeroplane; that word means a machine that floats on water, rises therefrom to fly, descends again to water, and is capable of indefinitely repeating the operation. It makes no difference (as seems to have been thought by the court below) that the first hydro-aeroplane could not perhaps do these things from rough water, or unless in charge of a man of exceptional skill; if it would work at all according to the disclosed law of its being, on the smoothest water and in calmest air, it would have been operative, under familiar rules.

Janin disclosed no boat body; by his own evidence he never conceived a boat body, other than one like that of a swift small vessel (e. g. a torpedo boat). He speaks, even in his 1913 specification, only of a "hull-like body," and his drawings only reveal the freeboard of something long and narrow of historic boat shape. Whatever may have

been the probative result of the interference evidence, this record makes it very plain that such a body could never be lifted from the water by any power compatible with flying and placed in a flying machine. That was proved by Curtiss' efforts with his canoe body in 1910.

We agree with the lower court in finding in substance, that any body even suggested by Janin could not be lifted from the water; we do not agree that there is any evidence of his even thinking of using hydroplaning surfaces to lift the "hull-like body," other than the stabilizing floats to port and starboard which are common to both parties. Nor can we agree with the reasons finally assigned in the District Court for still preferring Janin, viz.: (1) If a hydroplaning bottom be given Janin's boat, it would be a hydro-aeroplane, and there were such bottoms known to the art; (2) Janin had the right to "presuppose" or "assume" a proper boat structure. Both these reasons are insufficient, because they necessarily hold that the proper hydroplaning bottom, or the "assumed" boat, would and could be supplied by the man skilled in the art without the exercise of the inventive faculty.

There was no living man skilled in the art of hydro-aeroplaning, because (on this record) no one had ever flown from water, except Fabre, and he could only return by breaking his machine; and hydroplaning did not teach hydro-aeroplaning. Men knew how to skim over water, but (as is sufficiently shown by the fact-findings below) it required much inventive skill to enable the hydroplane bottom to leave the water, and take "the last step that counts," or to introduce into a long boat the "break" subsequently utilized.

Decision, both in the District Court of Appeals and the lower court, has rested on Janin's "unchallenged reduction to practice of January 26, 1911." It seems to have gone unchallenged in the interference, argument was rested on Curtiss' earlier achievements in 1910; in this case it is successfully challenged, and we find that Janin reduced nothing to practice, because what he conceived and disclosed is, as an hydro-aeroplane, wholly inoperative, for it cannot get out of the water; the rest is immaterial.

Decision is grounded on this point, though we may say, further, that in view of the proven unreliability of Janin and his witnesses, we think no reduction or conception can be assigned him earlier than January 26, 1911, in which case Curtiss antedated him by at least two days.

Decree reversed, and cause remanded, with direction to grant the prayer of the bill. Under the statute, there are no costs; mandate to issue forthwith.

THE SARNIA.\*

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 44.

1. Shipping  $\S$ 123—Shipment under clean bill of lading imports obligation to stow under deck.

Where goods are shipped under a clean bill of lading, the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary, or a custom to the contrary is proven.

2. Evidence  $\S$ 442(8)—Carrier may prove agreement for deck stowage, where bill of lading is silent.

Where a bill of lading is silent as to stowage, the shipowner may prove an agreement for deck carriage when a claim for loss is made.

3. Shipping  $\S$ 141(2)—Breach of contract to stow goods under deck, causing damage, held to vitiate valuation clause of bill of lading.

When a shipowner issues a bill of lading which calls for shipment under deck, and then carries the goods on deck, and by reason of their exposed position they are damaged, his breach of the contract deprives him of the benefit of the valuation clause in the bill of lading.

Mack, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by L. Telles De Vasconcellas against the steamship Sarnia; the Sarnia Steamship Corporation claimant. From the decree, libellant appeals. Reversed.

The libellant is a citizen of the republic of Portugal and a resident of the city of Lisbon therein. The libel was filed against the steamship Sarnia, which is a general ship engaged as a common carrier of merchandise for hire between the port of Lisbon, in Portugal, and the port of New York.

The libel alleges that on November 4, 1915, the libellant purchased from the King Motor Company, one eight-cylinder five passenger King touring car, one eight-cylinder King chassis, and one case of advertising matter to be forwarded to the libellant at Lisbon; that on December 21, 1915, the King Motor Car Company by their agents shipped and placed on board the steamship aforesaid, then lying at the port of New York and bound for the port of Lisbon, the aforesaid automobiles and advertising matter in good order and condition to be carried by the said ship under deck to Lisbon, and there to be delivered in as good order and condition as when shipped to the libellant or his assigns in consideration of the payment of the freight and in accordance with the valid terms of the bill of lading; that on December 23, 1915, the ship sailed, having on board the freight above referred to, but that it was not stowed under deck, but was wrongfully and improperly loaded on the deck of the steamer; that on January 19, 1916, the steamer arrived at Lisbon and made delivery of the shipment above described, but not in like good order and condition as when shipped, but was seriously damaged by water, and through the fault and negligence of the ship, her owners and charterers in respect of the loading, stowage, custody, and care of the shipment, as a result of which the property became a total loss. The libellant alleged that he had been consequently damaged in the sum of \$2,700, and that no part thereof had been paid, although the same had been duly demanded.

The Sarnia Steamship Corporation, claimant of the ship, put in an answer in which it admitted and alleged that the freight above described was received and loaded on the vessel in apparent good order and condition to be transported and delivered to libellant in accordance with the terms of a certain bill of lading issued to the shipper, which had been previously signed by the master

\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 257 U. S. —, 42 Sup. Ct. 332, 66 L. Ed. —.

acting in behalf of the charterer, and that the shipper agreed with the charterer that the cases containing the touring car and chassis should be transported on the deck. It admits that the two cases above mentioned were stowed on the deck as agreed with the shippers, and that the cases containing the advertising matter was stowed under deck, and that all this was in accordance with a specific agreement therefor. It admits that at the time of delivery the two cases carried above deck were in a damaged condition, because of heavy seas which boarded the steamship in the course of a heavy storm and broke the cases and did much damage to the vessel itself. The answer, as a further defense, relied on the terms of the bill of lading hereinafter referred to in the opinion.

The court below has found as a fact that it was not proven that the bill of lading was issued before the receipt of the goods on the dock. He also held that such a bill of lading as was issued conclusively imported under-deck stowage, and that the contract was breached by putting the machines on deck. He also held that this breach did not avoid the valuation clause, contained in the bill of lading, which reads as follows: "1. It is also mutually agreed that the value of each package receipt for as above does not exceed the sum of one hundred dollars (\$100) unless otherwise stated herein on which basis the rate of freight is adjusted."

The libellant obtained a decree in the court below in the sum of \$200, with costs amounting to \$66.35.

Harrington, Bigam & Englar, of New York City (Oscar R. Houston, of New York City, of counsel), for appellant.

Hunt, Hill & Betts, of New York City (John W. Crandall and H. Victor Crawford, both of New York City, of counsel), for appellee.

Before ROGERS, MAYER, and MACK, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought on the part of the shipper to recover damages for injury to the goods shipped, arising from their wrongful stowage above deck, whereas they should have been carried under deck.

[1] Where goods are shipped under a clean bill of lading the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary or a custom to the contrary is proven. *The Water Witch*, 1 Black, 494, 17 L. Ed. 155; *The Kirkhill*, 99 Fed. 575, 39 C. C. A. 658; *The New Orleans* (C. C.) 26 Fed. 44; *The Gran Canaria* (D. C.) 16 Fed. 868; *Two Hundred and Sixty. Hogsheads of Molasses*, 24 Fed. Cas. 445, No. 14,296; *Vernard v. Hudson*, 28 Fed. Cas. 1162, No. 16,921.

[2] But as silence in a bill of lading as to stowage is not an express contract to carry under deck the shipowner may prove an agreement to carry on deck where a claim for loss is made. *The Delaware v. Oregon Iron Co.*, 14 Wall. 579, 20 L. Ed. 779. It was attempted in the court below to prove that there was an agreement that the shipment might be carried above deck, but the proof offered of such an agreement was not sufficient, and the court found, and we have no disposition to reverse the finding, that no such agreement was made.

[3] This court, therefore, is confronted in this case with a question of law, which is both interesting and important. The question is this: When a shipowner issues a bill of lading which calls for a shipment under deck, and then carries the goods on deck, is his breach of the contract of shipment such as to deprive the shipowner of the benefit

of the valuation clause? In the court below the view was taken that there was a plain breach of contract, in that the goods had been stowed above deck, but that this deviation did not vitiate the valuation clause, by which the parties had agreed that the motor cars for purposes of shipment were to be deemed worth \$100 apiece on which basis the rate was adjusted. The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor. We are to inquire whether the valuation clause constitutes an exception to the general rule.

But it is urged that the question can hardly be regarded as an open one in this court, in view of the decision in *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033. In that case goods were shipped from New York to Savinilla on the steamer *Ailsa*. The goods were not delivered when the ship arrived at destination, but were carried back to New York and then reshipped by the carrier on the steamer *Alvo*, which was lost at sea in a hurricane. The bill of lading contained a clause designed to limit the liability of the carrier to \$100 per package. It was urged that the final loss of the goods was due to hurricane, an extraordinary sea peril, and that there was no liability as the bill of lading exempted from liability from perils of the sea; and it was further contended that, if a liability existed, it could not exceed \$100 per package because of stipulations in the bill of lading, as a value in excess of \$100 per package had not been disclosed, nor any agreement made at the time of shipment for the payment of freight at an extra rate. The case arose in the Southern district of New York and was heard before District Judge Addison Brown. He held that the case involved the principle of deviation, and that in marine transportation deviation made the carrier liable as an insurer, both because of the carrier's violation of the contract and because the deviation avoided the shipper's insurance and he had no opportunity to secure further insurance. The court sustained the validity of the clause as to value and limited the recovery of the cargo owner to the agreed valuation per package, allowing a recovery of \$2,900, instead of \$5,600, the full value. 64 Fed. 874.

The case was brought on appeal to this court, which affirmed the decision below. This court, in the opinions rendered, considered at length the question of the validity of the valuation stipulation and sustained its validity, but said nothing as to the phase of the subject now being considered. 69 Fed. 574, 16 C. C. A. 332. The case was then carried to the Supreme Court, on a writ of certiorari. That court held that the carrier was liable, to that extent agreeing with the courts below; but it reversed the decree, and held the valuation clause invalid, because it stipulated against any liability whatsoever on the part of the carrier where the goods were worth over \$100 per package.

The exact question presented in the case now to be decided was not discussed—was not so much as referred to—in the opinion of the District Court, or in those delivered in this court, or in that of the Supreme Court. In the absence of any allusion to the subject in any of

the opinions in the case, and especially in view of the fact that the opinion of this court was reversed, we feel that this court is free to consider the question now as *res integra*.

In the present case there is no doubt that the valuation clause inserted in the bill of lading was valid at the time it was made. It did not stipulate against any liability whatever if the value of each package exceeded \$100, but simply provided that the value of each package did not exceed \$100. The leading case in the federal courts as to the validity of such a valuation clause is that of *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. The court held that such an agreement, fairly entered into, where no deceit is practiced on the shipper, is just and reasonable, and not contrary to public policy, and must be upheld. To the same effect are numerous cases, among which are the following: *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576; *Reid v. Fargo*, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Dettlebach*, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453; *The Morro Castle* (D. C.) 168 Fed. 555; *Hohl v. Norddeutscher*, 175 Fed. 544, 99 C. C. A. 166; *Kuhnhold v. Compagnie Générale Transatlantique* (D. C.) 251 Fed. 387; *Frederick Leyland & Co., Limited, v. Hornblower*, 256 Fed. 289, 167 C. C. A. 461.

Conceding, then, the validity of the valuation clause at the time the contract was made, we are brought to inquire whether it was subsequently invalidated by the failure of the carrier to perform his undertaking in accordance with his agreement. In entering upon that inquiry it is important to keep in mind certain principles of law governing contracts of shipment made between the shipper and the shipowner.

Now, it must be admitted, in the first place, that if a shipowner issues a bill of lading which calls for a shipment under deck, and then carries the goods above deck, he commits a gross violation of his contract. He thereby not only renders void the shipper's marine insurance, but he exposes the goods to a much greater peril of the sea. It has been established law for hundreds of years that a plain bill of lading imports a shipment under deck. *The Water Witch*, 1 Black, 494, 17 L. Ed. 155; *The Kirkhill*, 99 Fed. 575, 39 C. C. A. 658; *Vernard v. Hudson*, 28 Fed. Cas. 1162, No. 16,921; 3 Sumn. 405. And it is equally well established that, where property is insured under a general description such as cargo, goods, etc., it only covers such property as is stowed under deck, unless it is specified that it is to cover deck cargo, or there is a general usage to carry that particular kind of property above deck. *Hazelton v. Manhattan Ins. Co.* (D. C.) 12 Fed. 159; *Appollinaris Co. v. Nord Deutsche Ins. Co.*, [1904] 1 K. B. 252, 9 Asp. 526; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473; *Adams v. Warren Ins. Co.*, 22 Pick. (Mass.) 163. To carry above deck what was insured to be carried below deck vitiates the insurance. For the insurer, as Lord Mansfield said in *Pelly v. Royal Exchange Association Company*, 1 Burr. 341, in estimating the price at which

he is willing to indemnify the trader against all risks takes under consideration the usual course and manner of carrying the goods. As he there stated:

"What is usually done by such a ship with such a cargo in such a voyage is understood to be referred to by every policy, and to make a part of it as much as if it was expressed."

If carrying above deck goods which should have been carried below deck vitiates the policy of insurance, as between the insurer and insured, we see no reason why, for like reasons as between the carrier and the shipper, a like breach of the contract of carriage should not vitiate the valuation clause; for the shipper, in fixing the amount in such a clause, takes under consideration the risk to which his goods are to be exposed and the manner of their carriage. The fact that the goods are to be carried below deck is understood between the parties, and is as much a part of the valuation clause as it is of any other of the clauses in the bill of lading. It seems to us most unreasonable to hold that, as between the shipper and the carrier, the former should be estopped by a valuation clause, where the latter's own misconduct has breached the agreement and destroyed the conditions upon which the estimate of value was predicated. In fixing the value the shipper was undoubtedly influenced by the fact that the goods were to be carried below deck, and not exposed to the perils of carriage above deck.

It has long been established law that a deviation changes the character of a voyage so essentially that the shipowner who has deviated cannot claim the benefit of the terms of the bill of lading. The unjustifiable deviation vitiates or avoids the contract of carriage. *Giband v. Great Eastern Ry. Co.*, [1921] 2 K. B. 426; *Morrison v. Shaw*, [1916] 2 K. B. 783, 86 L. J. K. B. 97; *Internationale, etc., Werken v. McAndrew & Co.*, [1909] 78 L. J. K. B. 691, 693; *Thorley v. Orchis Steamship Co.*, [1907] 1 K. B. 660, 76 L. J. K. B. 106, 595, 10 Asp. M. C. 431; *Luduc v. Ward*, 20 Q. B. D. 475; *Lawrence v. Minturn*, 17 How. 111, 15 L. Ed. 58; *Constable v. National S. S. Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Chubb v. 7800 Bushels of Oats*, 5 Fed. Cas. 663, No. 2,709; *Knox v. The Ninetta*, 14 Fed. Cas. 827, No. 7,912; *Thatcher v. McCulloh, Olc.*, 365, Fed. Cas. No. 13,862; *The Rebecca*, 20 Fed. Cas. 373, No. 11,619; *The Thomas P. Thorn*, 23 Fed. Cas. 1002, No. 13,927; *Stinson v. Wyman*, 23 Fed. Cas. 108, No. 13,460; *Vernard v. Hudson*, 28 Fed. Cas. 1162, No. 16,921; *The Waldo*, 28 Fed. Cas. 1356, No. 17,056; *The Wellington*, 29 Fed. Cas. 626, No. 17,384; *Pacific Coast Co. v. Yukon Independent Transportation Co.*, 155 Fed. 29, 83 C. C. A. 625; *The Citta di Messina* (D. C.) 169 Fed. 472, 475.

It is true that in the case now before us the goods were shipped from New York to Lisbon, Portugal, and that no complaint is made that the ship called at any port at which it was not entitled to call, or that it deviated from its proper and customary route. But the term "deviation," in the law of shipping, has been held to have a varied meaning and wide significance. Thus in *The Indrapura* (D. C.) 171 Fed. 929, 931, the court said, in speaking of the meaning of this term:

"It was originally employed, no doubt, for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of voyage; but it seems now to comprehend in general every conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment."

And in the above case the court held that dry-docking the ship was a deviation in the law of shipping and rendered the shipowner liable. The court further said:

"Whether there was an increase of risk or not, the elevation of the ship out of its natural element after the merchandise was received for transportation was an act beyond question not contemplated by the shipper, and was assuredly a breach of the implied contract that the ship should remain upon the water and proceed with all practicable dispatch to destination; and the only thing that would or could justify a deviation from this course is an absolute maritime exigency."

If a shipowner carries the cargo on deck, he breaks the contract contained in the bill of lading, and so cannot be protected by the exception of jettison. *Royal Exchange Shipping Co. v. Dixon* (1886) 12 A. C. 11, Q. B. 266, 6 Aspinal (N. S.) 92, 94. In *Scrutton on Charter Parties and Bills of Lading* (8th Ed.) p. 134, that writer states the rule as follows:

"Goods are to be loaded in the usual carrying places. The shipowner or master will only be authorized to stow goods on deck: (1) By a custom binding in the trade or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper of the particular goods so to stow them. The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading and to render the shipowner liable under his contract of carriage for damage happening to such goods."

In *Carver on Carriage by Sea* (6th Ed.) p. 398, it is said:

"A deviation is such a serious matter, and changes the character of the voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favor contained in the bill of lading."

In *Parsons on the Law of Shipping*, vol. 1, p. 172, note, it is said:

"It is well settled that, if the vessel deviates and the cargo is insured, the risk terminates, and the underwriters are exonerated. It follows, as a necessary consequence, that the shipowner, having put an end to the contract existing between the freighter and the underwriter, should stand in the place of the latter and assume his risks."

See *Abbott's Merchant Ships and Seamen* (14th Ed.) p. 525.

In *Ellis v. Turner*, 8 T. R. 531 (1800), it was held that deviation deprived the shipowner of the benefit of public notice limiting liability for loss by negligence of the master or crew to 10 per cent. In *Sleat v. Flagg*, 5 Barn. & Ald. 342 (1882), the carrier was held liable for full value of a lost package of bank notes, accepted to be carried by mail coach, but which had been actually sent forward by another coach. This deviation cost the carrier the benefit of a clause limiting the liability to £5 per parcel.

In *Balian & Sons v. Jloy, Victoria & Company, Ltd.*, 6 T. L. R. 345 (Ct. of Appeals, 1890), it was held that deviation ended all the stipula-

tions in the bill of lading in favor of the shipowner including limitation of liability per package. It was declared that the cases showed that deviation deprived the shipowner of all the stipulations in the bill of lading; that it was undoubtedly true of all the ordinary stipulations, such as those relating to excepted perils, and that a stipulation limiting the extent of the shipowner's liability for damage to goods was of precisely the same kind as the other limitations, which were admittedly done away with by the deviation; that there was no reason for making any distinction between them, and that the limitation of liability clause was done away along with the others by the deviation.

In *Pacific Coast Co. v. Yukon Independent Transportation Co.*, 155 Fed. 29, 83 C. C. A. 625, the bills of lading contained a clause providing that a claim for loss or damage to any of the property should be restricted to the cash value of the same at the port of shipment at the date of shipment unless otherwise agreed. There was a deviation, and the Circuit Court of Appeals for the Ninth Circuit held that the carrier lost the benefit of the clause and of other limitations of liability in the bills of lading by the deviation.

An analogous question, although it related to land transportation, was before the Supreme Court of Massachusetts in 1911 in *McKahan v. American Express Co.*, 209 Mass. 270, 95 N. E. 785, 35 L. R. A. (N. S.) 1046, Ann. Cas. 1912B, 612. The agreement in that case related to the transportation of horses from La Fontaine, Ind., to Boston, Mass. The contract provided that the company would furnish free transportation for an attendant and that the time of the transportation should not exceed 36 hours. During the transportation the company separated the horses from their attendant furnished by the shipper, and they were detained in the cars for 44 hours, instead of 36, without being fed or watered. The shipper, by the contract, declared the value of the horses to be \$75 each, and agreed that the company should be liable in no event for injury to any of the horses in excess of the value declared. The rate to be charged for the transportation was determined by the value declared. It was held that the carrier's departure from the agreed method of transportation displaced the contract of carriage, and released the shipper from all limitations upon the carrier's liability which he agreed to therein, and that he was entitled to recover from the carrier full compensation for his loss. In its opinion the court said:

"In the case at bar the shipper's agreement that the horses were to be valued at \$75 each was plainly based upon the risks incident to the transportation agreed upon, namely, transportation of the horses in care of an attendant. The breach by the carrier of its agreement to transport the horses in the care of an attendant was the proximate cause of the loss which occurred; and this case could be decided on the ground that it could not have been the intention of the parties to the original contract of shipment that the shipper should be held to his agreement as to the sum at which the horses were to be taken in case the carrier did not transport them in care of an attendant. But we are of opinion that the rule as to deviation from route and departure from method of transportation rests upon the broader ground that in such case the original contract is wholly displaced, at least at the election of the shipper, and we prefer to place our decision on the doctrine."

In *Dunseth v. Wade*, 2 Scam. (Ill.) 286, the court said:

"If a common carrier, in which character steamboats navigating our rivers must be classed, attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract."

A tortfeasor cannot take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate. *D'Utassy v. Barrett*, 219 N. Y. 420, 424, 114 N. E. 786, 5 A. L. R. 979; *Georgia Southern Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807; *Central of Georgia R. Co. v. Chicago Portrait Company*, 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87; *Merchants', etc., Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802. In *D'Utassy v. Barrett*, supra, the Court of Appeals declares that—

"The law remains that the carrier may not claim a limitation of liability to a certain amount for its affirmative wrongdoing when the plaintiff makes proof thereof."

We have been able to find no sufficient reason for distinguishing the valuation clause of a bill of lading from the other restrictive clauses in the bill, and for holding that the shipowner who performs his contract in a manner different from his undertaking may still claim the benefit of the stipulations respecting the value of the shipment, although he cannot claim the benefit of a single other stipulation in his favor found in the bill of lading. Neither upon principle nor upon the authorities do we think that such a distinction exists.

Decree is reversed, and cause remanded, with direction to take such further steps as may be necessary in accordance with this opinion.

*MACK*, Circuit Judge (dissenting). In *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, the Supreme Court, reversing this court (69 Fed. 574, 16 C. C. A. 332), which, with Judge Wallace dissenting, had affirmed Judge Addison Brown's decision (64 Fed. 874), held the clause of the bill of lading there in question void because it interpreted the language as an exemption from all liability for property over \$100 in value, not as a valuation of the property at \$100 for the purposes of the transportation and of the freight charges. In all of the courts the law was deemed settled that such an exemption clause would be invalid as a limitation of liability. The necessity of determining whether it was an exemption or a valuation clause—and it was on the interpretation that the members of this court differed—resulted from the implied assumption that a valuation clause would have been valid even in a deviation case. The validity of the valuation clause was not thus assumed without argument; the briefs filed in this court discuss the very question. The case is therefore at least persuasive that a valuation clause which, as distinguished from an exemption clause, has been upheld as valid in the federal courts, at least since *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, measures the amount of recovery even in a deviation case.

In the paragraph following the language quoted in the opinion of

my Brethren from *D'Utassy v. Barrett*, 219 N. Y. 420, 114 N. E. 786, 5 A. L. R. 979, the court says:

"The distinction must be borne in mind between a limitation of liability and an agreed valuation in case of liability. When it is urged that the limitation of value should not be applied to any case of theft by the carrier's employees, for the reason that the company is liable for such acts as if the company had been the thief, \* \* \* the argument loses sight of this distinction. \* \* \* The liability may exist and the valuation of the shipment in case of liability may be agreed upon when the rates for transportation are based on the valuation of the goods entrusted to the carrier. \* \* \* While the rule should not be extended to permit a carrier to realize a profit by converting valuable shipments, such conversions are so unusual as to be almost negligible. It would be unjust and contrary to the policy of the law to permit the agreed valuation to be overthrown for the purpose of enabling the shipper to obtain a recovery in excess thereof in a suit for loss or damage on any theory of trover or conversion for loss of goods by wrongful deliveries or acts of employees for their own benefit, based, not on the wrongful misconduct of the carrier as such, but on the act of the employee."

In that case, as in *Moore v. Duncan* (6th C. C. A.) 237 Fed. 780, 150 C. C. A. 534 (*Adams Express Co. v. Berry & Whitmore Co.*, 35 App. D. C. 208, 31 L. R. A. [N. S.] 309, contra), a valuation clause was upheld, even when the loss resulted from theft by the carrier's employees. It does not follow, however, that the valuation clause would serve to limit liability in all cases. It would be clearly against public policy to enrich the carrier thus to limit its liability and thereby to enrich itself, by an actual taking and retention of goods, as distinguished from a conversion due to negligent deviation, or from an imputed conversion due to the acts of employees for their own personal enrichment.

It is unnecessary in this case to consider the effect of a deviation ordered or directed with "privity or knowledge" of the owner, and not merely of the servants, including therein even the master of a vessel, or whether the liability is increased, if such a deviation be for the very purpose of enrichment by actually converting the goods to such owner's use. Even assuming—though without assenting thereto—that an improper shipment on deck is equivalent to a deviation, clearly in the case at bar there was no conversion with knowledge or privity of the shipowner, or for its enrichment. For while evidence of a contemporaneous oral consent to shipment on deck of goods which, but for consent, the carrier would be obligated, under a clean bill of lading, to carry under deck, is held in *The Delaware*, 14 Wall. 579, 20 L. Ed. 779, not admissible to vary even this implied obligation, it would seem clearly admissible on the question of the carrier's intent thereby actually to convert the goods and thus to enrich itself.

In this case, as I interpret Judge Hough's opinion—contrary to the views of my Brethren—he has found that there was such oral consent by the shipper. He says:

"The motors were only deck-laden because of and after an agreement on the part of Spiero [shipper's representative] that they would be insured against sea peril as deckladen—the charterers paying the extra premium."

The testimony clearly shows that no bill or request for such extra premium was ever sent to the charterers. There is a liability to the holder of the bill of lading for the breach of the implied under-deck

shipment obligation. It is immaterial whether this breach be called a deviation, or treated as analogous to a deviation, or not. The liability is that of an insurer in so far as the loss or damage resulted from this breach; that is, the benefit of the exceptions, in the bill of lading, to such liability is lost.

But the question remains: Liability for what and in what sum? In my judgment, Judge Hough has given the correct answer in the circumstances of this case of a breach not by or with the privity or knowledge of the owner and/or for his personal gain—liability only for the agreed value of the goods as stated in the bill of lading.

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**INTERNATIONAL SIGNAL CO. v. VREELAND APPARATUS CO., Inc.,  
et al.**

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 3.

**1. Patents ⇨114—Claims, to be interfering, must be substantially identical.**

As a prerequisite to declaring claims of a patent void, under Rev. St. § 4918 (Comp. St. § 9463), as interfering with claims of a prior patent, substantial identity between the claims must be found, interpreting them in the light, not only of text, but of the specifications and drawings, and of the prior art.

**2. Patents ⇨114—Suit for interference maintainable only where patents disclose invention.**

In a suit under Rev. St. § 4918 (Comp. St. § 9463), the court will not engage in useless investigation of priority, and if there is no patentable invention the bill will be dismissed.

**3. Patents ⇨114—Patentability of improvement not subject of interference suit.**

If a concededly junior patentee is claiming an alleged specific improvement on the device of the prior or basic patent, the patentability of the alleged improvement is not subject-matter for an interference suit.

**4. Patents ⇨328—Vreeland patents, 1,239,852 and 1,245,166, relating to the art of radio telegraphy, held not void, as interfering with prior Fessenden patents.**

Claims of Vreeland patents, No. 1,239,852, for receiver for electrical impulses, and No. 1,245,166, for method of transmitting and receiving high-frequency impulses, held not void, as interfering with claims of Fessenden patents, No. 1,050,441, for electrical signaling apparatus, and No. 1,050,723, for method of signaling, especially in view of the allowance by the patent office of the Vreeland claims after interference proceedings between the parties, in which Fessenden was awarded priority as to certain other claims.

Manton, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the International Signal Company against the Vreeland Apparatus Company, Inc., and Frederick K. Vreeland. Decree for defendants, and complainant appeals. Affirmed.

Frederick W. Winter, of Pittsburg, Pa., and Drury W. Cooper, of New York City, for appellant.

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⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Dyer & Taylor, John Robert Taylor, and Philip Farnsworth, all of New York City, for appellees.

Before ROGERS, MANTON, and MACK, Circuit Judges.

MACK, Circuit Judge. Appeal from the decree of the District Court, dismissing the bill brought by the plaintiff under section 4918 of the Revised Statutes (Comp. St. § 9463), seeking to have Vreeland patent, No. 1,239,852, granted September 11, 1917, for receiver for electrical impulses, and Vreeland patent, No. 1,245,166, granted November 6, 1917, for method of transmitting and receiving high-frequency impulses, adjudged void, as interfering with Fessenden patent, No. 1,050,441, granted January 14, 1913, for electrical signaling apparatus, and Fessenden patent, No. 1,050,728, granted January 14, 1913, for method of signaling. Plaintiff's specific contention is that the court should annul claims 1 to 8, inclusive, of Vreeland patent, No. 1,239,852, as interfering with claims 3, 4, and 29 of Fessenden patent, No. 1,050,441, and that, such interference having been established, the court may and should hold claims 9 to 28 of the Vreeland patent invalid, in view of the disclosure of Fessenden and the then state of the art (General Chemical Co. v. Blackmore (C. C.) 156 Fed. 968; but see Boston Pneumatic Tire Co. v. Eureka Patents Co. [C. C.] 139 Fed. 29); further, that all the claims of Vreeland patent, No. 1,245,166, should be annulled, as interfering with claims 10, 11, 12, 13, and 14 of Fessenden patent, No. 1,050,728.

The patents in question relate to the art of radio telegraphy and telephony. All of them involve wireless systems which utilize continuous or substantially continuous waves; that is, the so-called undamped waves, as distinguished from the damped waves of the old "spark" system. The damped waves are formed in groups or trains of relatively short duration, with long intervals of inactivity between groups, the waves or oscillations of each group being "damped"; that is, of rapidly decreasing amplitude or strength. An undamped wave is persistently generated and is of constant amplitude. All of the patents make use of the "heterodyne" principle, involving the production of signals by means of harmonic beats, analogous to musical beats. These are produced by the co-operation of the currents of the received electrical pulses and the locally produced forces. The heterodyne principle makes it possible to overcome many atmospheric disturbances, and to select the signals from a given station to the substantial exclusion of signals from other stations. The beats produced are measured by the difference between the frequency of the received wave and of the locally generated oscillations. The receiver controls the pitch of the signal note by controlling the frequency of the oscillations. The utilization of the continuous undamped waves and the beats principle marked a very great advance in the art. Kintner et al. v. Atlantic Communication Co. (D. C.) 249 Fed. 73.

[1] The Fessenden inventions, covered by the patents in suit, are admittedly prior in time. His claims, alleged to be interfered with, are broad in scope; if valid (and validity is not here contested), the utilization of Vreeland's patent concededly would involve infringement

thereof. But the question raised by this bill is that of interference under R. S. § 4918, not that of infringement; that is, it is not whether the plaintiff could enjoin the use of the method and product of the Vreeland patents, but whether there is substantial identity of scope, though not necessarily literal identity of language, in certain claims of the Fessenden and Vreeland patents. While, to ascertain the invention covered by a claim, the claim is to be interpreted in the light, not only of text, but of the specifications and drawings, and of the prior art, substantial identity in whole or in part in the invention so claimed must be found as a prerequisite to interference. *Stonemetz Co. v. Brown Co.* (C. C.) 57 Fed. 601; *Nathan v. Craig* (C. C.) 49 Fed. 370; *Simplex Ry. Appliance Co. v. Wands*, 115 Fed. 517, 53 C. C. A. 171.

[2] Two patents should not be issued for the same invention; if the Patent Examiner believes that such identity exists, either between two pending applications or between a pending application and a patent, verbally identical claims are suggested, and an interference declared by the Patent Office to determine priority of invention. If, however, two such patents have issued, the court, not the Patent Office, is the forum; proceedings under section 4918 may be brought. The aim, however, is unchanged; to determine priority of invention, and, on the basis thereof, to annul the patent erroneously and/or inadvertently issued. The court will not, however, engage in a useless investigation of priority; if there is no patentable invention, the bill will be dismissed. *Palmer Pneumatic Tire Co. v. Lozier*, 90 Fed. 733, 33 C. C. A. 255; *Simplex Ry. Appliance Co. v. Wands*, *supra*.

In a limited sense, so far as establishing inter partes the question of priority of invention, interference proceedings partake of the nature of the so-called declaratory judgments, a subject-matter of very recent legislation. See Borchard, *The Uniform Act on Declaratory Judgments*, 34 *Harvard L. R.* 697. Clearly, however, section 4918 does not provide for a declaratory decree to establish even inter partes the validity or scope of the claims either of a basic patent or of a concededly junior improvement patent; actual or threatened infringement is essential for a suit to settle these questions.

[3] If, then, the concededly junior patentee is claiming an alleged specific improvement of the prior and basic patent, the patentability of the alleged improvement is not the subject-matter of an interference suit. *Stonemetz Co. v. Brown Co.*, *supra*; *Boston Pneumatic Power Co. v. Eureka Patents Co.*, *supra*.

[4] Applications for the patents here in controversy were pending in the Patent Office at the same time. Five of Vreeland's claims in his transmitter application were suggested to and accepted by Fessenden, and, in the contested interference, that was declared by the Patent Office, Fessenden's right thereto was sustained. It is quite possible, as the file wrappers appear to indicate, that other claims in the Vreeland patents, as originally framed in ignorance of Fessenden's prior application, either covered the same invention or presented no patentable advance thereover. The Examiners endeavored to allow only those claims which, in their judgment, indicate some step forward in the art. Vreeland thought that the full scope of his invention was not recognized, and pressed, but without success, an appeal on some of his claims.

While the courts are not bound by the decision of the Patent Office as to the validity of those claims which were finally allowed, the considered decision of the Patent Office is entitled to great weight, and, in view of the careful examination of Vreeland's claims by the Patent Office, and its conscious endeavor to eliminate those in interference with or not patentable over Fessenden, only the clearest conviction of identity of claims would justify the court now to find an interference. The Patent Office would not have allowed the claims in question, in the light of its own comparison with the Fessenden claims, unless it considered that they not only asserted, but actually embodied, a patentable advance over Fessenden's claimed inventions. As Chief Justice Taft says in *Hildreth v. Masstoras* (U. S. Supreme Court, November 7, 1921), 257 U. S. —, 42 Sup. Ct. 20, 66 L. Ed. —:

"The presumption of priority and novelty [and, we may add here, noninterference] which arises from the granting of a patent must have greatly increased weight, and the claim of the inventor is subjected to such close and careful scrutiny under the stimulus of a heated contest."

Whether or not the asserted improvement embodies a patentable advance may be contested and determined in an infringement suit; indeed, defendant has sued plaintiff for an alleged infringement of these very claims. This court, however, would not be justified on this record in holding that Vreeland clearly did not even assert a patentable improvement over Fessenden. Let us consider the receiver or apparatus patents (Fessenden patent, No. 1,050,441, and Vreeland patent, No. 1,-239,852) first:

Claim 3 of Fessenden may be compared with claim 1 of Vreeland as typical of the interference claimed. Fessenden's claim 3 reads:

"A signal system having in combination at a receiving station, a receiver and a constantly operating frequency determining element having a frequency differing from that of the received impulses to such an extent as to cause beats to be formed at the station on the receipt of transmitted pulses."

Vreeland's claim 1 states:

"A receiver of sustained high-frequency signal impulses, wherein are combined a detector, a local source of sustained alternating currents of slightly different frequency from the signal impulses, and means for combining the local currents with the signal impulses, and applying the resultant beat current to the detector, substantially as set forth."

Vreeland's contention is that, while his claim may infringe Fessenden's patent, it goes beyond it and makes a substantial contribution to the art, in suggesting, not merely the mechanical interaction of the received and locally generated current to produce beats, but the combination of the two currents to form a resultant beat current, which is applied as a unit to the detector. Although the use of such a resultant beat current may fall foul of Fessenden's generic claims in an infringement suit, such a resultant beat current cannot be said to be so described or referred to in Fessenden's claim as to involve Vreeland's claims in interference.

Vreeland contends that there is no inkling in Fessenden's patent of the combining of the received current and locally generated current in a common circuit, so as to produce a new resultant beat current. He

points out that Fessenden uses a dynamometer telephone with two separate coils. Plaintiff contends, however, that by induction the currents in the two separate coils of Fessenden's dynamometer telephone combine in a common circuit and produce a resultant current. Vreeland denies that such a resultant current is a regular or necessary incident of Fessenden's patent, and states that any such current developed would be inefficient and not dependable and consequently could not be regarded as an anticipation of the resultant current described in his patent; and, of course, if necessary to sustain their validity, Vreeland's claims may be limited by the descriptions contained in his specifications.

But plaintiff proceeds to point out that Fessenden specifies that his patent may be operated by an interaction of either electrostatic or magnetic fields, and that the reference to electrostatic fields would inevitably suggest to any one versed in the art the use of a condenser telephone, which is one of the favored devices of Vreeland for uniting the received and local currents in a common circuit to produce a new beat current. Vreeland, however, takes the position that the use of the condenser telephone in this connection marked a distinct advance in the art over the preferred contrivances described by Fessenden, and that the means of utilizing the condenser telephone was not pointed out, or even understood, by Fessenden, who apparently deemed it desirable that the received and local currents be left in separate circuits. Vreeland contends that this reference to electrostatic fields has no clear or definite content, and that it may have referred to a quadrant electrometer, a laboratory instrument used for measuring potential or electrical charges.

These considerations evidence that there is at least a substantial controversy between the parties as to whether the invention which Vreeland asserts he has made is a patentable advance over Fessenden's disclosure. This may and should be determined in an infringement suit; but in view of the difference in the claims and the considered action of the Patent Office in respect thereto, an interference suit will not be allowed.

As to the transmitter or method patents, Vreeland maintains that his claims 1, 2, and 3 are distinguishable from and patentable over Fessenden, by reason of their describing as the very essence of the invention, the combination of the current oscillations in the receiver "in a common element in a tuned circuit." The issues thus raised are substantially the same as those discussed in connection with the receiver patents, and are not, in our judgment, appropriate for decision in an interference suit, under section 4918.

The interference issue raised, as between Vreeland's transmitter claims 4 to 10 and Fessenden's transmitter claims 10, 11, 12, 13, and 14, is somewhat different. It may be illustrated by a comparison of Fessenden's claim 11 with Vreeland's claim 8. Fessenden's claim 11 reads:

"The method of transmitting and receiving sustained alternating signal impulses, which consists in transmitting a continuous wave train of sustained oscillations, changing the frequency of such continuous wave train to produce signals, combining with such transmitted wave train at the receiver locally generated sustained oscillations and observing the combined effects of such oscillations."

Vreeland's claim 8 is word for word the same as Fessenden's claim 11 above cited, except for the addition of the word "abruptly" before the clause "changing the frequency of such continuous wave train." The identity of language, but for this one word, is due to the fact that it was Vreeland's language; Vreeland, not Fessenden, was its author; Fessenden adopted it at the suggestion of the Patent Office on the interference issue, in which he was successful. With this record before it, the Patent Office subsequently allowed Vreeland's claim with the addition noted, evidently for the reason that it considered the amended claim, read in light of Vreeland's specifications, not only substantially different from, but a patentable advance over, Fessenden. Both patents involve the variation in pitch of the beat notes through a slight change in the frequency of the signal pulses. But Vreeland claims his invention in the abruptness with which he is able to effect this change by varying the electric constants of the system, and through which he contends increased clarity of audition and sharpness in beat note changes are achieved.

The abrupt character of the frequency changes is not specifically claimed by Fessenden. Plaintiff contends that Fessenden makes his changes abrupt enough for practical purposes, but that would not in itself necessarily invalidate a patent intended to secure abrupt note changes, with increased effectiveness. Plaintiff further maintains that Fessenden did not restrict himself to effective frequency changes, by varying the speed of the mechanical alternator shown in his drawings, but expressly referred to the use of a mercury lamp, and to his patent, No. 706,742, both of which, it contends, should suggest to one versed in the art the variation of wave frequency by a change in the constants of the circuit. Vreeland denies the sufficiency of these references; he points out that patent No. 706,742 relates to "spark signals," and he maintains that it is in no event the simple equivalent of his contrivance. But the issues raised by these conflicting contentions go, not to the question of interference, but to that of patentable advance; that is, whether or not Vreeland is anticipated by the disclosures of Fessenden and by the prior art.

The trial judge was experienced in the trial of patent cases in this specific art; he heard the entire testimony, and took an active part in the examination of the witnesses; he has stated in his opinion that he was strongly impressed by Vreeland's testimony. These circumstances and the Patent Office proceedings fortify us in our own conclusions that the decree must be affirmed.

MANTON, Circuit Judge (dissenting). This is an appeal from a decree for the appellees, dismissing a bill asking for equitable relief under section 4918. The appellant seeks to have the Vreeland patents, No. 1,239,852, granted September 11, 1917, for a receiver for electrical impulses, and No. 1,245,166, granted November 6, 1917, for method of transmitting and receiving high-frequency impulses as interfering under this statute with appellant's Fessenden patent, No. 1,050,441, granted January 14, 1913, for electrical signaling apparatus, and patent No. 1,050,728, granted January 14, 1913, for method of signaling. It is sought by this action to annul claims 1 to 8, inclusive, of the Vreeland

patent, No. 1,239,852, as interfering with claims 2, 3, 4, and 29 of the Fessenden patent, No. 1,050,441; also, the suit seeks to establish that claims 9 to 28 of the Vreeland patent are invalid, for the reason that they are disclosed in the Fessenden patent and the then state of the art. The appellant also seeks to have decreed that all of the claims of Vreeland's patent, No. 1,245,166, are interfering with claims 10, 11, 12, 13, and 14 of the Fessenden patent, No. 1,050,728. The patents in suit all involve wireless systems in the art of telephony and telegraphy.

Under section 4918 of the Revised Statutes<sup>1</sup> the appellant may maintain, as a person interested, this action against the owner (as the defendant is) in equity for the interference with the appellant's patent by reason of the grant of the Vreeland patents to Vreeland. The court has the power to adjudge and declare either of the patents void in whole or in part, or inoperative or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. *General Chemical Co. v. Blackmore* (C. C.) 156 Fed. 968. Therefore, if the patents interfere or cover the same invention, this action is maintainable. It is therefore essential, as in infringement suits, that interpretation or construction of the patents be considered in determining whether there is such interference. It is necessary to examine the disclosure of the patents themselves, and to ascertain what was the state of the art at the time of the prior grant. Thus, one of the patents involved may have but a single claim that interferes; all other claims may be different in terms or degree. Under such circumstances, the court has power to declare such claim void because of the interference with the rival patentee. *Bird v. Elaborated Roofing Co.*, 256 Fed. 366, 167 C. C. A. 536.

When a patent is granted by the Patent Office, the grant must have protection against interference, for in a single invention there can be but a single patent. Under this statute, the court's decision only affects the actual interest before the court, and does not prejudice any stranger to the litigation owning an interest in either patent. The rule of construction in a proceeding of this kind forbids the outstanding of two grants of patents for the same invention. Such a situation is created where the same inventive thought is described in two patents in quite different language. It was this view which has led to a great number of decisions which find infringement or lack of infringement, irrespective of the presence or absence of the literal response to the language of the claim. *Benjamin El. Co. v. Northwestern Co.*, 251 Fed. 291,

<sup>1</sup> "Sec. 4918. Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

163 C. C. A. 444; *Geoghegan v. Ernst*, 256 Fed. 671, 168 C. C. A. 64; *Tostevin-Cottie Mfg. Co. v. Ettinger*, 254 Fed. 435, 166 C. C. A. 66; *Silver Co. v. Sternau & Co.*, 258 Fed. 448, 169 C. C. A. 464.

The inquiry in the case at bar is: Did the inventors make the same contribution to the sum of human knowledge as was said in *Bird v. Elaborated Roofing Co.*, *supra*? If so, the claims are for the same invention, notwithstanding the lack of similarity in language or scope or number of elements. In this study, the authorities clearly establish that the court is not limited to consideration of claims alone, but "the invention \* \* \* covered by the claims is to be ascertained \* \* \* by a proper construction thereof" giving to each claim its due scope and effect. *Simplex Ry. Appliance Co. v. Wands*, 115 Fed. 517, 53 C. C. A. 171. To determine the particular discovery for which each of the patents was granted and the point from which the inventor started, in order to know what the invention is that supports the patent, the courts have even taken recourse to expert testimony as to the technical terms and the difference between or the identity of the devices. *Palmer v. Lozier*, 90 Fed. 732, 33 C. C. A. 255. It has also examined the knowledge of the art and the position of the patents in that art. It may even apply the doctrine of equivalents, in order to determine what is a patentable invention covered or attempted to be covered by each of the patents. If there is no claim to the same invention made as to one of the patents, there is no interference; but, when each patent has a claim directed to that invention, there is an interference, even though the claims of the rival patents are not identical in terms and the number of elements, or in scope.

An issue of fact is thus presented upon all the evidence, whether they are of the same effective scope, and this issue cannot be determined upon the face of the two documents, but both are to be construed in the same way and upon like evidence as a patent in an infringement suit or in a suit to recover royalties under a license agreement. Logically, this is necessary in order to determine whether the two patents granted cover a single invention. If so, that which is granted later must give way to the earlier grant. If, under the evidence here disclosed, the system and methods disclosed by the Fessenden and Vreeland patents, as they are understood by the skilled worker in the art, and in view of the then state of the art, are the same essentially and electrically, there is only one invention, no matter how the claims may be phrased. If such a conclusion is reached, this court is empowered, under the terms of the statute, to go so far as to find the Vreeland patents void in whole or in part. It is true that, when two patents are pending in the Patent Office at the same time, and both of them granted there is a *prima facie* presumption that each was properly granted. *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973. Nevertheless, if both patents are for the same things as far as any inventive qualities are concerned, only one of them can stand. *Brooks v. Sacks*, 81 Fed. 403, 26 C. C. A. 456. The claim of the appellant is that the patents of Fessenden and Vreeland do exactly the same thing and in the same way.

The receiver patents are for continuous, or substantially continuous, waves; such waves are manifested in the indicator by combining the re-

ceived wave with the electrically produced oscillations of slightly different frequency. These produced beats are equal to the difference between the frequency of the received wave and the locally generated oscillations. The receiver controls the pitch of the signal note by controlling the frequency of the oscillations. They amplify the signal strength. Thus, both have the ability to select the signals from a given station to the substantial exclusion of signals from other stations. As I examined the claim of the appellees, it is that the Fessenden patent illustrates one kind of an indicator, in which the beat signal is made manifest, while the appellees illustrate indicators which are manifestly different. The transmitter patents utilize the continuous wave with the beats receiver or heterodyne. The transmission of the signals is effected by changing the frequency of the transmitted continuous wave, thereby producing in the heterodyne receiver a different beat note between the parts of the wave indicating the signals and the parts indicating the interval between signals. As one, for the signal parts, the transmitted wave can be of the frequency differing from the frequency of the electrically generated oscillations which are combined together, thus giving in the receiving telephone, the beat note of a pitch to say 1,000 vibrations per second, and whereas for the periods between the signals, the transmitted wave can be made to substantially co-exist in frequency with that of the electrically generated waves or oscillations, thus producing no beats giving periods of oscillations of the telephone, or made of such frequency as to give a different pitch note from that of the signal.

As to the claims, the appellees say that Fessenden's are generic in character, and are based upon a structure involving the keeping of the current separate; that the Vreeland claims are specific in character, and are based on a structure involving bringing the two currents together—that is, combining the two currents in one circuit. It contends that Fessenden used for his receiving apparatus a device known as a dynamometer telephone with two separate coils. With an ordinary telephone receiver, or so-called magnetic telephone, an electromagnet having a single coil transversed by telephone currents is located in close proximity to a diaphragm, which vibrates in accordance with the varying magnetic effect. It is claimed that with the dynamometer telephone there is no combined current, but two flat coils, known as "pancake" coils, each in a separate circuit, one of said coils being mounted on a telephone diaphragm and the other stationary, whereby variations in the magnetic pull between the two coils will take place when they are traversed by the telephone currents.

It is argued that Fessenden never conceived of Vreeland's invention of combining the two currents in one circuit, and that therefore he used this type which is an inefficient separate coil dynamometer. It is contended that the signal and local currents are separate, transversing separate circuits, and that they separately transverse the separate coils which produce mechanical action. Appellee's claim is that Fessenden's patent is known as a mechanical heterodyne. The appellant claims that there is an induction and therefore there is no separation of currents; but there is the interaction of currents, and but one circuit. It is the

matter of control of current or the circuit that counts. It may be that Vreeland, by the receiver which he has used, has accomplished the result of an improved indicator of the current; but this does not make his invention different, if there is in appellant's an interaction of currents and but one circuit.

Fessenden, in his patent, says that it may operate by interaction of either electrostatic or electromagnetic fields, and that a variety of forms of receiving devices may be employed saying that those which he illustrates are convenient and desirable. The indicator illustrated is old in the art, operating with an electrical magnetic field. It is called a dynamometer telephone, but it is apparent that an induction of one current to the other takes place at the two coils marked 8 and 10 in Fig. 3. Vreeland admits that, even with the arrangement shown in Fig. 5 of his receiver patent, either the received signal impulse or locally generated oscillations alone would produce an electrostatic field between the plates of the condenser telephone. Claims 26, 27, and 28 of this receiver patent include the electrostatic field excited by local oscillations and another field of different frequency excited by signal impulse. It thus appears that, where the local voltage is produced, the static telephone has two existing interacting fields whose resultant moves the diaphragm.

Is there any essential difference between the static and the dynamometer telephone, as far as the fields are concerned? In either case, the heterodyne, the currents of different frequency, are applied to the instrument, and there is a resultant field in the telephone, due to the interaction or superposition of the effects of the energies supplied by the two currents. The substitution, therefore, of the static telephone for the dynamometer telephone, is not a difficult, but a simple, matter to one skilled in the art. Vreeland admits that there is no distinction between the fields and currents or between superposition or combination of currents and the interaction of fields. This is illustrated in Figs. 5, 9, and 10 of the Vreeland original drawings and in his original specifications. The same contention that is advanced here by the appellee, that the Fessenden claims are for a generic invention, while Vreeland's are for a specific invention, was presented in *General Chemical Co. v. Blackmore* (C. C.) 156 Fed. 968, and an interference was held to exist, because the only reasonable interpretation of Blackmore's alleged generic claims rendered them an obscure description of the specific discovery. In the case at bar, a combined or beat current necessarily exists in the Fessenden circuits, and since the indicator or detector is operated by that beat current, a proper interpretation of Fessenden's claims becomes a clearer description of Vreeland's alleged specific invention. It is thus apparent that the patents in suit (Fessenden's, No. 1,050,441, and Vreeland's, No. 1,239,852) contain claims in common and are interfering patents. The substance or invention is one and identical; the only difference is in the manner of its statement.

The transmitter patents (Fessenden, No. 1,050,728, and Vreeland, No. 1,242,166) involve the use of the continuous wave transmission with the beats reception or heterodyne; the essential novelty consisting in transmitting the signals by changing the frequency of the continuous

wave whereby there is produced in the heterodyne receiver a different beat effected by the waves constituting the signal characters than by those constituting the intervals between signal characters. The systems of the Fessenden and Vreeland patents do exactly the same thing. Both make use of a continuous wave; both produce the signal characters by changing the frequency of the wave; and both receive with a beats receiver. The analogy is so close between these patents that the sole difference between certain of the rival claims is that Vreeland claims say the change of frequency of the transmitted wave is made abruptly; whereas in the Fessenden claim the word "abruptly" is not used. So far as the physical things are concerned, this attempted definition has to do merely with a particular kind of generator used for producing the transmitted wave. Fessenden illustrates a transmitting generator, a high frequency alternator, a form which he had previously patented, and to which he would by nature be partial. Vreeland illustrates a vacuum tube, an alternator of the form which he had previously patented, and to which he was naturally partial. Both types of generators were old in the art and were used for producing continuous waves.

To sustain the appellees' position, it is necessary to limit the Fessenden disclosure of a transmitting generator to a high-frequency alternator illustrated, and then so that change of frequency can be effected only by varying the speed of the roto of that alternator, and that this cannot be done abruptly. But in practice, with the use of the appellant's generator, the change of frequency is effected with sufficient rapidity to transmit, and there is sufficient "abruptness" to accomplish the purpose of the invention. Fessenden does not limit, by his illustration, a particular form of generator, but mentions other forms of generators.

Does the change of wave frequency by the alternator illustrated by Fessenden become "abrupt"? And then does Fessenden disclose a sending generator of a type the frequency of whose generated waves can be changed in precisely the way disclosed by Vreeland, and therefore equally as abrupt as with the Vreeland generator? Vreeland cannot confine Fessenden to the use of the high-frequency alternator illustrated. The method in issue contemplates only a slight change of frequency; Fessenden saying a matter of one-fifth of 1 per cent., while Vreeland a minute variation during the frequency of these (transmitted) waves. Fessenden in no way limited himself to the use of the high-frequency alternator, and changing its speed by means of rheostat or the like. He disclosed, among a number of transmitting generators to be used, one of exactly the same kind as illustrated by Vreeland. He says in his patent:

"In the practice of my invention I prefer the use for sending and means for producing continued radiation, which may be, for example, the high-frequency generator having the characteristics described in patent No. 707,737, or the means described in patent No. 706,742."

And again:

"It is preferred to use a high-frequency alternator, or any other suitable device for producing unintermittent oscillations, as, for example, a device

operating by direct current, with or without discharge gap, as described in letters patent No. 706,742."

In patent No. 1,050,441 he says:

"I prefer to use a high-frequency alternator, or a mercury lamp producing oscillations whose frequency is maintained constant—that is to say, not intermittent—by automatic means."

It is apparent to me that the specific transmitting generator used by Fessenden, to wit, the high-frequency alternator, with a slight change of speed necessary to produce the necessary change in the signal note, can be made with sufficient rapidity to transmit signals nearly as fast as they can be recorded and received by the aural receiver, and that, therefore, the change of frequency of the transmitted waves is made abruptly. Speaking from the result accomplished by each as disclosed by the record, I do not think that there is much more than a change of phraseology in the specifications and claims used by Vreeland. Fessenden was the first in date of application and of grant as to the receiver and transmitter patents, and protection should be accorded to him.

I think that claims 1 to 8, inclusive, of Vreeland patent, No. 1,239,852, interfere with claims 3, 4, and 29 of Fessenden's patent No. 1,050,441, which was granted first, and that the Vreeland patent, No. 1,245,166, are interfering claims with claims 10, 11, 12, 13, and 14 of Fessenden patent, No. 1,050,728. The subject-matter is technically the same. The invention discloses the same idea. Similarities and differences do not depend on mere names or words used to describe them, or immaterial matters by which they may be distinguished. *Glue Co. v. Upton*, 97 U. S. 3, 24 L. Ed. 985. In determining similarities and differences, the courts are not governed by the names of things, but they must look to the devices and contrivances in the light of what they really are and what office or function they perform and how they perform it.

For these reasons, I think the decree below should be reversed.

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PINO V. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1921.)

No. 2029.

**Intoxicating liquors** ⇨279—Proceeding for contempt for violation of injunction restraining maintenance of nuisance under Prohibition Act held criminal in nature.

A judgment of contempt, imposing a fine and imprisonment for a definite term for violation of an injunction granted under National Prohibition Act, tit. 2, § 22, restraining maintenance of a common nuisance, held criminal in its nature and abated by the death of the defendant.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

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⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Proceeding for contempt by the United States against Caesar Dal Pino. Defendant brings error. Dismissed.

Timothy J. Fell, of Chicago, Ill., for the motion.

C. W. Middlekauff, of Chicago, Ill., opposed.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Caesar Dal Pino was informed against by the Attorney General of Illinois, for and on behalf of the United States, for having violated section 22 of the Volstead Act (41 Stat. 314). A finding that his place of business was conducted as a common and public nuisance was made, and an order entered abating it, and enjoining him and others from "manufacturing, selling, or bartering any intoxicating liquor, as defined in section 1, of title II, of said National Prohibition Act, or upon the premises described in the bill of complaint," etc. Subsequently he was charged with violating the restraining order, and proceeded against as for contempt of court, found guilty, fined \$1,000, and sentenced to serve a year in jail. From this judgment he sued out a writ of error, and, pending its hearing, died. We are to determine the effect of his death upon the collection of the fine.

Our answer is dependent upon our determination of the character of the judgment rendered in the contempt proceedings. In other words, was the judgment rendered in a civil or a criminal contempt proceeding? If criminal, the authorities are numerous to the effect that death abates the judgment. *U. S. v. Mitchell* (C. C.) 163 Fed. 1014; *U. S. v. Pomeroy* (C. C.) 152 Fed. 279; *U. S. v. Dunne*, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145; *Menken v. Atlanta*, 131 U. S. 405, 9 Sup. Ct. 794, 33 L. Ed. 221; *List v. Penn*, 131 U. S. 396, 9 Sup. Ct. 794, 33 L. Ed. 222; *Boyd v. State*, 3 Okl. Cr. R. 684, 108 Pac. 431. Whether the proceedings are civil or criminal is not always a matter of easy determination.

On examining the information (set forth in full below <sup>1</sup>), we are

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<sup>1</sup> Information for Citation for Contempt of Court.

In the District Court of the United States, Northern District of Illinois,  
Eastern Division.

United States of America, Complainant, v. Caesar Dal Pino, Defendant.

In Equity No. 1648.

Information in Chancery.

The United States of America, by Edward J. Brundage, Attorney General of the state of Illinois, represents unto your honor that on the 24th day of November, 1920, your petitioner filed in this court a bill in equity charging that the defendant Caesar Dal Pino sold intoxicating liquor as defined by the National Prohibition Law, in violation of the National Prohibition Law, in the first floor, i. e. the ground floor of the premises located at 808 West Madison street, Chicago, Cook county, Illinois, and on the 28th day of November, 1920, this court entered an order restraining the said defendant Caesar Dal Pino from selling intoxicating liquor in said premises and restraining the defendant from maintaining a public and common nuisance on said premises, described in said bill of complaint.

Your petitioner further represents that a deputy United States marshal of this court duly served a temporary restraining order upon the said Caesar

persuaded that the pleader, when he drew his pleadings, had no question in mind involving the distinction between civil and criminal contempt. He terms his application to the court an "Information in Chancery," and repeats the designation in the verification. We are not, however, at any place informed as to the nature and character of such a pleading. It is a nondescript term, indicative of a criminal proceeding if we stress the first word, while negating it if emphasis be given to the word "Chancery."

The allegations in the application, as well as the relief sought and the judgment pronounced, all indicate that the proceedings were viewed by court and counsel as criminal. That the distinction between the two should at all times be kept clearly in mind is well illustrated in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, where it is stated:

"For, notwithstanding the \* \* \* elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. \* \* \* There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

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Dal Pino restraining him from violating the National Prohibition Law and maintaining a public and common nuisance as described in the National Prohibition Law, in pursuance of the temporary restraining order entered by your honor as above set forth, which said temporary restraining order, or writ of injunction was served on the said Caesar Dal Pino on the 30th day of November, 1920.

Your petitioner further represents that on the 30th day of December, 1920, Samuel Ball visited the said premises described in the bill in equity in this cause and purchased from a person behind the saloon bar on the said premises, being the person then in control of the said described premises a drink of whisky, and the person in charge of said place and having charge of said bar, sold said drink of whisky to said Samuel Ball who paid the said bartender for said drink of whisky 100 cents per drink for said whisky. That, since said temporary restraining order was entered by this court and since the writ of injunction, as above described, was served on said defendant, that said defendant, and his agents and servants sold whisky to other persons who entered said premises and received pay for said whisky and said whisky was drunk upon the premises described in the bill in chancery in this suit.

Your petitioner, therefore, prays that a citation may issue against the said Caesar Dal Pino defendant herein, commanding him that he appear before this court and show cause why he should not be held in contempt of this court for violating the injunction issued by the court as above set forth.

United States of America,

By Edward J. Brundage, Attorney General of Illinois.

Samuel Ball, being duly sworn, on oath says that he has read the foregoing information in chancery, subscribed United States of America, by Edward J. Brundage, Attorney General of Illinois, and knows the contents of said information in chancery, and that the facts stated in said information in chancery are true of his own knowledge.

Samuel Ball.

Likewise the procedure to review the judgment differs in the two classes of proceedings. The review of a judgment of criminal contempt must be by writ of error. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 338, 24 Sup. Ct. 665, 48 L. Ed. 997; *Garrigan v. U. S.*, 163 Fed. 16, 19, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295. In the present case the review is by writ of error, and acquiescence in this procedure by defendant in error furnishes some support for the conclusion that the judgment was criminal in character.

While the intention of the pleader may be considered in determining the character of these proceedings (*Gompers v. Bucks Stove & Range Co.*, supra), and this intention may be gathered from the title of the cause, the designation of the pleading, the prayer for relief, and other helpful signs, none of them are very persuasive in the present case. For example, the title would be the same whether the proceedings were criminal or civil, because the complainant in the equity suit is the United States of America. The designation of the pleading by the Attorney General being unfamiliar to us is noninformative. The prayer for relief and the allegations in the application, however, suggest rather clearly a criminal proceeding.

The character and purpose of the punishment sought and granted, and the allegations upon which the prayer for relief is based, are generally determinative of the character of the proceedings. If punishment is imposed in civil contempt proceedings, it is remedial, and for the complainant's benefit. In criminal contempt, the judgment is punitive, and to vindicate the authority of the court. The money part of the judgment goes to the government.

The judgment here reviewed provides for the payment of a fine and imprisonment for a fixed period. Plaintiff in error is charged with having deliberately violated the court's orders, with having sold intoxicating liquor on the premises abated as a common nuisance. He is not charged with refusal to perform an act called for by an order of the court, but with having committed an act expressly forbidden by an order of the court. As stated by the court in the *Gompers Case*:

The distinction between refusing to do an act commanded, remedied by imprisonment until the party performs the required act, and doing an act forbidden, punished by imprisonment for a definite term, is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

If a judgment of imprisonment be entered in a civil contempt proceeding, ordinarily the defendant "carries the keys of his prison in his own pocket," and can discharge himself at any moment by doing what he has previously refused to do. The prayer for relief prays that a citation may issue against the defendant, "commanding him that he appear before this court and show cause why he should not be held in contempt of this court for violating the injunction issued by the court as above set forth." Petitioner was not seeking damages for wrongs committed. Relief was not sought in favor of the petitioner. But defendant was specifically informed that he was to meet a charge and face a possible judgment for "contempt of this court."

We therefore conclude that the proceedings were criminal in nature.

Being criminal, the judgment is abated by the death of the plaintiff in error. The judgment having abated, it follows that the writ of error should be and is hereby dismissed.

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LANG & GROS MFG. CO. v. FT. WAYNE CORRUGATED PAPER CO.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1921.)

No. 2870.

1. Sales  $\S$  23(3)—Order for weekly shipments held accepted by conduct.

Where the parties had exchanged considerable correspondence concerning an order for a large quantity of cloth tape, and as a result thereof defendant finally ordered the shipment of tape by reference to a previous order to be made in weekly shipments, the action of plaintiff in making weekly shipments of substantially the amount ordered was an implied acceptance of the order.

2. Sales  $\S$  85(2)—Offer "subject to market conditions remaining unchanged" refers to time of acceptance.

Where an offer for the sale of tape was made "subject to market conditions remaining unchanged," the term referred to unchanged conditions at the time of the acceptance of the offer, and not to a change of conditions which might occur after the acceptance of the offer and before performance of the contract was completed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject to.]

3. Sales  $\S$  85(2)—Inability to purchase supplies to fill order must be shown at date of acceptance.

A condition in an offer to sell tape that it was subject to ability to purchase the material specified does not relieve the seller of liability, where it accepted an order for the tape after considerable correspondence and began filling the order, but claimed that some time after the acceptance it became unable to purchase the material, and where during its correspondence with the buyer it had urged definite information, so that it might protect itself by advance purchases of raw material.

4. Sales  $\S$  172—Impossibility of performance because of war held not shown.

Where a contract for the sale of tape was made some time after war was declared, and shipments were made from time to time thereafter, and finally terminated after the seller had sought to induce the buyer to order a different quality of tape, the seller cannot excuse his nonperformance on the ground it had been rendered impossible by the war.

5. Sales  $\S$  172—Correspondence held not to show final contract was limited to six months.

Where the original proposition for the purchase of tape referred to the buyer's requirements for six months or a year, but the order as finally made was for a definite quantity of tape to be shipped in specified weekly amounts, which would require 50 weeks for the shipment of the entire amount, it was evident the provision for a 6 months requirement had been eliminated, and the seller cannot excuse nonperformance after the expiration of 6 months because of that provision.

6. Sales  $\S$  87(2)—Evidence as to trade meaning or expression held immaterial.

Evidence offered by the seller that the expression "subject to market prices remaining unchanged" meant under a trade custom that the contract was subject to the seller's ability to purchase the material when

the specifications were furnished by the buyer and at time of receipt of buyer's shipping orders, was immaterial, where the buyer began making shipments on receipt of the specifications and shipping orders, and the breach did not occur until 6 months thereafter.

**7. Sales ¶93—Evidence held not to show abandonment by buyer.**

Evidence that, after the seller had breached its contract to furnish the buyer with a stated quantity and quality of cloth tape in weekly shipments, the buyer had purchased a different quality of tape to supply its needs, making such purchases largely from the seller at an increased price, *held not to show abandonment by the buyer of the contract originally made.*

**8. Appeal and error ¶499(3)—Objection to testimony and competency of expert must be shown by the record.**

The contention that the trial court erred in admitting the testimony of witness as an expert on market values does not require reversal, where the record shows no objection to his evidence or to his qualification as an expert.

In Error to the District Court of the United States for the District of Indiana.

Action by the Lang & Gros Manufacturing Company against the Ft. Wayne Corrugated Paper Company, in which defendant admitted the claim sued on, but filed a counterclaim. Judgment for plaintiff for only the difference between its claim and the counterclaim, and plaintiff brings error. Affirmed.

The Manufacturing Company, plaintiff in error, sued the Paper Company, defendant in error, for \$11,085.47 for merchandise sold. The Paper Company admitted the demand, but counterclaimed \$10,415.29 as damages for breach of contract for sale of other material. Counterclaim was disputed, though not as to amount. Court directed allowance of counterclaim and verdict and judgment of \$661.04 for Manufacturing Company, which prosecutes this writ. The issue is on the counterclaim.

Manufacturing Company was a producer or finisher of cloth tape, and Paper Company a maker of corrugated paper boxes, for which such tape was required. The alleged contract claimed to have been breached by Manufacturing Company is evidenced by correspondence, in substance as follows:

(a) Letter April 7, 1917, from Paper Company to Manufacturing Company asking proposal on requirements of ungummed tape "on the basis of six months and one year respectively."

(b) Letter April 10, 1917, Manufacturing Company to Paper Company: "Replying, we are pleased to quote you as follows, subject to market conditions remaining unchanged and our being able to purchase the material as you specify." Then follow price quotations. "The above quotations are made with the understanding that goods will be ordered forward in approximately equal monthly shipments. Terms, f. o. b. our mill net thirty days or less, 2 per cent. for cash ten days from date of invoice."

(c) Letter April 28, 1917, Manufacturing Company to Paper Company: "We inclose you herewith order covering the requirements of tape in accordance with your proposal. \* \* \*

(d) Order referred to on printed blank form of Paper Company, April 28, 1917, No. 6299: "Ship to us at Ft. Wayne, Ind., delivery to be made subject to our further orders, terms 2 per cent. ten days f. o. b. Brooklyn, 5 million yards basis one-inch cambric filled tape ungummed. \* \* \* \$3.30 M. yards. 1" wide. One million yards basis one inch wide extra heavy \* \* \* ungummed Hercules cloth \$3.60 M., 150 thousand yards basis one inch wide cambric cloth gummed \$4 M."

(e) Letter May 1, 1917, Manufacturing Company to Paper Company, acknowledging letter of 28th ult., inclosing order No. 6299: "We regret to state that we cannot at this writing accept your contract, inasmuch as you have failed to specify your acceptance of terms and conditions in accordance with our offer of April 10th. In regard to our quality 16 plain cloth (which is the five million yards ordered), we find that we failed to specify a six-months period but such was our intention. Subject to your immediate response, we are willing to enter your contract for goods to be taken in approximately equal monthly shipments during a period of six months. \* \* \* Offer on the plain Hercules cloth was for immediate shipment."

(f) Telegram May 3, 1917, Paper Company to Manufacturing Company: "Immediate shipment of Hercules cloth will be satisfactory. Wire acceptance to-day if contract prices and specifications will go forward."

(g) Telegram May 3, 1917, Manufacturing Company to Paper Company: "Your telegram received. We will accept contract prices as requested."

(h) Letter May 3, 1917, Paper Company to Manufacturing Company, re order No. 6299: "Acknowledging receipt of to-day's telegram in confirmation of acceptance of order 5,000,000 yards basis 1" wide ungummed cambric filled tape \$3.30 per M.; 1,000,000 yards Hercules to be shipped at once. We should like to have all the time possible in the handling of the regular ungummed cloth, and if possible shipment not to commence before the 1st of October. Wish you would advise us the longest amount of time that could be arranged for in the shipping of regular cloth and we will arrange the specifications accordingly."

(i) Letter May 3, 1917, Manufacturing Company to Paper Company, quoting the telegrams of same date (f and g): "We understand you are forwarding specifications, as, of course, if you intend to change the amount specified in your previous order, we wish you to let us know promptly, so we can protect ourselves by contracting for the correct amount of raw material."

(j) Letter May 8, 1917, Manufacturing Company to Paper Company, acknowledging receipt of letter and telegram of 3d: "We understand you will forward us promptly specifications on the Hercules cloth. In regard to the other matters that you wish us to take under consideration, please to be advised that we will do all we can to meet your views and will write you a little later in regard to same."

(k) Letter May 22, 1917, Manufacturing Company to Paper Company: "With further reference to your letter of May 3d, please to be advised that in the matter of the quality 16 plain cloth tape covered by your contract, we will try and waive the matter of shipments until October. We expect, however, that, we shall have to pay a substantial advance for finishing after July 1st, which will, of course, necessitate our ordering goods forward before that time in order to protect ourselves. If we find it necessary to do so, we shall take the liberty of asking you to help us out by taking in some goods before October, but shall do the very best we can to meet your views in the matter."

(l) September 10, 1917, Paper Company to Manufacturing Company, re order No. 7263: "Beginning with October 1, ship 50 thousand yards 2" ungummed filled tape to apply on contract order No. 6299."

(m) Letter September 14, 1917, Manufacturing Company to Paper Company: "We have before us your letter of the 10th inst., asking us to begin shipments on your contract for plain quality 16 cloth tape, and note that it calls for 50,000 yards 2" beginning with October 1st, but it does not state how often shipments are to be made. Please inform us promptly in this matter, so we can make provision to take care of you."

(n) Letter September 17, 1917, Paper Company to Manufacturing Company: "In re our order No. 7263: Replying to your letter of the 14th, acknowledging the above order, we intended to state on this order that it was to be a weekly shipping order. In other words, beginning with the 1st of October, we would like to have you ship at the rate of 50,000 yards 2" ungummed tape per week."

Thereupon began weekly shipments of about 50,000 yards of the 2" tape (equivalent to 100,000 of the 1"), which continued until January 10, 1918, after which further shipment was for a time discontinued. April 6, 1918, Paper Company wired Manufacturing Company: "Rush quick 100,000 to 200,000 yds.

2" tape. Through oversight have permitted our stock to run down dangerously close." April 8, 1918, this was followed by a letter to Manufacturing Company, re order No. 7263, reiterating the wired request, stating they did "not understand why shipments were discontinued," and urging prompt action. On the 10th another wire to same effect was sent, and on same date Manufacturing Company wired, "Shipped tape yesterday, also to-day." Under date of April 8, 1918, Manufacturing Company wrote: "We beg to acknowledge receipt of your telegram of the 6th inst., and we will make substantial shipments of quality 16 plain cloth tape on Tuesday, the 9th. Trusting the goods will arrive in time to meet your requirements, we remain." April 11, 1918, Paper Company acknowledged receipt of letter of 8th and wrote: "Please be sure to resume weekly shipment, and for the first two or three weeks ship us 100,000 yards; after that time make the regular weekly shipment of 50,000." April 16, 1918, Manufacturing Company wrote: "Replying, will state that we are not at present accepting any orders for our quality 16 cloth tape same as you have previously had," and referred to sending of a circular in regard to a new process cloth tape, saying that many large companies had adopted it, and expressing belief that it will be generally adopted in the future, advising a trial order, and offering to quote on Paper Company's requirements of such grade as may be selected. Beginning April 9, 1918, the shipments of the contract tape were: April 9, 150,300 yards; April 10, 100,200; April 10, 100,200; April 11, 51,600. Thereafter none of this tape was shipped. Manufacturing Company was paid for all of this tape that was shipped, its claim being based on other tapes which the Paper Company purchased of it. Tape such as that in question rose rapidly in price in 1918, reaching in August approximately \$8.50 per M. yards 1", and to supply its requirements Paper Company bought other tapes at about such price, much of it from Manufacturing Company.

Neil P. Cullom, of New York City, for plaintiff in error.

James M. Barrett, of Ft. Wayne, Ind., for defendant in error.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). To entitle the Paper Company to recover damages for breach to contract, it must appear that there was a contract to deliver 5 million yards of the tape basis one inch in weekly shipments of substantially 50,000 yards 2". It is insisted for plaintiff in error: (1) That it never accepted defendant's final order to deliver 50,000 yards weekly beginning October 1; (2) that it was under no obligation to deliver the tape, if the price of raw materials changed, or if it was unable to purchase raw materials when the orders were given, and that war conditions relieved it from responsibility to deliver; (3) that if there was a contract it expired by its own terms October 3, 1917, and in any event on March 3, 1918, and that no deliveries thereafter could have been required; (4) that defendant in error breached any contract there was by failing to make its specifications prior to September 17, 1917; (5) that there was error in the exclusion and admission of evidence, and in the court's direction of verdict.

[1] The proposal which it is claimed was not accepted is that contained in Paper Company's specification of September 10 for shipment of 50,000 yards 2" tape beginning October 1, followed by the letter of September 17 stating that this was intended to be a weekly shipping order, and again specifying 50,000 yards 2" tape per week. This last letter followed the Manufacturing Company's inquiry of September

14, which referred to the order, calling attention to the fact that it is not there stated how often shipments are to be made, and requesting prompt action. While the record shows no reply to the letter of September 17, it does show that in pursuance of it the Manufacturing Company at once began shipment of approximately 50,000 yards 2" tape, and continued practically weekly thereafter for a number of months. This order referred to contract order No. 6299, which specified 5 million yards. There is nothing in the evidence to suggest any quantity other than 5 million yards as the subject-matter of these parties' dealings. It was either 5 million yards or no fixed quantity at all. One cannot read the record of the transaction between the parties without concluding that, as the deliveries were being made and accepted and paid for, it was under the full assumption and belief on the part of both that there existed between them a valid and binding contract for the sale of 5 million yards of the tape at the stipulated price to be delivered and accepted at the rate of 50,000 yards 2" each week until the entire quantity was delivered. If in any manner the minds of the parties met on this proposition, it is sufficient manifestation of a binding contract, even though formal acceptance is wanting. The contract of a party in making performance in pursuance of a definite proposition is an acceptance of the proposition. Page on Contracts (2d Ed.) § 156; Parsons Contracts (9th Ed.) § 476; Miller v. McManis, 57 Ill. 126; Plumb v. Campbell, 129 Ill. 101, 18 N. E. 790; Monarch Cement Co. v. Creedon, 94 Neb. 185, 142 N. W. 906; Woodbury v. Jones, 44 N. H. 206; N. Y. & N. H. R. v. Pixley, 19 Barb. (N. Y.) 428.

[2] As to rise in market prices and inability to purchase materials, we find in Manufacturing Company's letter (b) quoting figures, the words, "Subject to market conditions remaining unchanged and our being able to purchase the material as you specify." If it be assumed that these conditions ultimately remained as part of the contract, we are of opinion that the expression "subject to market conditions remaining unchanged" would have reference to the time the contract was entered into, so that if, at some time after the proposition was made and before acceptance, prices had materially advanced, the Manufacturing Company would not be bound by the subsequent acceptance of the Paper Company, but might then have objected that the price had advanced; but if, without such objection, it accepted the order as finally given, it would be bound by it, even though after ultimate acceptance the price did advance.

[3] As to inability to purchase material, it may be said that the record discloses no evidence, nor was any offered, that at the time the specification was made there was inability to purchase the material. As early as in the letter of May 3, Manufacturing Company stated that it wished to be promptly informed of the specifications, so that it might protect itself for the correct amount of raw material, and when in September, after the specification had been definitely made at 50,000 yards per week, and it manifested, as indicated, its willingness to accept the contract and specifications, it might then, as before, have protected itself by arranging for raw material, or, if unable then

to do so, promptly have made known the circumstances and claimed then the advantage it now seeks, because of suggested inability to procure the raw material, and declined to accept the specification and begin shipments.

[4] As to the suggestion that war conditions prevented compliance, the war was on during practically all the time covered by the correspondence and the negotiations, and there was nothing in the correspondence or otherwise in the record to indicate any intention that the contract should be affected by the exigencies of existing war. After having supplied about half of the total contract requirement for this tape the Manufacturing Company said in the letter of April 16 that they would not at present accept any further orders for such tape, but suggested that they were putting out another tape, which was being used by other manufacturers, and which they claimed eliminated some of the objectionable features of the contract tape. But in this letter they did not suggest the substitution of this tape for the other to fill the contract, but advised the giving of a trial order, and that, if satisfactory, they would be "very pleased to quote on your requirements as soon as we know the grade you have selected." This amounted to a declination to be governed by the contract, and an invitation to enter into a new contract for the new material at some new price to be agreed upon. Indeed, the large quantity of other tapes which Paper Company was compelled to buy, and did buy of Manufacturing Company, was charged at the greatly increased market prices, without regard to the contract.

[5] Respecting the contention that the contract expired by limitation on October 3, 1917, and that in no event did the contract require specifications to be filled after March 31, 1918, it appears that, after the first order was forwarded, the Manufacturing Company on May 1 stated it could not accept it because not in compliance with its offer, though not stating wherein it did not comply. Attention is called in that letter to the fact that the original offer failed to specify a six-months period for the quality 16 tape, and that it was willing to enter the contract for supplying the tape, to be taken in approximately equal monthly shipments during a period of six months. It also called attention to the fact that the offer on Hercules tape was for immediate shipment, and that the price of that had advanced since the offer, quoting new price of \$3.95. The Paper Company responded by a telegram wherein it said "immediate shipment of Hercules cloth would be satisfactory. Wire acceptance to-day of contract prices and specifications will go forward." This of itself did not signify a willingness to accept the six-months period as part of the contract; indeed, the only proposition contained in the Manufacturing Company's last named letter, which the Paper Company's telegram and letter of May 3 accepted, was with reference to the immediate shipment of Hercules cloth. This is further manifested by the Paper Company's letter of the same day wherein they acknowledged receipt of the Manufacturing Company's telegram accepting the contract prices as requested, and stating their understanding that the contract was for 5 million yards of the one inch ungunmed tape at \$3.30 per M. and one million of the Hercules at \$3.60

per M., which was the price named in the Manufacturing Company's original proposal for the Hercules tape, and the Paper Company's order therefor, and not the advanced price stated in the Manufacturing Company's letter of May 1. That the May 3d letter of the Paper Company was satisfactory to the Manufacturing Company is manifested by its reply to it of May 8. That there was no six months limit, as was proposed in the Manufacturing Company's letter of May 1, is evident further from what is said in the Paper Company's May 3d letter, wherein it asks that the time for shipment of the tape in question do not begin until October 1, and postponing the statement of requirements until the Manufacturing Company replied to this request, which the latter did through its letter of May 22, in further reply to that of May 3, stating that it would try to waive matter of shipments until October. The matter of deliveries appeared to have remained in suspense for nearly four months, until, under date of September 10, the Paper Company sent its order to apply on its previous contract order, for shipment beginning October 1 of 50,000 yards 2" tape, followed by that of September 14th fixing weekly intervals for shipments, as pointed out.

Assuming, as we do, that the contract quantity of this tape was 5 million yards 1", it is very plain that if the deliveries were made weekly of 50,000 yards 2", it would require 50 weeks to complete delivery. Given the total yardage and the quantity to be delivered weekly, it would be quite superfluous to insert in the contract the time within which delivery was to be completed. It is there as definitely as if it had been specified. That practically such a time was under consideration, though not in words carried into the contract, would be indicated by the Paper Company's very first request for submission of prices, wherein it asked it on basis of six months and one year, respectively. Six months was evidently dropped out, and a period of nearly one year by necessary inference inserted. The contention that defendant in error breached the contract by failing to make its specifications earlier than September 17 is negatived by what has been said respecting the specification for deliveries, and acceptance by the Manufacturing Company.

[8] As to the alleged errors in rejecting evidence for plaintiff in error, the first is the offer to prove a trade custom that the expression "subject to market prices remaining unchanged and our being able to purchase the material as you specify" means that the contract was to be subject to the seller's ability to purchase the material when the specifications were furnished by buyer and subject to conditions remaining unchanged at time of receipt of buyer's shipping orders. While we have heretofore stated our view of what the expression means, uninfluenced by any trade usage, yet, admitting in general the propriety of evidence as indicated by the offer, there is nothing in the offer which makes it material. The offer refers to the time the specifications were furnished, which was on September 17, and no claim was then made by the seller that there had been any change in market price of the tape, or that there was then inability to purchase the material; but, as has been pointed out, the specifications were accepted,

and the contract, as it then was, both parties proceeded to execute, and they actually and strictly operated under it for a considerable time. Under these circumstances the offered evidence was properly excluded.

[7] Second, certain letters and telegrams between the parties were offered for the purpose of showing conditions which rendered impossible the delivery of the tape in question, and that defendant in error voluntarily abandoned the contract and purchased a large amount of other material in place of this tape. We have commented on this situation, and we find nothing in the rejected correspondence which would in our judgment relieve plaintiff in error from the consequence of its failing to fulfill its contract. We find nothing in the offered evidence that tends to show abandonment of the contract by defendant in error. It purchased a large quantity of tape in the open market, most, if not all, from plaintiff in error. It paid the very much greatly increased market price for this substitute material. Plaintiff in error did not contend that it was thereby complying with the contract; indeed, it contends that in 1919, after prices for the contract tape had very materially declined, it offered the Paper Company to deliver the balance due on the contract. We find no error in the rejection of the correspondence.

[8] As to the contention that the court erred in admitting the testimony of witness Stalhut as an expert on market values of such tape, it is sufficient to point out that the record shows no objection to his evidence or to his qualification as an expert.

We find no error in the record, and the judgment is affirmed.

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### NATIONAL BRAKE & ELECTRIC CO. v. CHRISTENSEN et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1921. Rehearing Denied November 14, 1921.)

No. 2163.

1. Equity  $\S$  443—Bill of review, or petition in nature thereof, lies only to final decree.

Neither a bill of review, nor a petition in the nature of a bill of review, is addressable to a decree that is not final in its essence.

2. Equity  $\S$  445—Bills of review allowable for apparent errors or new matters.

Bills of review are allowed for the purpose either of correcting errors of law apparent on the face of the record, or of admitting new evidence which has come into being since the decree, or was not known or knowable at the time of the trial.

3. Equity  $\S$  447 (2), 452—Bill of review not allowed, if there is delay in presenting matters, or if equities would not be changed.

A bill of review will not be allowed, if the new evidence or the errors of law are not presented at the earliest practicable moment, or if they would not change the substantial equities between the parties.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. Equity ⇨446—Decree not opened on bill of review, to let in technicalities.  
A decree establishing true justice between the parties should not be opened on bill of review, to let in mere legal technicalities, which on the opening up would be reformed to accord with the unimpeachable equities apparent in the record.

5. Equity ⇨446—Decree supported by findings held not subject to review for error of record.

Where the court in a patent infringement suit found novelty, utility, the exercise of the inventive faculty, nonanticipation, absence of aggregation, presence of a true combination, the applicant's full compliance with all requirements, the issuance of the patent, of which the applicant continued to be the equitable and legal owner, and defendant's unlicensed use of the invention, the only equitable and legal conclusion was that an injunction should issue and an accounting follow, and there was no error of record authorizing a bill of review.

6. Equity ⇨447(1)—Identity of defendants in patent infringement suits held not newly discovered evidence, supporting bill of review.

Where the substantial identity of the defendants in a patent infringement suit, in which a decree for plaintiffs was rendered in 1914, and a similar suit, in which a claimed repugnant decree was entered in 1917, was known to defendant, but unknown to plaintiffs at all times, it did not constitute newly discovered evidence, which would support a bill of review by defendant.

7. Equity ⇨446—Decree in patent infringement suits held not to be opened on bill of review, for purpose of writing a more explicit decree.

In a patent infringement suit, in which plaintiffs pleaded a corrected patent, but by amendment set up the original patent and disclaimed a monopoly, except for 17 years from the date of the original patent, and the court found that there was but a single grant, and not a case of double patenting, but the decree inadvertently was based on the corrected patent, limiting the monopoly, however, to 17 years from the date of the original patent, no opening of the decree held necessary on bill of review, even for the purpose of writing a more explicit decree.

8. Equity ⇨431—Decrees read in light of pleadings, evidence, findings, and conclusions.

A decree must be read in view of the bill, answer, evidence, findings of fact, conclusions of law, and the whole record, of which it is the consummation.

9. Equity ⇨446—Decrees in patent infringement suits held not in conflict, so as to support bill of review.

A patent, through error, contained a sheet of drawings having nothing to do with the invention, and the Patent Office, instead of canceling or removing it, issued a new patent. The patentee sued for infringement, setting up the second patent, but in response to the defense of double patenting pleaded the first patent by amendment, and disclaimed any monopoly, except for 17 years from the date of the first patent. The answer, as permitted to stand, made no issue respecting notice or prolongation of the franchise. The court found that there was but a single grant, and not a double patenting, and rendered a decree which limited the franchise to 17 years from the date of the first patent, and, by inadvertence, adjudged the second patent valid. In another suit, the first patent was adjudged valid, and the second invalid. Held, that there is no conflict in the two judgments, so as to require the opening of the judgment in the first suit on bill of review.

10. Equity ⇨445—Supposed repugnant judgments not between same parties, so as to authorize opening on bill of review.

Where, in a suit for infringement of a patent, brought in Pennsylvania, plaintiffs, who had obtained a decree for infringement in Wisconsin

against a company which was in fact a subsidiary of the same parent company as the Pennsylvania company, sought to prove the relationship, but it was obstructed by defendants' counsel, and defendants never admitted or asserted the privity of the defendants until after the decree in the Pennsylvania suit, and until an accounting in the Wisconsin suit, the Wisconsin decree will not be opened on bill of review, to permit the Pennsylvania decree to be pleaded as *res judicata*.

11. **Judgment ¶887—Plaintiffs held not to waive decree by failing to bring it into the record of another suit.**

Where plaintiffs, suing for infringement of a patent in Pennsylvania, had no knowledge or notice of the privity between the defendant and a defendant against whom they had already obtained a decree for infringement in Wisconsin, they did not release the Wisconsin decree, or estop themselves from claiming the benefit thereof, by failing to bring it into the record in the Pennsylvania suit.

12. **Judgment ¶633—Defendant held estopped to claim estoppel against plaintiffs with respect to failure to set up decree in another suit.**

Where plaintiffs, after obtaining a decree for infringement of a patent in Wisconsin, conducted a suit in Pennsylvania against another defendant, without setting up the Wisconsin decree, and after a decree in the Pennsylvania suit defendant, with full knowledge of plaintiffs' ignorance of the concealed relationship between the two defendants, failed to claim an estoppel for three months, during which time plaintiffs with great difficulty and expense were endeavoring to procure an accounting in the Wisconsin suit, defendant was estopped to base a claim of estoppel on plaintiffs' failure to set up the decree in the Pennsylvania suit.

13. **Judgment ¶633—Defendant held barred by laches from setting up judgment in favor of one in privity with it.**

The defendant in a patent infringement suit brought in Wisconsin held barred by laches from pleading a supposed repugnant decree rendered in Pennsylvania in favor of a company with which it claimed to be in privity, by reason of its delay in avowing such relationship and presenting its petition for leave to file a bill of review.

Petition for Leave to File Petition in Nature of Bill of Review in the District Court of the United States for the Eastern District of Wisconsin.

Suit by Niels A. Christensen and another against the National Brake & Electric Company. On petition by the defendant to the Circuit Court of Appeals for leave to file in the District Court a petition in the nature of a bill of review. The petition was denied (258 Fed. 880), but the order was reversed by the Supreme Court (254 U. S. 425, 41 Sup. Ct. 154, 65 L. Ed. 341). Petition denied.

John S. Miller, of Chicago, Ill., for petitioner.

William R. Rummeler, of Chicago, Ill., and Louis Quarles, of Milwaukee, Wis., for respondents.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. A preliminary view of the instant controversy may be had by referring to the opinion of Judge Geiger, August, 1914, in which he directed the entry of (1) an injunctive decree on the merits of Christensen's patent monopoly of a combined pump and motor, and (2) an order for an accounting; the opinion of this court, October, 1915 (229 Fed. 564, 144 C. C. A. 24), affirming the

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rulings of Judge Geiger; the order of the Supreme Court, February, 1916 (241 U. S. 659, 36 Sup. Ct. 447, 60 L. Ed. 1225), denying petitioner's application for a writ of certiorari; the opinion of the Court of Appeals for the Third Circuit, July, 1917 (243 Fed. 901, 156 C. C. A. 413), holding that Christensen's patent 635,280 was a nullity, in obedience to which the District Court for the Western District of Pennsylvania, on October 1, 1917, dismissed respondents' bill against the Westinghouse Traction Brake Company as to patent 635,280; the opinion of the Court of Appeals for the Third Circuit, June, 1918 (252 Fed. 392, 164 C. C. A. 316), refusing to hold that the merits of respondents' bill as to patent 621,324 had ever been adjudicated in that circuit; the opinion of Judge Geiger, July, 1918, unreported, denying petitioner's motion to interpose as a defense to the entire bill, which was founded on patents 621,324 and 635,280, the decree in the Third Circuit holding that patent 635,280 was a nullity; the opinion of this court, April, 1919 (258 Fed. 880, 169 C. C. A. 600), denying petitioner's application for an order to direct the District Court to receive petitioner's proposed answer of *res adjudicata* and thereupon to dismiss respondents' bill; and the opinion of the Supreme Court, December, 1920 (254 U. S. 425, 41 Sup. Ct. 154, 65 L. Ed. 341), reversing this court's order of general dismissal of the petition and directing a determination of the merits of the petition "as an application for leave to file in the District Court a petition in the nature of a bill of review."

Since the remand the petitioner has brought no additional facts into the record, and in its additional brief it has advanced but two new contentions: (1) That the Supreme Court has decided that the Wisconsin District Court's decree is only interlocutory in its essence, and that petitioner is therefore entitled as a matter of right to interpose its answer of *res adjudicata*; and (2) that respondents, by conducting the Pennsylvania litigation against the Westinghouse Traction Brake Company, without bringing into that record their Wisconsin decree against petitioner as an adjudication against the Westinghouse Traction Brake Company, have released and canceled their Wisconsin decree against petitioner, even assuming that it was final in its essence.

[1] As to the first of the new contentions we are of the opinion that, if the Supreme Court had intended to sustain petitioner's demand to file an answer of *res adjudicata* as a matter of right because nothing had yet been adjudicated in this circuit, language would have been used which would express that intent. Our view is based, not merely on the silence of the Supreme Court in that respect, but as well on attributing the usual legal meaning to the words actually employed. Without going into the history of reviews, or the distinction between filing a bill of review to open a decree which has been "signed and enrolled," and filing a bill or petition in the nature of a bill of review to open a decree which has not been signed and enrolled, but which at the direction of the court has been recorded by the clerk in the order book, it is enough to say that a bill of review and a petition in the nature of a bill of review are alike in this: That neither is addressable to a decree that is not final in its essence. At the former hearing of

this petition our mistake consisted, not in denying petitioner's prayer for the specific relief based on the contention that nothing had been adjudicated in this circuit, but in our failure to give proper significance to the added prayer "for general relief," and therefrom to perceive an invocation to examine the record to determine whether facts exist which would appeal to the equitable discretion of a chancellor and afford a proper basis for opening in the interests of justice and equity a decree which otherwise would remain final.

Our answer to the second of the new contentions will appear in the course of our disposition of the case on the entire record.

[2-4] I. Bills of review are allowed for the purpose either of correcting errors of law apparent on the face of the record or of admitting new evidence which has come into being since the decree or was not known or knowable at the time of the trial. Not only will the appeal to equitable discretion fail if the new evidence or the errors of law are not presented at the earliest practicable moment, but also if the errors of law or the new evidence would not change the substantial equities between the parties. In this entire record from beginning to end we find nothing to change the substantial justice based on the following established facts: Christensen made a valuable invention. He fully and accurately complied with all the conditions necessary to obtain from the government a franchise to exclude others from practicing his invention. In consideration of his disclosure the government executed and delivered to him its franchise-contract. Petitioner's predecessor, the general manager in charge of operations being continuously the same, used Christensen's invention under license. After that license was abrogated and a new license was given to respondent Allis-Chalmers Company, petitioner continued to use the invention. Neither notice nor bill for injunction sufficed to stop infringement, which began before the filing of the original bill in 1906 and continued until the expiration of the patent in March, 1916, with the litigation still unended. In stating the facts controlling the merits we have omitted a clerical mistake of the Patent Office and also an oversight on the part of respondents' counsel or the clerk of the District Court, which was not corrected by the judge of the District Court or the judges of this court, in failing to have the wording of the decree conform strictly to the facts as found by both courts respecting the merits. Both of these matters will be set forth fully hereinafter; but at this point we desire to emphasize that, even assuming for the moment that these technicalities are of legal soundness, the decree which establishes true justice between the parties should not be opened up to let in mere legal technicalities which, on the opening up, would be reformed to accord with the unimpeachable equities apparent in the record.

[5] II. No error of law is apparent on the face of the Wisconsin record. On the finding of facts respecting novelty, utility, the exercise of the inventive faculty, nonanticipation, absence of aggregation, presence of a true combination, the applicant's full compliance with all requirements, the government's issuance to him of a franchise to exclude unlicensed persons, of which he continued to be the equitable

and legal owner, and defendant's unlicensed use of the invention, the only equitable and legal conclusion was that an injunction should issue and an accounting follow.

[8] III. Under the head of newly discovered evidence petitioner offers the 1917 Pennsylvania decree in the suit of respondents against the Westinghouse Traction Brake Company, holding that patent 635,280 was a nullity. Between that decree and the 1914 Wisconsin decree in this suit of respondents against petitioner, in which the injunction was based in words upon patent 635,280, apparently there is opposition. In subsequent paragraphs of this opinion we will point out that, when these decrees are read in the light of the issues, the evidence, the findings of fact and the conclusions of law in the respective cases, the seeming repugnancy utterly disappears. But for the purpose of this paragraph we assume that there is an irreconcilable conflict. What pertinency to the 1914 Wisconsin decree has the fact that the Pennsylvania courts in 1917 entered a repugnant decree between different parties? None, of course, in and of itself. But petitioner seeks to make that otherwise irrelevant fact material by contending that the record shows that the Wisconsin defendant and the Pennsylvania defendant were Siamese twins, that one and the same stream of blood (capital and management) sustained both, that a blow upon one was ineluctably felt by the other, and that neither could defend itself without defending the twain. Was this, the only material new fact offered, one that came into being since the decree, or, if older, was unknown to petitioner prior to the decisions in this circuit? From the record the facts are that petitioner knew of the twinship ever since 1906 and that respondents fought the case through and obtained their decrees in this circuit in the belief that petitioner was a separate and independent infringer. If petitioner had desired in 1914, as it now desires, to have one decree be a bar for both infringers, it could then have brought the matter into this case.

IV. Inasmuch as there is neither newly discovered evidence nor error of law in the decision on the merits, and especially as this appeal to equitable discretion is antagonistic to any desire to see substantial justice done, it would seem that those three grounds would afford sufficient basis for dismissing the petition. But, on petitioner's hypothesis that the Supreme Court intended that this court should do more than determine whether the petition, viewed as an application in the nature of a bill of review, required the opening of the Wisconsin decree, we proceed, as if the decree were opened, to examine the sufficiency of the proposed answer of *res adjudicata*.

[7, 8] A. What was decided in this circuit? Respondents filed the usual bill on patent 635,280, dated October 17, 1899, averring marking and notice. Petitioner filed the usual answer as to the merits of the alleged invention and as to the fact of infringement, and additionally set up a defense of double patenting in this, that patent 621,324 dated March 21, 1899, for the identical invention was issued in identical words to the same patentee, on account of which the later patent 635,280 was void. Thereupon respondents filed an amended bill, stating that after allowance of Christensen's application the Pat-

ent Office issued to him patent 621,324; that some clerk had inadvertently bound in with the sheets of drawings referred to in the specification a sheet of drawings that had nothing to do with the invention described in the specification and covered by the claims; that Christensen, noticing the errant sheet, returned said patent 621,324 "for the sole and only purpose of securing a correction therein by having said sheet 2 eliminated from the drawings attached thereto"; that the Patent Office, instead of cutting out the fugitive sheet or marking it canceled, issued to Christensen patent 635,280 which, excepting number and date, is patent 621,324 with sheet 2 eliminated; that there was but one application, one allowance, one order of grant; that Christensen disclaimed and now disclaims any monopoly after March 21, 1916; and praying that the court adjudge that patent 621,324 is valid evidence of the single grant, "unless the court shall find and adjudge that patent 635,280 is valid for a term ending March 21, 1916." Petitioner did not answer the amended bill, but procured an order of court allowing its answer to the original bill "to stand as an answer to the amended bill as to all defenses relating to the novelty, patentability, validity and infringement of patent 621,324." Therefore the issues joined on the amended bill were confined to the merits of the invention and the fact of infringement. There was no issue respecting marking or notice or prolongation of the franchise from March 21, 1916, to October 17, 1916. It was on this situation that Judge Geiger found:

"Whether the patent be evidenced by the one document, the other or both, is not, in view of the issues now here, material. Complainants' contention that, even though the second patent on its face extends the term of the monopoly beyond that permitted by statute, the court may, when necessary to protect the public or a party, give the instrument its actual limitation and effect, strikes me as fair and entirely consistent with the spirit of the patent laws. In other words, there is no reason why the irregularity of procedure should work a default or a total lapse in the patentee's right or title, especially as against one who has not been injured or misled, nor from whom relief is sought in reliance upon the irregularity. The question, upon the present state of the case, is therefore academic only."

And on the appeal this court held:

"It is of no moment which of the two patents be held to be in force. \* \* \* This is a case of a pure clerical error, not of double patenting. While two documents have been issued, there is but a single grant of one and the same right to the same person."

Judge Geiger's written direction on finding the amended bill to be true was as follows:

"Complainants may take a decree sustaining the patent and adjudging infringement."

If complainants or the clerk or the judge of the District Court or the judges of this court had seen to it that the decree of injunction and order of accounting were in direct words based on the single grant, evidenced by patent 621,324, or evidenced by patent 635,280 reformed to stand only as a correction of patent 621,324 by the elimination of the improprietly inserted sheet of impertinent drawings, or evidenced by both the original document and the reformed copy of the original, petitioner's struggle to evade paying for its appropriation of

a meritorious invention would have been at an end. But the decree as actually entered declared:

"I. That the patent of Christensen 635,280, dated October 17, 1899, for combined pump and motor, is good and valid as to each and every of the claims thereof."

On this solitary hook petitioner hangs its robe of innocence. Let us examine the hook's strength as against paragraph IV of the decree:

"That the said defendant, its officers, agents \* \* \* and each of them, for the remainder of the term of seventeen years from and after March 21, 1899, are hereby enjoined from making, selling or using any combined pump and motor embodying the improvements described in any of the claims of said letters patent 635,280."

Paragraph I of the decree shows that patent 635,280 was dated October 17, 1899, and paragraph IV limits the franchise to 17 years from March 21, 1899. What is the meaning of this limitation? A decree must, of course, be read in view of the bill, answer, evidence, findings of fact and conclusions of law, the whole record, of which the decree is the consummation. So read, the decree means that patent 635,280 has no standing in the case except as a corrected copy of patent 621,324, dated March 21, 1899, which lawfully granted the single franchise to exclude others for 17 years from that date. Consequently the case need not be opened even for the purpose of writing a more explicit decree.

[8] B. What was decided in the Third Circuit? On petitioner's motion for a decree of dismissal on bill and answer, respondents' bill counting, as here, upon patents 621,324 and 635,280, petitioner's answer, not as here, raising issues (1) as to marking, and (2) as to prolongation of the monopoly from March 21, 1916, to October 17, 1916, both patents having expired pendente lite, and nothing remaining but the question of accounting, the courts in the Third Circuit held patent 621,324 valid and patent 635,280 invalid. From the decision in 243 Fed. 901, 156 C. C. A. 413:

"We think it clear that the question now presented was not directly decided in the Seventh Circuit. As the suit there was begun in December, 1906, when both patents were only between 7 and 8 years old, the question which patent was in force was 'academic.' One or the other was valid, and as the invention was identical the infringer was not harmed by being enjoined under one rather than the other. In point of fact the injunction was under the second patent, and this is the decree that was affirmed, although the opinion of the Court of Appeals may be thought to lean toward the view that the first patent continued to be in force, and that the second patent had been erroneously granted. But, while it might be regarded as a matter of indifference under which patent an injunction should be granted, the situation is changed when the question of accounting is presented. The two patents have different dates of expiration, and the question of marking is also to be considered. We are therefore required now to decide between the two, for confessedly both cannot be valid, and in our opinion the decision should be in favor of the first patent. The mistake could have been corrected under rule 170 of the Patent Office."

On the question of marking, the courts in this circuit said nothing, because in closing the issues that question was eliminated. On the question of the prolongation of the monopoly beyond March 21, 1916, the courts in this circuit found in harmony with the finding in the

Third Circuit, and embodied that finding in paragraph IV of the decree, which passed unnoticed in the Third Circuit. We agreed that patent 635,280 was void as an independent grant. They agreed that patent 621,324 was valid. They did not disagree that patent 635,280 when limited to March 21, 1916, was merely a corrected copy of the original legal document.

[10] C. Who were the parties to the respective decrees? In the Wisconsin suit, petitioner, the National Brake & Electric Company, was the defendant; in the Pennsylvania suit, the Westinghouse Traction Brake Company. On the face of things the companies seemed to be strangers. As heretofore stated, respondents obtained their decrees here in the belief that they were prosecuting a separate and independent infringer. In taking depositions for the Pennsylvania suit, respondents, possibly for the purpose of pleading the Wisconsin decree as a bar, attempted to extract from witnesses connected with one or the other of the defendant companies a disclosure of the relationship. Taking, as we do, the two companies to be one in interest in these lawsuits, we find that their counsel obstructed respondents' attempt, frequently advising the witnesses not to answer. At no time during the Wisconsin litigation (except as hereinafter stated) or during the Pennsylvania litigation did either company admit or assert their privity. It was not until the president and vice president of the Westinghouse Air Brake Company were called in December, 1917, as witnesses for petitioner before the master in the Wisconsin accounting that anything definite appeared from which a finding could be made or which would charge respondents with notice. From their testimony it seems that the Westinghouse Air Brake Company, which was not a party to either suit, is a large "parent" corporation with many "subsidiary" corporations in its family, including the two infringing companies. On cross-examination they substantially admitted that, until after they thought they had secured some advantage by reason of the asserted conflict between the Pennsylvania decree and the Wisconsin decree, petitioner's relationship to the parent and the family was deliberately concealed. Distinctive machines were put forth by the infringing defendants, and the parent let the public believe that the two children were competitive sellers of competitive devices.

From the testimony of the president of the Air Brake Company:

"XQ. Did you consider the National Brake & Electric Company a competitor of either the Westinghouse Air Brake Company or Traction Brake Company on and after 1906?

"A. We considered the National Brake & Electric Company as supplying a type of machine, in which the apparatus furnished by the Traction Brake Company was not found as marketable as that of the National Company.

"XQ. And that relationship still continues, or did up to 1916?

"A. To a limited extent.

"XQ. Will you refer to the last page of that catalogue or bulletin? There is a list of affiliated companies given, which, I notice, does not contain the defendant, the National Brake & Electric Company. It is a fact, is it not, that that company was not generally advertised to the trade as being affiliated with either the Air Brake Company or the Traction Brake Company?

"A. I do not recall that it was so advertised."

From the testimony of the vice president:

"XQ. And the public was encouraged to look upon them as competitors, was it not?

"A. No effort was made to encourage them in that belief.

"XQ. Or to discourage them?

"A. Or to discourage them.

"XQ. It was not customary to list it in your list of affiliated companies in publications, I suppose?

"A. I believe not."

Summing up this paragraph we find that in the two lawsuits there was no identity of issues, no conflict in matters decided, and no identity or privity of parties within the knowledge or notice of respondents.

[11] V. As to petitioner's contention that respondents, by conducting the Pennsylvania litigation against the Westinghouse Traction Brake Company without bringing into that record their Wisconsin decree, released or estopped themselves from claiming the benefit of that decree, the answer is found in the facts stated in part C of the preceding section. Plainly respondents had no intention to cancel the Wisconsin decree, for they had no knowledge or notice which would require them to elect between holding a perfectly good decree and surrendering it in order to litigate the merits again with the same party.

[12] VI. But, speaking of estoppels, it is interesting to note that petitioner is estopped from claiming its alleged estoppel against respondents. With full knowledge of all the facts, including the facts of respondents' ignorance and their futile attempts to unearth the concealed relationship, petitioner waited from July 3, 1917, the date of the decision in the Court of Appeals for the Third Circuit (the entry of the decree by the District Court on October 1, 1917, was in obedience to the mandate), until March 9, 1918, when it first applied to the Wisconsin District Court to interject its proposed answer of *res adjudicata*, while respondents during those months, with great difficulty and expense, were endeavoring against active resistance and counter-attack to bring petitioner to book for its wrongful appropriation of respondents' property. Here was knowing action that caused the unknowing respondents to change their position substantially for the worse if they are not to have the benefit of the Wisconsin decree; and petitioner has never offered to make respondents whole even in that respect.

[13] VII. Petitioner is guilty of laches:

A. By its delay of eleven years in avowing the concealed relationship.

B. By its delay in presenting this petition, irrespective of the considerations stated in paragraph VI concerning its participation in executing the Wisconsin decree as a live decree and respondents' change of position for the worse.

VIII. Respondents have asked leave, which is granted, to amend their answer to this petition by adding that the Court of Appeals for the Third Circuit took jurisdiction over the appealable decree of the Pennsylvania District Court, not on an appeal, but on an alternative petition for a writ of *certiorari* or of *mandamus*, and based its jurisdiction on the consent of counsel in open court. But we do not think

it is necessary to take up respondents' contention that the Pennsylvania decrees are void for want of jurisdiction.

The petition, considered as an application for leave to file in the District Court a petition in the nature of a bill of review, is denied.

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**SUPREME COUNCIL, CATHOLIC BENEVOLENT LEGION, v. GALLERY.\***

(Circuit Court of Appeals, Seventh Circuit. October 7, 1921. Rehearing Denied November 18, 1921.)

No. 2811.

1. Pleading  $\S$  360(4)—Entry on striking affidavit of defense for amount therein admitted leaving suit to proceed as to balance held authorized.

Where an affidavit of merits, asserting that there was a defense to the entire action, but admitting that there was due plaintiff \$1,079.91, was stricken from the files, with leave to file a new affidavit, and judgment thereupon given for the amount admitted, with leave to file instant an affidavit of defense to the entire action, excepting such amount, which was done, such proceedings were authorized by Practice Act III.,  $\S$  55, though at the precise instant of the entry of the judgment the affidavit of defense had been stricken.

2. Pleading  $\S$  426(1)—Objection to entry of judgment for amount admitted, because no affidavit of defense then on file, waived by proceeding without objection.

An objection to the entry of judgment for an amount admitted by defendant to be due under Practice Act III.  $\S$  55, because the affidavit of merits had been stricken and another not filed when the judgment was entered, was waived when not suggested in the subsequent proceedings.

3. Courts  $\S$  365—Right to charge amount against certificate governed by decisions of state where benefit society chartered.

The decisions of the courts of the state in which a benefit society was chartered as to its right to charge against certificates a deficiency in the reserve provided by its constitution must be given effect by federal court.

In Error to the District Court of United States for the Eastern Division of the Northern District of Illinois.

Action by Mary J. Gallery against the Supreme Council, Catholic Benevolent Legion. Verdict for plaintiff, and defendant brings error. Affirmed.

The action was upon a benefit certificate issued in 1884 to Wm. J. Onahan by plaintiff in error, a fraternal benefit society chartered by the state of New York. The certificate provides for payment of \$5,000 maximum to the beneficiary named upon death of the member. In 1904 the Legion found itself quite deeply in arrears for accrued benefits, and it set about to change its plan, not only to meet the deficiency, but to accumulate a reserve fund. Constitutional amendments were adopted whereby rates were radically increased, so that in Onahan's case his payments, which for 20 years theretofore had averaged a little more than \$100 annually, thereafter amounted to nearly \$450 a year. In lieu of this increase it was provided that members desiring to continue paying their old rates might do so by agreeing to have charged against the face of the certificate the difference between the amount which the actaries had computed the value of the insurance to have been. Had Onahan accepted this option, he would have continued paying the old rate, but would have reduced the face of his certificate between one-half and one-third. A few

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\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 257 U. S. —, 42 Sup. Ct. 272, 66 L. Ed. —.

members chose this plan, but Onahan, with most of the others, paid the increased rate. These were given the privilege of paying part of it in cash, the rest to remain a charge against the certificate; the member to pay 4 per cent. annual interest on amounts so charged. In 1908 the charging privilege was withdrawn, and thereafter the full amount was paid in cash. The total amount thus charged against Onahan's certificate was \$814, on which he paid 4 per cent. interest annually until his death. Among the amendments adopted to the constitution in 1904 was

"Section 5. A reserve shall be accumulated and maintained upon the following basis, viz.: For each certificate in force on September 1, 1904, the net select and ultimate reserve thereon by the Catholic Benevolent Legion's experience table and interest at 4 per cent. per annum. Such reserves shall be sufficient by the aforesaid standards, together with the ultimate net premiums, fixed by the ages on September 1, 1904, for members on that date, if under age 70, and by age 70, if aged 70 or over, and fixed by ages last birthday upon admission for members admitted after September 1, 1904, to keep these rates level throughout life, and to assure the payment of all benefits. Each member must maintain to his credit a net balance at least equal to the reserve upon his certificate; any deficiency shall be a lien upon a member's insurance, accumulating at 4 per cent. interest, compounded annually, until the same is made good."

Although the largely increased payments served to discharge the deficit existing in 1904 and to raise a very considerable benefit fund, it was not deemed that the reserve was sufficient according to the law of New York, and in 1917 it was for the first time undertaken to charge certificates with the estimated amount of the deficiency between the amount paid in and the value of the insurance to that time. This was done by resolution of the trustees, under supposed authority of section 5 of the amended constitution, and under direction of the state insurance department; and, assuming that section 5 was applicable only to certificates issued prior to 1904, the charge was made only against certificates issued prior to that year, and no charge whatever was made against the others. Onahan received notice from the Legion that pursuant to this action his certificate was charged with \$2,877. His payments remained the same. He replied, protesting against this charge, and stating that payment of further assessments is not to be regarded as acquiescence therein. He continued paying the full rates and interest on the charged part of previous assessments, until his death, which occurred the following year.

The affidavit of merits filed with the plea of defendant stated that it had a defense to the entire action, but admitted there was due the plaintiff \$1,079.91. On motion of the plaintiff the affidavit was stricken from the files, with leave to file a new affidavit, and judgment was given for the plaintiff in the action for \$1,079.91 and interest, and at the same time leave was granted defendant to file instant its affidavit of defense to the entire action, excepting \$1,079.91 thereof, which was done. This judgment was satisfied, and thereafter by written stipulation jury was waived, the cause tried before the court, and judgment was rendered against the Legion for \$3,106.03. The facts leading up to the attempted charging of such certificates are more fully stated in the opinion of the New York Appellate Division in the case of Schwemmer v. Supreme Council Catholic Benevolent Legion, 187 App. Div. 673, 176 N. Y. Supp. 139.

Irwin I. Livingston, of Chicago, Ill., for plaintiff in error.

Daniel V. Gallery, of Chicago, Ill., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above).  
[1, 2] The contention is made that the entering of the judgment for \$1,079.91 and interest terminated the controversy, and that no subsequent judgment could be rendered in the action. The position is not tenable. Section 55 of the Illinois Practice Act (Hurd's Rev. St. 1919,

c. 110) provides for entering judgment for such amount, if any, of a plaintiff's claim as to which no defense is shown by the affidavit of defense, leaving the suit thenceforth to proceed as to the part of the plaintiff's demand in dispute. While at the precise instant of the entry of the judgment the affidavit of defense had been stricken, it is apparent that the contemporaneous leave to file amended affidavit, followed on same date by actual filing of it, is quite sufficient to characterize the entire proceeding as one falling within the statutory provision. If the point had been raised at the time, and had been considered good, the order for judgment would undoubtedly have been vacated, and another judgment entered upon the filing of amended affidavit, in which defense to the entire action was not asserted, but only as to that portion of it beyond the \$1,079.91. Throughout the proceedings subsequent to this judgment no suggestion of this contention appears, and there was in any case a waiver of it.

Considerable discussion is presented by the briefs as to the right of fraternal benefit societies organized in New York to increase their rates. This member definitely assented to the increase, and paid it from 1904 to his death, and so that question does not here arise.

[3] The controlling proposition is as to the right of the Legion to charge these certificates with the reserve, as was for the first time undertaken in 1917. This proposition is one which is governed by the laws of New York, under which the society was chartered, and if the courts of that state have passed upon the question here involved, so that we are enabled to say what is the law of New York thereon, we must give effect thereto. *Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771. It appears that a like certificate of the society was in issue in the case of *Schwemmer v. Supreme Council, Catholic Benevolent Legion*, 187 App. Div. 673, 176 N. Y. Supp. 139, and from the statement and opinion there the facts are quite the same as those here. That court held that, unless certain further facts appear (which are likewise absent in the case at bar), the action taken in 1917, to charge the old certificates only, was discriminatory and void, and reversed and remanded for new trial a judgment below in favor of the Legion. We find no further proceedings in that case. This was followed within a few months by the case of *Kennedy v. Supreme Council, Catholic Benevolent Legion*, 177 N. Y. Supp. 268, 188 App. Div. 613, wherein the Appellate Division considered a controversy in which there, as here, was involved the question of the right of the Legion to so charge one of these same old certificates. In the interest of brevity we will not quote from the opinion. Suffice to say the court held that the Legion had no power to charge the certificate as was undertaken, and it affirmed judgment for full amount of the certificate.

We can find nothing in the case at bar to distinguish it from the *Kennedy Case*. Indeed, the actuarial evidence offered in the case at bar was by stipulation read from the transcript of the record in the *Kennedy Case*. Upon appeal by the Legion to the New York Court of Appeals, that court, on May 1, 1921, affirmed with costs the judgment in the *Kennedy Case*, filing no opinion. The case of *Donaldson v.*

Supreme Council, Catholic Benevolent Legion, 180 N. Y. Supp. 598, was an action in the New York Supreme Court, based on another one of these old certificates; the primary question being the right of the Legion to charge such reserve against it. The court in its opinion cited the Kennedy Case as authority for its conclusion against the right, and gave judgment in favor of the plaintiff in the action. We find no reported decisions of New York courts which conflict with those referred to, and in view of them we conclude it is the law of New York that certificates such as that here in issue may not be charged as was undertaken in 1917 to do.

The judgment of the District Court is affirmed.

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FREDERICK v. MEYRAN.

In re HARRY DAVIS RESTAURANT CO.

(Circuit Court of Appeals, Third Circuit. February 9, 1922.)

No. 2761.

1. Bankruptcy  $\S$  267—Landlord may prove value of part of bankrupt's property subject to his lien.

A landlord, who had a lien on a part of bankrupt's property, which he waived by agreement with the trustee to allow the property to be sold as a whole, *held* entitled to prove that the value of the property subject to his lien exceeded his claim, in support of his claim to priority of payment from the proceeds of the sale, and the inventory and appraisal of the trustee and the bid of a third party for such property, when offered separately, *held* competent evidence.

2. Bankruptcy  $\S$  267—Claimant not estopped by failure to except to orders.

Failure of a lien claimant to except to the action of a referee in striking out a provision of a consent order submitted, stating the value of the property subject to the lien as not germane to the purpose of the order, *held* not to preclude him from proving such value.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of the Harry Davis Restaurant Company, bankrupt. Elliot Frederick, trustee, appeals from an order allowing the claim of Louis A. Meyran. Affirmed.

James I. Marsh, Lewis M. Alpern, and Gordon & Smith, all of Pittsburgh, Pa., for appellant.

William Macrum, of Pittsburgh, Pa., for appellee.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

DAVIS, Circuit Judge. The Harry Davis Restaurant Company, hereafter called the company, was adjudged a bankrupt on an involuntary petition filed June 9, 1920. At that time the company was in arrears in rent in the sum of \$14,227.66. Prior to bankruptcy Albert Pick & Co. had leased to the Restaurant Company certain goods on

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which the landlord waived his right to distrain. There was other property on the premises in the possession of the company subject to the landlord's lien. Pick & Co. instituted reclamation proceedings, but the court held that the so-called lease was a conditional sale, and the goods covered by it belonged to the estate in bankruptcy.

Repeated efforts were made to sell the property subject to the landlord's lien, and that not so subject separately, but the advertised sales were adjourned from time to time until August 31, 1920, when A. P. Jasperson, representing Pick & Co., offered \$45,000 and the cancellation of the claim of that company, not yet settled, for the entire assets of the bankrupt. This was the highest and only bid, and the sale was made and confirmed. Every person having an interest in the property was anxious that the sale be immediately confirmed. The landlord was co-operating with the trustee in bankruptcy and in order that his lien might not prevent the sale, he released all claims he had against the property and sought to protect himself by stipulating with the trustee that the chattels subject to his lien were of sufficient value to pay his rent claim in full, and that out of the \$45,000 a sum sufficient to pay the rent claim, after the payment of all expenses of administration, was received from the sale of the goods and chattels subject to the lien. This was agreed to, but it was thought better to put the agreement into the order of confirmation, and thus secure the referee's approval, than into a separate stipulation. Accordingly the order of confirmation presented to the referee by the trustee in bankruptcy contained the following provision:

"And it is further ordered and decreed that the sum of \$14,000 shall represent the value of the property on the premises not embraced in the reclamation proceedings of Albert Pick & Co."

The referee struck this out, not on the ground that it was not a fact, but on the ground that—

"he had no evidence before him to sustain any such allegation and furthermore because it did not appear to the referee a clause pertinent to the confirmation of the sale."

Subsequently, on petition of the landlord, the referee allowed his claim, and this allowance was affirmed by the District Court, from whose decree this appeal is before us.

All of the assignments of error upon which appellant relies may be reduced to two propositions:

1. The theory of apportionment is not applicable to this case; but
2. If applicable, the testimony by which it is sought to be established is: (1) Incompetent, irrelevant, and immaterial, and in any event is (2) not sufficiently certain and definite as to enable any reliable conclusion to be based thereon.

[1] This court has held that, where goods on which there is a lien are so commingled and confused with goods on which there is not a lien as to make it impossible to identify and separate the one class from the other or to determine the proportional value of the particular part bound by the lien to the gross purchase price, the lien may not be enforced. *Keyser v. Wessel*, 128 Fed. 281, 62 C. C. A. 650; *Vollmer et*

al. v. McFadgen, 161 Fed. 914, 88 C. C. A. 605. This seems to be the general rule. 12 Corpus Juris, 495. This court has also held that in case of a sale, if there is evidence tending to show the proportionate value of the particular part bound by the lien to the gross purchase price, the lien claimants may prosecute their claims as preferred creditors against the fund. *George Carroll & Bro. Co. v. Young*, 119 Fed. 576, 56 C. C. A. 380.

There was testimony on which the referee based his conclusion as to the value of the property on which the landlord had distrained for rent; at least he concluded that its value exceeded the amount due the landlord for rent. The trustee testified that, according to the inventory and appraisal, the property covered by the landlord's lien was worth \$33,900. Mr. A. P. Jasperson testified that he made an inventory of the property covered by the lien at the receiver's sale, which was not confirmed, and estimated it to be worth \$37,000. Representing Pick & Co., he bid \$28,050 for it. This bid did not include the property claimed by Pick & Co., for at that time he thought that the bailment lease covering the property was valid, and the title to it was still in the company. Mr. Julius Kahn, manager for Pick & Co., testified that without using the property in the restaurant as a going concern, "we could have realized more than our bid (\$28,050) on the property right there." The order of confirmation presented by agreement and without objection from anyone stipulated a value of \$14,000. This indicated that in the judgment of the parties interested it was worth at least that much.

This evidence in our opinion was sufficient to justify the allowance of the claim by the late referee, who concluded "that there was on the premises of the bankrupt lienable property far in excess of the amount of the landlord's claim." He had the witnesses before him, and heard and saw them testify. This testimony was admissible on the authority of *George Carroll & Bro. Company v. Young*, supra; *Marine National Bank et al. v. McCreery & Co. et al.*, 218 Fed. 50, 134 C. C. A. 26; *First Savings & Banking Co. v. Kilmer et al.* (C. C. A.) 263 Fed. 497, and on the authority of these cases the decree should not be disturbed.

[2] The trustee now contends that, because the landlord did not take a formal exception when the referee struck out the provision as to the value of the property subject to his lien, he has lost his right to prosecute his claim to priority. It should be borne in mind, however, that he and the trustee had been working together earnestly and persistently for the sale of the entire property to the best advantage. This seemed impossible, unless it was sold in bulk. It appeared to be the common understanding that the property subject to the landlord's lien was amply sufficient to pay the rent claim, and no one was objecting to the payment. To realize the highest price and secure most for the creditors was apparently uppermost in the mind of everybody. When the stipulation was drafted, reserving a sufficient part of the proceeds of the sale to pay the landlord's prior claim, nobody objected; but it was thought that the better procedure was to incorporate the provision in the order of confirmation. The referee, in striking it out, did not pretend to pass upon the merits of the claim. He did not

intend, as his subsequent action shows, to preclude a determination of the priority of the claim. He merely meant that in his opinion the proper practice to have the merits passed upon was not being pursued, and in no event could he pass upon the question without evidence. It was not a matter "pertinent to the confirmation of the sale." This left the appellee free to proceed in another and proper way to bring the claim before referee for adjudication, and when it was so brought before him he passed upon the merits and overruled the contention that the landlord had lost the opportunity to have the claim adjudicated, because he failed to note an exception to the striking of the provision from the proposed order of confirmation. In this the referee was sustained by the District Court.

We find no reason to interfere with this decree, and it is affirmed.

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**WICKHAM & BURTON COAL CO. v. EVANS COAL CO.**

(Circuit Court of Appeals, Seventh Circuit. January 8, 1922.)

No. 2953.

**Sales 679—Buyer of coal held to have right to change destination of shipments.**

Under a contract for the sale and purchase of 100 cars of coal, to be delivered f. o. b. at the mine, "destination where ordered," the destination of the coal was a matter immaterial to the seller, and where it claimed that by reason of a car embargo it was unable to ship to a destination ordered, because off the line of railroad on which its mine was located, the buyer *held* to have the right to designate another point of destination on such line and not affected by the embargo.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action at law by the Evans Coal Company against the Wickham & Burton Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Crozier, of Chicago, Ill., for plaintiff in error.

Francis M. Lowes, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Defendant sold plaintiff 100 cars of coal, Carterville 2-inch screenings, the failure to deliver which resulted in this action. A verdict and judgment for plaintiff followed.

Both parties were jobbers, defendant selling the output of a mine in the Carterville district located on the Illinois Central Railroad. Carterville coal comes from Williamson county, in which there are located some 40 or 50 mines, served by three different railroads. The contract is evidenced by four communications. The first, from the plaintiff, made inquiry for defendant's best price, which elicited the following reply:

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"We are now in a position to accept an order for some of our Carterville 2-inch screenings for shipment at the rate of one or two cars per day for an order of 100 cars at \$1 per ton mines."

To this offer plaintiff replied:

"Accept offer 100 cars Carterville screenings \$1 mine."

On the same day plaintiff sent a written order, confirming telegram, but before it was received defendant wrote:

"Your wire, 'Accepting offer one hundred cars Carterville 2-inch screenings,' received, and we were about to book your order when we discovered that the rate from our two mines, both being local to the I. O., does not apply to Ft. Wayne. In the intervening time this afternoon we have been trying to trade some of our screenings with some of our friends on the Missouri Pacific, but haven't succeeded in doing so. We hope to be able to wire you to-morrow morning that the order is taken care of."

Whereupon plaintiff sent defendant this wire:

"Yours 18th Ship Screenings Grand Rapids, Michigan."

To which defendant replied:

"Order booked. Will ship same to Grand Rapids."

Confirming this wire, defendant wrote plaintiff:

"This acknowledges receipt and acceptance of your order for 100 cars of screenings coal, for shipment on or about one or two per day consigned to yourselves at Grand Rapids, Mich., of price of \$1.00 per net ton f. o. b. mines shipping point."

Shortly after this contract was negotiated, the various railroads operating in and around Chicago announced a rule the effect of which was to embargo shipments beyond the lines upon which the shipment originated; that is to say, the Illinois Central Railroad would not accept shipment of freight in Illinois Central cars to go beyond the Illinois Central lines. In other words, to ship Carterville coal to Michigan required the presence of a foreign car at defendant's mine. Defendant offered to show that no such foreign car was obtainable by the Illinois Central Railroad, and therefore it was unable to ship the coal to Grand Rapids. When this rule was made known to plaintiff, it wrote defendant, October 28th:

"Your favor of October 27th received and carefully noted. We cannot permit you to cancel our order No. 4007 with you for 100 cars of Illinois 2-inch screenings, as we have not more than half this coal sold on basis of this order and must make delivery. We respectfully refer you to your letter of October 17th in which you advised 'we are now in position to accept an order' for this coal 'for shipment at the rate of one or two cars per day, or an order of 100 cars.' On the strength of this letter we mailed you our order No. 4007 on October 18th for 100 cars, shipment starting at once at the rate of one or two cars daily, and you accepted this order on October 19th.

"We have the matter of embargo on shipments off the I. O. R. R. to Michigan up with the I. C. C. through our attorneys and believe we will get this straightened out very shortly. In the meantime, you can surely get some foreign cars to apply on our order and we shall expect you to start shipments at once (payment for same to be made on cash basis) or suffer the consequences."

"Kindly arrange to mail us car numbers promptly and let us have an acknowledgment of this letter."

To this letter defendant promptly replied:

"Very sorry indeed that the embargo placed by the Illinois Central prevented our shipping your coal as ordered. We were therefore compelled to cancel same, and hope that some time in the future we may be able to serve you."

Plaintiff thereupon replied:

"We are willing to enable you to comply with your contract to accept shipments of this coal in Chicago."

Defendant gives as reasons for failure to make shipment: (a) It could not get cars to make shipment from its mines located on the Illinois Central to a point in Michigan; (b) plaintiff had no right to change the point of destination from Grand Rapids, Mich., to Chicago, Ill., a point to which defendant could have made shipment.

Plaintiff insists that it not only had the right to name Chicago as the point of destination, and did so to overcome defendant's objection that it could not get cars, but it further contends that the coal purchased was Carterville coal produced in Williamson county, in which there were some 40 mines served by three different railroads, and defendant failed to show on the trial that it could not have shipped the coal to Michigan from one of the many mines on one of the three different railroads. Whether the parties contracted for Carterville coal mined from any of the Williamson county mines, or whether the parties understood that defendant was selling Carterville coal mined at a mine located at Cambria in the Carterville district, we need not determine.

We are satisfied that plaintiff had a right to change the point of destination from Grand Rapids, Mich., to Chicago, Ill., in order to make possible defendant's compliance with its own construction of the contract respecting mines from which the coal was to be taken. Not only did defendant by its letters and wires clearly indicate that the place of destination was an unimportant factor, so far as it was concerned, but the order itself shows clearly and indisputably that destination was a matter of interest to plaintiff alone. The order read, "*destination where ordered.*" Later in the same order, under the sub-head "Remarks," the following appeared, "Start shipment to us, Ft. Wayne." Later, when it was found impossible to ship to Ft. Wayne, plaintiff gave shipping directions to Grand Rapids, Mich., and this change in destination was acquiesced in by defendant.

The original proposal of defendant confirms this conclusion. Its offer to plaintiff was to accept an order for 100 cars of Carterville screenings for shipment at the rate of one or two cars per day at \$1 per ton mine. It was offering to sell coal at the mines at a net price at the mines. The gross amount and the per day shipments only were designated. The destination was a matter for the purchaser to determine.

It is urged, however, by defendant that, because the wire changing the point of destination from Ft. Wayne to Grand Rapids did not contain the word "start," the place of destination was definitely and irrevocably fixed at Grand Rapids. Such a deduction would do violence to the theretofore clearly expressed intention of the parties, and at the

same time violate the rule of construction requiring us to give effect, if possible, to each provision of the contract. The original order and acceptance spelled the contract which fixed the rights of the parties. That order gave to plaintiff the right *to name and to change* the point of destination. Because the plaintiff did not again reserve the right to substitute another point when making his first change affords no reason for denying to him what was specifically provided for his benefit in the original order.

Other assignments of error require no special discussion. The verdict was amply supported by the evidence. Concluding, as we do, that the parties intended to, and did, contract, leaving the point of destination open, and to be determined by plaintiff, the purchaser, we are not called upon to determine the effect of a change in the point of destination of a shipment, such as Illinois coal, where no damage or threatened injury to the seller by virtue of such change is disclosed.

The judgment is affirmed.

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IN RE O'GARA COAL CO. \*

CHICAGO TITLE & TRUST CO. v. GARDNER.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1922.)

Nos. 2933, 2954.

**Bankruptcy** § 154, 326—Claim of bank against estate and claim of trustee for funds of estate deposited held not subject of set-off; "mutual debts."

A provable claim of a bank against a bankrupt estate, and a claim of the trustee in bankruptcy for funds of the estate deposited in the bank as an authorized depository of the court, held not "mutual debts," which may be made the subject of set-off by either party under Bankruptcy Act, § 68a (Comp. St. § 9652a).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Debts.]

Appeal from, and Petition to Review and Revise Order of, the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the O'Gara Coal Company, bankrupt. From an order of the District Court, made on petition of Frank G. Gardner, trustee, the Chicago Title and Trust Company, as receiver of the La Salle Street Trust and Savings Bank, appeals, and also files petition to review and revise. Reversed, and petition dismissed.

In 1913 O'Gara Coal Company became bankrupt. It owed the La Salle Street Trust & Savings Bank a note for \$15,000. Trustees of bankrupt deposited funds of the estate in this bank, which was an authorized depository of the District Court. In June, 1913, the bank became insolvent and suspended business, and a receiver was appointed in the state court. On suspension of the bank the deposit of the trustee was almost \$20,000. The state court appointed a receiver for the bank, who, in September, 1914, exhibited in the bankruptcy court proof of unsecured claim against the bankrupt, based on said note due the bank, which was allowed in full. June,

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\*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari granted 258 U. S. —, 42 Sup. Ct. 461, 66 L. Ed. —.

1916, trustees in bankruptcy filed in the state court claim for the amount of such deposits and demanding priority for the claim. Afterwards the demand for priority was abandoned, and claim allowed in full as a general claim. In the liquidation of the assets of the bank its receiver has paid creditors two dividends, the trustee in bankruptcy being paid as such dividends, on its claim allowed against the bank for the deposits, August, 1916, \$4,963.35, and June, 1918, \$1,985.34. May 22, 1918, trustee in bankruptcy filed its petition in the bankruptcy court, setting forth the facts substantially as above stated, and alleging that by section 68 of the Bankruptcy Act (Comp. St. § 9652) the trustee is entitled to set off against the claim of the receiver of the bank the amount which is due to the bankrupt estate from the bank as aforesaid, praying for decree setting off such claims, and that upon payment of balance, if any, which may then be due on such note, certain collateral which accompanied said note may be ordered to be surrendered by the receiver of the bank. October, 1920, the referee entered an order granting the prayer of the petition for set-off and decreeing accordingly, and February, 1921, the district court confirmed such order and decree. The matter is brought here both by appeal and petition to review and revise.

Hiram T. Gilbert, of Chicago, Ill., for appellant.

A. F. Reichman, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVAN A. EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). Only questions of law are involved, which we will dispose of without determining the question of appellate procedure. The primary and controlling question is: Was there at the time the bank suspended a right of set-off as between these demands? Section 68 provides that—

“In all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor the account shall be stated and one debt set off against the other and the balance only shall be allowed or paid.”

We are met upon the threshold with the condition that the deposits were not made by the bankrupt, which, but for the bankruptcy, would presumably have had the right to determine whether or not it would select as its depository the bank to which it was at the same time indebted, and which it knew had a right to apply the deposit upon any debt due the bank. The deposit here was made by the trustee in bankruptcy, an officer of the court, in a bank which was by the court and under the law designated as a depository for funds of bankrupt estates, not of this bankrupt alone, but of any bankrupt. Indeed, under the pleadings here, it does not appear that at the time these deposits were made the trustee in bankruptcy was aware that the bank held any such claim against the bankrupt, for it appears that only after the bank suspended was the claim of the bank exhibited in the O’Gara bankruptcy proceedings. This fact may not in strictness affect the question of the right of set-off, but it serves to show the doubtless unintended result which might flow from holding the bank and trustee in bankruptcy to be in such relation toward each other that the respective claims might be considered “mutual debts.”

The relation between a bank and its patron, under which the latter borrows from the bank and carries there a checking account, of itself suggests that mutuality which is a proper subject for the set-off of

contra debts. The depository here is but the agent of the court, or more directly of the officer of the court in the holding of the funds which the court controls. If it chanced that a bankrupt was personally indebted to a receiver or a trustee of an estate, could the trustee apply the funds coming into his hands in this capacity upon a debt personally owed the trustee by the bankrupt? The question answers itself. So if the trustee, instead of himself holding the money, constitutes some bank his agent or depository for the purpose of safely keeping it, there is not thereby constituted between them that legal or equitable mutuality which would enable the claims to be set off.

While here it is the depositor who is undertaking to have the claims set off as mutual debts, in order to succeed the mutuality must be such that at the time of the insolvency they may be the subject of set-off. In this case it would be the time of the suspension of the bank. If at that time each debtor had not a right of set-off against the other, neither had such right. But it is hardly conceivable that prior to the suspension of the bank it was within its right and power to have applied the deposit made by the trustee in bankruptcy upon the bank's claim against the bankrupt. If a bank had the right so to do, no legal representative of a bankrupt estate could safely deposit funds of the estate in any bank, for it may be that without the knowledge of the depositor, the bank may hold a claim against the bankrupt, by virtue of which the bank could appropriate the deposit and apply it upon the bank's claim, to the detriment of other creditors of the bankrupt. Such legal representative, if so minded, might deliberately deposit with a creditor bank the funds of the estate with the very purpose of putting it in the bank's power to appropriate such funds upon the claim of the bank, and thus under sanction of the law prefer the bank. It seems too plain for argument that this cannot properly be done. If, prior to the suspension of the bank, it could not properly have seized upon and applied the trustee's deposit, it could not properly be done by the bank's trustee after the suspension.

The fact that this bank was a depository which under the law the court had designated as such also militates against the proposition of mutuality of debt. To the extent that legally authorized depositories are less than the whole number of banks, the choice of the trustee is narrowed to such banks as have been duly authorized. Had there been but one, the trustee would have only "Hobson's choice." Surely it could not have been intended that, in limiting the number of depositories in which such funds may be placed, there be incurred even remotely the risk of the lawful appropriation of funds to which normally all creditors are entitled to the claim of one creditor whose legal or equitable standing was not different from the others, save only in the fortuitous circumstance that the court's officer happened to deposit there funds of the bankrupt estate.

The right to set-off of the bankrupt estate as against the insolvent bank and its creditors is not different from the right of set-off of the insolvent bank as against the bankrupt and its creditors. There are not here such "mutual debts" as in law or in equity may properly be set off. In *re United Grocery Co.* (D. C.) 253 Fed. 267, considers a situation

quite identical with that here, and reaches the same conclusion as above indicated. The main reliance in support of the decree is the case of *People v. California Safe Deposit & Trust Co.*, 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299. While in some respects that case may be distinguished, there is much in it which, if followed here, would justify this decree. In this respect, however, we are not in accord with its holding.

We find that claim of the receiver of the bank and that of the trustee in bankruptcy were not properly the subject of set-off, and direct that the order or decree entered in the District Court be set aside, and that the petition to set off the claims be dismissed.

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**BREWER v. LICHTENSTEIN et al.**

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 3050.

**Patents 828—780,086, for vending device, held void for lack of lawful utility and invention.**

The Brewer patent, No. 780,086, for a vending device or punch board intended for use as a lottery device, *held* void for want of lawful utility, and also for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Charles A. Brewer against Leo Lichtenstein and Sol Harrison, doing business as the Harlich Manufacturing Company. Decree for defendants, and complainant appeals. Affirmed.

Russell Wiles, of Chicago, Ill., for appellant.

Samuel W. Banning, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellant's bill to enjoin infringement of the three claims of his patent, 780,086, January 17, 1905, for a "vending device," was dismissed for want of equity. Lack of lawful utility and lack of invention were the defenses.

In the specification the object and the form of the device are thus described:

"The object for which the invention is principally designed is to promote the introduction and sale of merchandise, principally of that class which is retailed in separate pieces or packages at a uniform price per piece or package—such, for instance, as chewing gum, cigars, etc.—and this we accomplish through a novel mode and instrumentality of advertising and vending a line of goods involving the sale of orders for the goods, accompanied by orders for a limited number of premiums or gifts that are distributed with the goods.

"The form which we have chosen as the preferred mechanical embodiment of the invention consists generally of a receptacle containing a series of pockets or holders for written or printed order slips or equivalent order mediums, which latter are confined within the respective pockets or other holders of the receptacle by a frangible device which serves to entirely conceal from

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sight the order itself, in association with an ejecting device by which the orders may one at a time be dislodged from the receptacle. In practice the receptacle will have prominently displayed thereon an announcement or advertisement of the goods for the sale of which it is instrumental, and the orders confined in the holders of the receptacle will call for a package or other fixed quantity of the article advertised, while a limited number of the holders may also contain orders for premiums or gifts, either separate articles or a certain value in trade. A customer will pay a certain sum—say five cents—for the privilege of ejecting or withdrawing an order from the device, which order will call for at least a quantity of the goods advertised to the retail sale value of the price paid for the privilege and in some instances for a premium or a gift. Preferably and as herein shown and described the series of order holders or containers will be sealed, and the orders themselves will be obtainable on the part of the customers by ejecting them from their sealed receptacles after paying the price charged for the privilege by means of the ejector, which breaks the frangible seal and removes the printed order slips therefrom."

Claim 1 is as follows:

"1. In a device of the character described, the combination with a receptacle containing a series of apertures, of removable objects in said apertures, frangible means serving to retain said objects in place and concealing the same, and a device adapted to break said frangible retaining means, substantially as described."

I. *Utility.* The element which in claim 1 is defined as "frangible means serving to retain said objects in place and concealing the same" appears in claim 2 as "perforable covering sheets applied to both sides of said board and sealing the ends of said perforations," and in claim 3 as "paper sheets applied to the opposite surfaces of said board and sealing the perforations therein." It is to be noted that this element in the "punch board" is not merely "frangible means serving to retain said objects in place," but is frangible means so used as to "conceal the objects in the holes or pockets in the board." A patent claim for a structure which otherwise would be void may be valid solely by reason of the limitation of an element by a "whereby" clause, if the limitation calls into being a new combination that produces a new and useful result. *Crane Co. v. Baker*, 125 Fed. 1, 3, 60 C. C. A. 138. In appellant's patent, as the specification and claims clearly disclose, the utility of the limitation of the covering element to a concealing means was to enable the gambling instinct of purchasers to be appealed to in promoting the sale of merchandise. No other utility than as a lottery device (in promoting sales or for similar uses) is suggested in the patent; and the claims themselves exclude any combination in which the element of the concealing means has no useful function.

As a basis for argument appellant exhibited a punch board made up so that the pockets in the first column each contained a five-cent order for a drink of soda water, in the second column each contained a ten-cent order, and so on. And over each column was a printed statement of what the pockets contained. The suggested utility was that each purchaser, in punching out his order, would leave a hole as a registration of the sale, and that the proprietor, by counting the holes at the end of the day, would have a way of computing his sales tax. As an accounting system that supposititious punch board might be as use-

ful as making chalk marks on the wall behind the counter; but the point is that in such a use concealment plays no part.

At the oral argument appellant asserted, correctly enough, that not all drawings of lots are illegal, and suggested the case of two candidates who are directed by law to resolve a tie by drawing lots and also the case of the government's determining by lot the order in which eligible conscripts should go to war. But those instances seem to us to be beyond the range of any practical utility with which the patent law is concerned.

Appellant cites *Fuller v. Berger*, 120 Fed. 274, 56 C. C. A. 588, as analogous. In that case the device of the patent was a "bogus coin detector." It was invented as the result of a demand by a manufacturer of coin operated banjo playing instruments for a device to protect the musical instrument from being set in operation by means of bogus coins. Up to the time of the trial the only use to which the patented device had been put was to protect coin operated gambling machines. But the mechanism of the detector had no connection with the mechanism of the machine to which it was attached. It was a separate entity, quite as capable of protecting an innocent musical instrument as a vicious gambling machine. Inasmuch as the specifications and claims had nothing to do with the selection of the thing to be protected, the patent was held to cover a lawful device, and the illustration was given that a patented revolver should not be blamed if, without its own volition, it found itself in the hands of a burglar instead of a policeman.

II. *Invention*. In view of the Kuenzell patent, 499,124, June 6, 1893, wherein the patentee described and claimed "a box or case divided into a series of parallel compartments open at both ends, and fabric membranes adapted to be punctured and closing both ends of the series of compartments, whereby the finger may be pushed through one membrane to force the desired article from its compartment and through the opposite membrane," we think there was no invention. Kuenzell's box and appellant's punch board are identical. Kuenzell directs the user to burst the membrane with a finger, and appellant with a "device" or "ejector" or "plug." This difference is immaterial. "Whether the power be mediately or immediately human seems to us indifferent." *Krell Auto Grand Piano Co. v. Story & Clark Co.*, 207 Fed. 946, 953, 125 C. C. A. 394. The only other difference is that Kuenzell's membrane may be transparent, in order to permit the purchaser to see the article within the receptacle, while appellant's covers must be concealing means in order to constitute a lottery device.

The decree is affirmed.

**LONE STAR IMMIGRATION CO. et al. v. JOHNSON.**

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 2895.

1. Vendor and purchaser ⇨36(2)—Representations by vendor that land was "irrigable" means at reasonable cost.

A representation by a vendor that the land sold is "irrigable" agricultural land is to be understood as meaning that it can be irrigated at a reasonable cost, which would make its irrigation practicable for agricultural purposes.

2. Vendor and purchaser ⇨37(4)—Rule of caveat emptor held not applicable, where land represented to be irrigable.

The rule of caveat emptor cannot be invoked by the vendor of a large tract of land against the purchaser, where he represented the tract to be irrigable agricultural land, whereas fully half of it could not be irrigated, except at a prohibitive cost, and where his agent, in showing the land to the purchaser, purposely took him only on the level part, from where, because of intervening brush, he could not see the broken character of the other part.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit in equity by George A. Johnson against the Lone Star Immigration Company and others. Decree for complainant, and defendant appeals. Affirmed.

R. B. Graves, of Sparta, Wis., for appellee.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. Appellee owned farms in Monroe county, Wis., and made a contract with appellant corporation, non-resident of Wisconsin, for exchange of the Wisconsin farms for a large tract of land of the corporation in Cameron county, Tex. Pursuant to the contract, appellee gave deed and possession of the Wisconsin lands, and proceeded to Texas with the intention of taking possession of the land there. Upon arrival there he had the tract surveyed, and concluded he had been deceived and defrauded by appellant. He notified appellant that he rescinded the contract, demanding that the Wisconsin farms be reconveyed to him. Upon appellant's refusal, action was brought in Wisconsin, which resulted in a decree of cancellation of the contract, and reconveyance of the farms, and awarding appellee damages of \$1,000.

The complaint was predicated upon allegation of appellant's fraudulent representation to appellee to induce him to enter into the contract; that the Texas tract was all level, and could readily and advantageously be irrigated and used for agriculture, its agricultural and commercial value consisting very largely in its irrigability; that in fact the land was traversed by ravines and gullies, and was not reasonably capable of irrigation, nor fit for agriculture, and had practically none of the advantageous qualities which had been represented to appellee; that appellant knew the representations of irrigability and agricultural

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possibilities were false, but that appellee did not know of their falsity, and was by appellant's conduct prevented from finding it out.

It seems that appellee joined a land excursion party which appellant had organized for showing Texas lands to prospective buyers. The excursion was in charge of appellant's agents, who likewise had charge of the party on its reaching Texas, and conducted the tours for inspecting land. There was evidence tending to show that appellee was taken to what purported to be the land, and it was pointed out in a general way by appellant's agents as extending to what looked like a row of posts in the distance. As a matter of fact, the tract as surveyed extended far beyond the posts, and considerable of the land as surveyed was not visible, because of a thick growth of underbrush which obstructed the view, and beyond the posts and hidden by the underbrush it seems the tract was traversed by depressions and gullies, which according to evidence for appellee made about half the tract incapable of irrigation or agriculture and quite valueless. The representations of irrigability and fitness for agriculture, and their important bearing on the value of the land, were admitted; but it is claimed for appellant that the land was in fact irrigable, that no misrepresentations were made, and that in any event appellee was at the land, and had full opportunity to observe and know its character and possibilities, and as to him the rule "caveat emptor" applies; also that what was said on the subject of irrigability was not a representation of facts, but was at most an expression of opinion.

[1] There was evidence that fully half of the land could not be irrigated, except at prohibitive cost. It would not comply with the representation of irrigability that at unreasonable impracticable expense lands may be irrigated. Perhaps some Croesus, at fabulous cost, might raise oranges in Greenland; but this would hardly justify representation of the orange-producing qualities of Greenland real estate. It is more than likely this land could be irrigated, even if to do so it was necessary to build a railroad through it, and haul water in tank cars, and distribute it by garden hose or sprinkling pots. But representations must be considered in the same sense in which the maker of them has reason to believe they will be understood by him to whom made. The agent who made the representation of irrigability well knew that thereby appellee would understand was meant at cost which would not be prohibitive. Such representations must be considered, not in the light of the remotely possible, but of the practicable. If a substantial part of the Texas land was not irrigable, except at prohibitive cost, it must be regarded as not being irrigable at all. That the court was warranted upon this record in finding material misrepresentation whereon appellee to his detriment relied sufficiently appears.

[2] Does the rule "caveat emptor" apply? Appellant's agents were probably familiar with the Texas lands which they were showing. They doubtless knew their topography, advantages, and disadvantages, and that appellee, a Northern farmer, was probably unacquainted with the peculiarities of Texas lands, and their adaptability for irrigation and agriculture. They knew, or assumed to know, the particular land for which appellee was bargaining, and in pointing it out they

must be held to the utmost of good faith in the employment of the superior knowledge they evidently possessed, not only of the tract itself, but also as to the fact of its being irrigable agricultural land. The gullies and depressions could not be seen from the various places on the tract to which these agents took appellee for the purpose of inspecting it. It was in their charge and under their direction that appellee inspected the tract, and from the evidence the court could properly find, as it did, that appellant's representatives so arranged and manipulated the inspection as to reveal to appellee the better parts of the tract, and conceal from him the undesirable portions. If in this they succeeded, appellant should not be permitted to hold onto the fruits of its deception, and escape restitution, on the plea that appellee ought not to have believed these agents and relied on what they told and showed him. *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439. What has been said will sufficiently dispose, also, of the contention that the alleged misrepresentations were not of facts, but only expressions of opinion.

The evidence was largely oral, and the trial court had the advantage of hearing and seeing the witnesses. We find in the record no misapplication of the law, and no reason for disturbing the court's conclusion as to the facts.

The decree of the District Court is affirmed.

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**DANISH PRIDE MILK PRODUCTS CO. v. PAUL STUPPEL, Inc.**

(Circuit Court of Appeals, Seventh Circuit. January 8, 1922.)

No. 2987.

**Sales 4-177—Facts held not to authorize cancellation of contract by seller.**

A contract for sale of 10,000 cases of condensed milk, to be shipped under buyer's labels and delivered f. a. s. New York, held not subject to cancellation by the seller after shipment of 2,000 cases, because the labels furnished were a few short of the total number required, of which fact the buyer was not notified, nor because, owing to delay in obtaining shipping permits, the buyer directed shipment to stations in New York other than the docks, which change was immaterial to the seller.

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action at law by Paul Stuppel, Inc., against the Danish Pride Milk Products Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James H. McGillan, of Green Bay, Wis., for plaintiff in error.

G. T. Gifford and Joseph Martin, of Green Bay, Wis., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Defendant prosecutes this writ of error to review a judgment based upon a directed verdict entered in a

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trial of an action growing out of a contract for the sale of 10,000 cases (48 cans to a case) of condensed milk which it, as the manufacturer at Denmark, Wis., sold to the plaintiff, a jobber in New York. The material portions of the contract provided that the commodity was—

"To be shipped under buyers' labels. \* \* \* Labels to be in packer's hands in time for shipment."

"G. O. C. permits, routing instructions, and any special case markings to be furnished by buyer before time of shipment."

"Terms. Draft against bill of lading less 2 per cent., payment upon arrival of car f. a. s. New York."

"Shipment. During April, 1919, on buyer's instructions."

The evidence showed that the contract was made March 14, 1919; that the price of condensed milk was rising; that plaintiff, March 19th, gave its order for 500,000 labels to a lithographic company, which, in turn, delivered the labels so ordered to defendant prior to April 15th, but which labels, when counted, numbered only 492,000, or 8,000 less than the required number. On April 15th defendant wired to plaintiff saying, among other things, "Labels have arrived," and at no later date complained that any part of the 500,000 had not been received.

During the war, because of the congested condition of freight at the docks in New York, the government appointed a committee known as the general operating committee to control the arrival and departure of freight. Before merchandise would be received on the docks, permits, known as G. O. C. permits, were required, and these were not issued unless the shipper could show the committee that it had "bottoms sufficient to take the freight aboard." Plaintiff experienced some difficulty in getting these permits. On March 26th plaintiff directed the shipment of 1,000 cases of the milk, but did not inclose the permit, and later advised the defendant that it was unable to get the permit, adding:

"Inasmuch as we are anxious to receive the merchandise, we would ask you to please forward same without such permits and name the Franklin Street station for delivery."

At the same time plaintiff requested defendant to have 1,000 more cases marked ready for shipment and permits would soon follow. To this letter the defendant replied that the—

"railroad agent refused to accept car without G. O. C. permit. Have two cars on track loaded. \* \* \* Please do utmost to wire us G. O. C. permit number, routing instructions, or will be forced to cancel contract."

Plaintiff wired reply on the 17th as follows:

"Ship both cars any available route. Deliver downtown district New York, preferably Franklin Street station or St. Johns Park. Under these circumstances, G. O. C. permit unnecessary as waiving lighterage."

On the same day a letter was sent, repeating words of telegram and inclosing permit to ship 1,000 cases. On April 28th a telegram was sent, directing the shipment of 2,000 cases—

"any available route. Deliver downtown district New York, preferably St. Johns Park or Franklin Street station."

On April 29th plaintiff wired these directions:

"Ship additional 5,000 cases. \* \* \* Any available route. Deliver downtown district New York, preferably St. Johns Park or Franklin Street station. This completes contract of March 14th. \* \* \*"

Defendant complied with the first two orders and shipped 2,000 cases, but refused to ship any part of the remaining 8,000 cases. This action was for damages for breach of contract, and parties agreed upon the amount, if any were recoverable. Defendant relies upon two defenses as justification for its refusal to make shipment: (a) Plaintiff's failure to furnish a sufficient number of labels; (b) plaintiff's change in the contract in reference to point of destination.

(a) As to the labels, defendant's position is untenable, first, because it advised plaintiff that the labels were on hand, and never again notified it that the number received was a few short of the total requirements. Further, plaintiff had on hand over 300,000 unused labels furnished by defendant when it breached its contract, and had it notified plaintiff that the shipment from the lithographic company was short, the additional ones could have been promptly supplied. Nothing appears in the record that would have presented a jury question on this phase of the case.

(b) In reference to the alleged change in the contract made by the plaintiff, wherein he designated a point of shipment other than that named in the contract, we likewise agree with the District Judge that the sale was not necessarily made for export. While the purchaser designated the point of shipment f. a. s. New York, we find nothing which bound the purchaser to export the milk. Does it follow that, because the seller was required to ship the milk to a point where it could be readily exported, the purchaser was thereby limited to ordering for export shipment? We think not. Such changes as were made in point of shipment were for defendant's benefit and to its advantage, for it made earlier payment possible.

But if the sale of the milk was for export trade, if that fact be material, there is nothing in the evidence indicating or tending to show that plaintiff, because it changed the point of destination, thereby intended to sell the milk for domestic use. If the fact that the parties intended the sale for export can be read into the contract, then nothing which the plaintiff did indicated a change in its plans. The letters and telegrams show clearly that plaintiff wished to have the milk delivered as near to the seaboard as possible, and that it expected to get the milk on board a ship, once it reached the railroad terminal in New York.

In this court it is argued that the shipping orders were not received in time to permit defendant to load the cars during the month of April. This point is an afterthought. It was never suggested to plaintiff that defendant might not be able to load the last five cars by April 30th, nor was it required to do so. The contract contemplated the giving of shipping orders during the month of April, and defendant was to fill the orders within a reasonable time.

The judgment is affirmed.

**CHIPMAN CHEMICAL ENGINEERING CO., Inc., v. READE MFG. CO.**

(Circuit Court of Appeals, Third Circuit. February 14, 1922.)

No. 2694.

**Patents 328—873,680, claims 5, 8, for railroad track spraying apparatus, held anticipated.**

The Pearse patent, No. 873,680, for an improvement in spraying apparatus, designed primarily for spraying railroad tracks, claims 5 and 8, held anticipated by devices in the analogous arts of street-sprinkling and insect-destroying devices, so as to be invalid.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Suit for infringement on patent by the Chipman Chemical Engineering Co., Inc., against the Reade Manufacturing Company. From a decree holding the patent invalid (270 Fed. 677), complainant appeals. Affirmed.

Edward S. Beach, of New York City, for appellant.

Lewis J. Doolittle, of New York City, for appellee.

Before WOOLLEY and DAVIS. Circuit Judges, and J. W. THOMPSON, District Judge.

DAVIS, Circuit Judge. The District Court held United States patent No. 873,680, issue to J. V. Pearse, December 10, 1907, invalid. The patent is for an improvement in spraying apparatus designed primarily for spraying railroad tracks with a liquid adapted to kill plants and weeds. The fifth and eighth claims only are in issue.

The fifth claim comprises: (1) A tank; (2) discharge device connected therewith; and (3) means for establishing pressure in the tank whereby the discharge therefrom may be regulated independently of the liquid contents of the tank. The eighth claim is for: (1) A transverse nozzle pipe; (2) a series of nozzles, each of which has (1) a perforated head; (2) a neck; (3) a pipe section; (4) a coupling connecting the neck and pipe section; and (5) a valve controlling the passage of liquid from the nozzle pipe to the head.

Defendant denies infringement and alleges that the patent was anticipated and is invalid.

In the Haughey patent, No. 397,287, for a street-sprinkling device, in the Tyrell patent, No. 444,786, a device for destroying insects, and in the Smith patent No. 765,518, for an improved street cleaner, there is a tank, discharge devices, and means for establishing pressure in the tank, substantially as described in claim 5 of the Pearse patent. These patents in analogous arts antedate Pearse.

In the patent No. 390,657, issued to George A. Farrand, October 9, 1888, for improvements in potato sprinklers, there are a nozzle pipe and a series of nozzles, with the corresponding equivalent parts as found in the Pearse patent. The patent No. 803,090, issued to C. G.

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Bradford, October 31, 1905, also contains a nozzle pipe and nozzles similar to that found in claim 8 of the Pearse patent.

The appellant emphasizes the fact that the "means for establishing pressure in the tank," of claim 5, is regulated "by means absolutely independent of the operation of the car." This feature is simple and apparent, and would suggest itself to any one skilled in the art of spraying. The parts forming Pearse's device are all old, and had been used by others in substantially the same way to produce substantially the same result long before his application. The slight changes he made here and there are not a substantial departure from the prior art. There are really no novel, inventive features disclosed in the device of the patent.

The decree of the District Court is therefore affirmed.

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**HOLY v. UNITED STATES.**

(Circuit Court of Appeals, Seventh Circuit. December 16, 1921.)

No. 2887.

**Perjury**  $\S$  10, 34(1)—Form of oath immaterial; conviction may be based on testimony of single witness, supported by documentary evidence.

A conviction of perjury may be based on the testimony of a single witness, though contradicted, supported by documentary evidence, and if the defendant was sworn the oath need not be in any particular form.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against George Holy. Judgment of conviction, and defendant brings error. Affirmed.

Fred Holy, for plaintiff in error.

John B. Boddie, of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was convicted of perjury in swearing in his application for a position in the civil service that he had never been indicted for or convicted of any crime, when in truth he had been indicted and convicted and had served a sentence for receiving stolen property.

At the trial the government introduced in evidence the record of plaintiff in error's conviction, his application to the civil service commission, and the testimony of the notary public, whose jurat and seal are upon the application:

"That defendant appeared before me and swore to the application. I asked him if he swore to it, and he said he did; and thereupon I subscribed my name and affixed my seal."

A conviction of perjury may be based upon the testimony of a single witness supported by documentary evidence; and, if the defendant was sworn, the oath need not be in any particular form. United States

$\S$  10, 34(1)—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

v. Baer (C. C.) 6 Fed. 42; United States v. Mallard (D. C.) 40 Fed. 151, 5 L. R. A. 816; United States v. Hall (D. C.) 44 Fed. 864, 10 L. R. A. 324; Greene v. People, 182 Ill. 278, 55 N. E. 341.

On cross-examination the notary said that, "if it had not been for my having my signature there, and my seal, I wouldn't have remembered anything about it." This, so far from destroying his testimony in chief, meant that the presence of his signature and seal on the document refreshed his memory.

Plaintiff in error's contentions that, because he and another testified that he was not sworn by the notary, therefore guilt was not proven beyond a reasonable doubt, and that, because the notary did not use the formula prescribed by an Illinois statute, there was merely an abortive attempt to administer an oath, arise from a misconception of Federal procedure. Applebaum v. United States (C. C. A.) 274 Fed. 43.

The judgment is affirmed.

#### McCARTHY v. MARSHALL.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922.)

No. 2962.

**Brokers ⇨88(1)—Evidence held to sustain direction of verdict for defendant in suit for commission.**

Evidence held to sustain the action of the trial court in directing a verdict for defendant in an action by a broker to recover a commission.

In Error to the District Court of the United States for the District of Indiana.

Action at law by John A. McCarthy against Henry W. Marshall. Judgment for defendant, and plaintiff brings error. Affirmed.

William Velpeau Rooker, of Indianapolis, Ind., for plaintiff in error.  
James A. Ross, of Indianapolis, Ind., for defendant in error.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

**PER CURIAM.** The determinative issue before this court on all the assignments of error is one of fact, viz.: Does the evidence present a jury question respecting the right of plaintiff in error to recover for broker's services in negotiating the sale of the Lafayette Courier, a newspaper published at Lafayette, Ind.? The evidence consists of numerous letters and telegrams and some oral testimony, the substance of which it is not deemed necessary to here specifically detail. To set it forth in full or to discuss its effect would contribute nothing of value to the parties or of interest to the bar on the subject of a broker's right to recover a commission for services rendered. No legal question not well settled is involved. We have viewed the testimony most favorably to the plaintiff in error, and find no basis for his recovery. The court committed no error in directing a verdict for the defendant in error.

The judgment is affirmed.

**NIEBUHR v. UNITED STATES.**

(Circuit Court of Appeals, Seventh Circuit. January 9, 1922.)

No. 2939.

**Criminal law** ¶1090(8, 14)—Bill of exceptions essential to review of errors in evidence and instructions.

A bill of exceptions is essential to the consideration of alleged errors in the admission of evidence and the instructions.

In Error to the District Court of the United States for the Western District of Wisconsin.

Criminal prosecution by the United States against Charles Niebuhr. Judgment of conviction, and defendant brings error. Affirmed.

Q. H. Hale and A. T. Twesme, both of La Crosse, Wis., for plaintiff in error.

Arthur Mulberger, of Watertown, Wis., for defendant in error.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted of violating the National Prohibition Act (41 Stat. 305), and assigns errors in the trial of the cause which deal with the admission of evidence and the instructions of the court. We are unable to consider their merit, because no bill of exceptions was presented or settled in the court below, and there is nothing to support the assignments of error.

It follows, therefore, that the judgment must be, and it is hereby, affirmed.

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**In re FEDERAL SYSTEM OF BAKERIES OF MARYLAND, Inc.**

**In re FEDERAL SYSTEM OF BAKERIES OF AMERICA.**

(District Court, D. Maryland. February 21, 1922.)

No. 3589.

**Bankruptcy** ¶188(2)—Validity of contract reserving title to property.

A so-called license contract, under which petitioner delivered to bankrupt certain patented ovens and other unpatented bakery tools and equipment, for a consideration equal to their full value, with the right to use petitioner's trade-mark on its products and certain secret formulas, on payment of a royalty on its sales, which contract reserved title in petitioner to all the property, with the right to retake the same on breach of conditions, held valid in such reservation as to the patented ovens, and the right to use the trade-mark, but invalid to give a lien on any of the unpatented articles, as against bankrupt's creditors, not being recorded as required by the laws of the state.

In Bankruptcy. In the matter of the Federal System of Bakeries of Maryland, Inc. On petition of the Federal System of Bakeries of America to reclaim property. Granted in part.

Niles, Wolff, Barton & Morrow, of Baltimore, Md., for petitioner.  
Clarence A. Tucker and Paul R. Kach, both of Baltimore, Md., for receivers.

Lee I. Hecht, of Baltimore, Md., for bankrupt.

ROSE, District Judge. The Federal System of Bakeries of Maryland is a Maryland corporation. It is now in bankruptcy, and will be referred to as the "bankrupt." It operated a number of bakeries in this city. The petitioner, the Federal System of Bakeries of America, is a Delaware corporation, which now has its actual headquarters at Davenport, Iowa. It will be called the "petitioner." Almost all of the equipment of the five or more establishments carried on by the bankrupt originally came from or through the petitioner, which is now seeking to repossess itself thereof.

Something over five years ago, one Feder, still connected with the petitioner, in Oakland, Cal., came across a rotary oven. He saw great advertising possibilities in the operation of such appliances in the show windows of shops upon much-traveled highways. He obtained an assignment of the patent for the oven, which had attracted his notice, and, having convinced some others that his idea was likely to prove profitable, they and he put it into practice. After various reorganizations and transfers of headquarters, the petitioner took over the scheme, which, by that time, if not earlier, had developed into what it calls the "System," under which it says some 450 bakeshops are now operated. Every one of them is called a "Federal" bakery. The word is stamped on every loaf of bread baked in them, and constitutes petitioner's nationally registered trade-mark.

Originally the patent purchased by Feder was that under which the licenses to these various establishments purported to be issued, but before the bankrupt came into existence the petitioner, in its agreements with so-called licensees, had ceased to refer to that particular patent, and the invention supposed to be covered by it, and had substituted in its place two subsequently applied for by Feder himself. At the hearing, little was said about them. They do not appear to be basic, and no explanation has been vouchsafed as to their real value in the industry. The petitioner, of course, uses the trade-mark, and has accumulated a number of formulas and recipes. Whether there is anything out of the ordinary in any of them does not appear. It has sometimes sought to be the exclusive seller to its licensees of flour, raisins, and perhaps other staple raw materials, or to act as their purchasing agent for such articles. There might obviously be some advantages, both to it and its licensees, under some conditions, in such wholesale marketing, but in practice it would appear that it had not been possible always to realize them.

In the agreements with the bankrupt, which it is stated are of the same general character as those into which it has entered with many other individuals, copartners, and corporations, much is said of a "Federal System," and of the grant by the petitioner of the right to its benefits. What they are, other than the freedom to use the patents, trade-mark, and formulas, is not altogether easy to make out. The persons

active in petitioner's management are perhaps all the better able to speak impressively of the "system," in that, like other devout worshippers, they adore rather than analyze.

In the fall of 1918, two brothers named Strasburger, who had been in the liquor business until unfriendly legislation made it unlawful, thought there was money to be made by becoming the "Federal" bakers of Baltimore. They entered into negotiations with the petitioner and with one Braucker, also of Davenport, who had some months before acquired a "Federal" license for these parts. As the result, the bankrupt was incorporated; a majority of the stock being taken by the Strasburgers and others associated with them, and about 175 shares, of the par value of \$100 per share, being subscribed for by persons connected with the petitioner. The bankrupt paid Braucker a number of thousands of dollars for his rights, and on October 24, 1919, accepted a so-called license agreement from the petitioner.

This instrument set forth that the petitioner was the owner "of the rights in and to a certain 'System'" which "includes the making and selling of bread and rolls and other such food products as may from time to time be authorized by the licensor in writing, \* \* \* the formulas under which the same are made, the ovens used in connection therewith (said ovens comprising the invention described in application for letters patent of the United States, being serial number 244,087, allowed March 28, 1919, and serial number No. 272.-445, allowed March 21, 1919, respectively, and sundry improvements thereto), the items and articles constituting the equipment for said system and method of display." Then the petitioner granted the bankrupt, as licensee, the exclusive rights to the use of the System for Baltimore, including the exclusive rights, as licensee, to the use of the ovens incorporating the inventions, and any improvements thereon and additions thereto which might be made for and on behalf of the petitioner, or to which it should become entitled.

The bankrupt was further given the option to set up stores under the System in other Maryland towns, provided it exercised it within 48 hours after it was notified that someone else was ready to do so. The petitioner was to furnish bankrupt the formulas to be used in making all Federal products. The bankrupt was to use them, and no others, and was to keep them secret. The license was to continue during the life of either of the patents which might be issued under the applications mentioned, or any extensions thereof, as well as that of any patent or patents issued to or for the benefit of the petitioner, or to which it should become entitled, and granted for improvement or additions to the inventions described in such applications, or either of them.

The bankrupt was to open not less than 10 stores in Baltimore within 2 years from January 1, 1920, at the rate of one unit every 90 days, and was to continue to operate them during the life of the license and agreement. These stores were always to be on the first or ground floor of a building, with a window facing the street, and at least one oven was to be installed in such window, so as to be visible to passers-by. The bankrupt was to buy all flour and raisins from the petitioner,

who was to sell the same at a price at least as low as the market price in Baltimore. The bankrupt's stores were to be used exclusively for the making and selling of bread and rolls, and such other articles as from time to time the petitioner might in writing authorize. No other articles or equipment, other than that furnished by petitioner, were to be ever kept in any of such stores, without petitioner's written permission.

The bankrupt was, during the existence of the agreement, to pay the petitioner a royalty of 3 per cent. on the gross receipts from all goods manufactured and sold by it. The right of inspection of stores, books, and accounts was reserved by petitioner. The equipment of these stores was to be obtained by bankrupt from petitioner, and, for each single-oven unit sold the bankrupt, the bankrupt was to pay the petitioner \$3,775, and for each two-oven unit \$5,000. These units, in addition to the patented ovens, comprised an assortment of baker's tools and equipment, none of which were patented, and in none of which petitioner had any peculiar rights. The testimony shows that, at the price charged, it would have been amply worth any one's while to sell the equipment. The bankrupt was to pay for the replacement parts, and was to secure them from the petitioner. It was to keep the equipment insured, apparently in its own name, and to pay all taxes thereon. Nevertheless it was expressly declared that all the ovens and other equipment should remain, the sole and absolute property of the petitioner, subject only to bankrupt's right of use. Upon the failure of the bankrupt to make the payments required, or to perform any other part of the agreement, its right to use the oven and other equipment was absolutely to cease, and petitioner became entitled to the immediate return of all ovens and other equipment forming part of the System as its sole and absolute property, "without the payment of any sum whatever" to the bankrupt.

The bankrupt's business life, was troubled, and its relations with the petitioner were not always agreeable to either. Various disputes arose. The bankrupt charged that the petitioner had not fulfilled its contract as to the price at which flour and raisins would be sold, and set up other alleged breaches. The petitioner asserted, with truth, that the bankrupt was in arrear in the payment of royalties. There was much friction. Finally, in December, 1920, Mr. Hecht, a director and counsel of the bankrupt, and another of its officers, went to Davenport and spent some days in consultation with petitioner's officers. The result was a new agreement, in which a number of concessions were made to the bankrupt. Most of them have no direct bearing upon the questions here in issue, and throw no light upon them. In addition to a waiver of the arrears of royalty and certain other pecuniary advantages given bankrupt, it received the sole right to establish Federal bakeries in Maryland, and was released from any binding obligation to set up any more than it had already in operation. The new or substituted agreement was made out upon a printed form, in most important respects similar to, if not identical with, that used at the time the first agreement was entered into. Upon this blank was written with a typewriter:

"The consideration of this license is full payment, herewith acknowledged, for seven installations now operated by the licensee in the state of Maryland."

Mr. Hecht, who on behalf of the bankrupt negotiated the new arrangement, said that he understood the petitioner thereby intended to surrender all claim to ownership of the ovens and other equipment. The petitioner did not produce as witnesses those who had acted for it in these negotiations, but it strenuously denies that it ever for a moment contemplated surrendering what it insists was, from its standpoint, the vital portion of its whole license system. It says that all the clause in controversy really means is that the bankrupt had paid for the license all other than the royalty it was bound to pay, and was relieved from any obligation to make further installations in Maryland. The words employed were chosen by petitioner. They are not very apt for the expression of the meaning it now says they have, but, on the other hand, its construction of them harmonizes with the printed portions of the license agreement, as that contended for by the bankrupt will not. The trustee for the bankrupt relies upon the rule that ambiguous language is to be construed against its author, and that, when what is written in the blank is inconsistent with an uneliminated printed provision, the former must control.

The subsequent conduct of the parties throws little additional light upon the merits of their respective contentions as to what this added language was intended to mean, except that it does tend to establish the good faith with which each now maintains its own view. The bankrupt was so certain of its position that it undertook to put a chattel mortgage on the property now in controversy. Two of the petitioner's officials were directors of the bankrupt. Neither of them were present at the meeting at which the mortgage in question was authorized, but, as usual, a copy of the minutes thereof was sent to them, apparently without any suspicion that they would make any objection to what had been done. On the other hand, so soon as they received the copy, they made immediate and emphatic protest. Neither side receded from its position, and a couple of months later, to be exact, September 8, 1921, when both were represented at a directors' meeting, it was found equally impossible to reach a common point of view as to whether the mortgagees, who were the Strasburgers, or the petitioner, had the first claim upon the equipment.

Together they represented practically all the stockholders, and the immediate necessities of the situation forced them to agree as to what should be done to meet the bankrupt's other pressing demands. They accordingly entered into an agreement between themselves, which they also united in making a part of the minutes of the bankrupt's directors. In substance it provided that all debts created since August 1, 1921, should be paid; a note due a bank should be reduced \$500 a month; all debts other than those owing the Strasburgers and the petitioner, created before August 1, should be paid pro rata before anything was given to either of them, and that the \$6,000 note, dated July 1, 1921, in favor of one of the Strasburgers, to secure which the mortgage was given, and all royalties and other claims due and owing the petitioner prior to August 1, 1921, were to be paid pro rata, irrespective of due

dates. There was then added an express understanding that the parties to the agreement did not waive any right to any preference on account of any contract, agreement, or otherwise, but merely waived the time of payment, for the benefit of the bankrupt. The petitioner further undertook to furnish for one year a manager for the bankrupt. It appears that this was done, and at the time of the bankruptcy, and for some while before, such person managed its business.

From this recital of the facts, some conclusions are clear enough. The petitioner had, or at least may have had, the exclusive rights to two things: (1) Its patented ovens; (2) the word "Federal" as a trade-mark for baker's products. The first it might unquestionably license on such terms as to initial payment and subsequent royalties and retention of property rights as it might find any one willing to accept. It may, for the purposes of this case, be assumed, without deciding, that petitioner might license other people to use its trade-mark, although by such assumption no expression of opinion on the legal issue involved is intended. It is sufficient that, for the immediate purpose in hand, it is immaterial what limitations, if any, there may be upon the right of an owner of a trade-mark to grant licenses to use it to an indefinite number of other people. Such secret formulas as it had for making bread and rolls, and similar products, it might permit others to use, also upon such terms as might be mutually agreed upon. Apart from these three things, there was nothing in which it had any monopolistic right, and, except to the extent that its so-called system was embodied in them, it had no property right in it. All the world was entitled to use all there was of merit in it, so far as that might be done without infringement upon the petitioner's patents or registered trade-mark, or without breaking a contract under which petitioner had communicated its secret formulas. Unpatented mixers, racks, troughs, counters, ice boxes, ash cans, and the like remained mixers, racks, troughs, counters, ice boxes, and ash cans, no matter how often petitioner called them a part of its System.

The petitioner's counsel do not, as I understand, question any of these propositions; but they say any one may lend a chattel without consideration, or hire it upon any consideration, or for any length of time, and may reclaim it whenever the contract authorizes him to do so. Such agreement, it is true, may sometimes operate as a trap for creditors, and the Legislature may, if it shall see fit, require that it shall be recorded, upon a penalty of allowing any creditor of the bailee to ignore it; but Maryland has never seen fit to pass any such statute. To this the trustee in bankruptcy answers that he is not concerned with the limitations to which these, as most other legal propositions must be subject, such as, for example, may be inspired by a policy of law similar to that which for many centuries has prohibited the creation of unusual tenures in land, or has forbidden perpetuities, and so on. In his view the doctrine upon which the petitioner seeks to rely, whether it be sound or not, has no real application to the facts in the instant case. As he sees it, the petitioner actually sold the unpatented chattels, and received full price for them. It turned them over to the bankrupt, and required the latter to accept all the responsibilities of owner-

ship, such as keeping them insured in its own name, paying taxes on them, keeping them in repair, and replacing them when worn out. The bankrupt, so long as it kept its agreement, was in every sense their owner. It might and was expected in ordinary course to use up the particular chattels transferred to it. In short, there was only one limitation upon its full ownership. If it became indebted to the petitioner for royalties, or upon other account, or in any other respect broke its contract, the petitioner might repossess itself of the property.

Now, call this contract what you will; it is in reality nothing more than an attempt to fix a lien upon the property of the bankrupt, as security for the performance of the bankrupt's undertakings. That may be done, but only by a paper executed and recorded in the manner the statutes of Maryland prescribe. The testimony of petitioner's own general counsel that the reservation of the title was but nominal, and that the rights under it were never to be enforced, except under circumstances in which there was danger that the equipment might pass into competitor's hands, is illuminating.

It is quite natural that the two parties to the modified agreement of December, 1920, might have very different views as to what was intended. On the whole, I am satisfied that, as to the unpatented articles, the rights conferred upon the bankrupt by the petitioner were inconsistent with the retention of any substantial property right in the petitioner—at least as against creditors of the bankrupt, and so far as concerns these articles, it is immaterial what is the construction which should be put upon the amended agreement, as it is also unnecessary to determine what effect, if any, the agreement of September 8, 1921, might have by way of estopping the petitioner from setting up its claim as against those of the creditors, whom it there agreed should be first paid.

I am, however, strongly persuaded that the petitioner never intended to permit its patented ovens, during the life of the patent, which still has many years to run, to pass out of its control. No public policy was contravened by its retaining the ownership of these patented devices, and I am therefore disposed, as to them, to resolve all otherwise doubtful questions in favor of the right of the petitioner to repossess itself of these ovens.

Its petition, therefore, will be sustained, so far as concerns the ovens, and the word "Federal" must be removed from the pans before they are disposed of by the trustee. In other respects, the petition will be dismissed.

**PALMER et al. v. E. Z. WAIST CO. et al.**

(District Court, N. D. New York. February 1, 1922.)

1. **Patents** ¶328—878,995, for fabric turning machine, held valid and infringed.

The Palmer patent, No. 878,995, for a machine for feeding a hollow web of fabric onto a tube, held valid and infringed.

2. **Patents** ¶237—Infringement not avoided by substituting equivalent.

Where a "yielding means" constitutes an element of a patent claim, the substituting of a different yielding means for the coil spring in the patent device does not avoid infringement.

3. **Patents** ¶235—Giving part an additional function does not avoid infringement.

That a part in a patented machine is given an additional function in another machine does not avoid infringement.

In Equity. Suit by William B. Palmer and Jesse V. Palmer against the E. Z. Waist Company and the Grand Rapids Textile Machine Company. Decree for complainants.

Herbert Van Kirk, of Greenwich, N. Y. (James L. Norris and Clarence A. Bateman, both of Washington, D. C., of counsel), for plaintiffs.

Chappell & Earl, of Kalamazoo, Mich. (Fred L. Chappell, of Kalamazoo, Mich., John C. Watson, of Albany, N. Y., and Arthur E. Parsons, of Syracuse, N. Y., of counsel), for defendants.

COOPER, District Judge. This suit is for infringement of the Palmer patent, No. 878,995, issued February 11, 1908. This suit was brought originally against the E. Z. Waist Company, a corporation doing business in this state, and subsequently the defendant Grand Rapids Textile Machine Company, the maker of the machine claimed to infringe the Palmer patent, was permitted to intervene, and the answer of the original defendant was permitted to stand as the answer of the Grand Rapids Company.

[1] The purpose of the machine described in the Palmer patent is to feed or run a hollow web of fabric onto a tube or pipe with speed and without injury. The feeding of the fabric onto the tube or pipe is affected by a pair of feed rolls, which run on upright shafts and are simultaneously revolved in an appropriate direction. These feed rolls are made to engage the outer surface of the tube or pipe and to move the fabric thereon by means of a yielding pressure. This pressure in the patent is obtained largely from the spring connecting the shafts. The only claim in suit is Claim 1, which is as follows:

"In an apparatus of the class described, the combination, with the fabric-supporting tube, of a pair of feed rolls adapted to engage the opposite sides of said tube, and yielding means for forcing said feed rolls against said tube."

Only two questions are involved in this suit: First, the validity of the Palmer patent; second, infringement. Counsel for the defendants has ably and persuasively presented and argued the claim that the

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Palmer patent is not valid, but has been anticipated by the prior art, relying more particularly upon the Gove patent, No. 769,641.

Inasmuch, however, as the Circuit Court of Appeals has twice held this patent to be valid in two cases, in the earlier of which the Gove patent is particularly referred to, and later the District Court of the Northern District, in a case from which no appeal was taken, has upheld its validity (*Palmer v. Jordan*, 192 Fed. 42, 112 C. C. A. 454 [November 13, 1911]; *Palmer v. Superior Mfg. Co.* [C. C. A.] 210 Fed. 452 [December 9, 1913]; *Palmer v. John K. Stewart & Sons, Inc.* [D. C.] 269 Fed. 148 [February 13, 1920]), this court feels bound by those decisions, inasmuch as, apparently, no new evidence of prior art or anticipation is offered which clearly distinguishes this case from those previously decided.

The main question, therefore, is that of infringement. In considering this question of infringement, we are concerned only with the particular machine manufactured by the defendant Grand Rapids Textile Machine Company for the defendant E. Z. Waist Company, and used by the latter company. The plaintiffs have not contested in this action, and, indeed, they have expressly declined to litigate, the question of the infringement of the later machines now made by the defendant Grand Rapids Textile Machine Company. This decision, therefore, in no way affects the machines now being manufactured by the Grand Rapids Company.

The E. Z. Waist Company machine, which plaintiff claims is an infringement, contains the fabric-supporting tube or pipe, and a yielding means for bringing the feed rolls into engagement with the opposite sides of the tube or pipe and feeding the fabric onto the tube. The feed rolls do not come into direct contact with the exterior of the tube or pipe, but do come into direct contact with the anti-friction idler rolls which are inside of the pipe and project through the same. These anti-friction idler rolls correspond to the idler rolls in the tube of the Stewart machine, which idler rolls the court considered as equivalent to the surface of the pipe. *Palmer v. John K. Stewart & Son, Inc.* (D. C.) 269 Fed. 149. They are also equivalent to the idler rolls in the tube of the Superior machine, which the Circuit Court of Appeals characterized as a mere mechanical change, involving no departure from the spirit of the Palmer invention. *Palmer v. Superior Mfg. Co.* (C. C. A.) 210 Fed. 452.

[2] The yielding means for bringing the feed rolls into engagement with the tube, or, in the E. Z. Waist Company machine, with the idler rolls, which are equivalent to the tube, resides in the upright feed roll shafts and the manner of their attachment, and the ratchet lever and links connecting the frame and shafts. To evade infringement because of the "yielding means," counsel for defendants contends that the E. Z. Waist Company machine was used principally for wet cloth, while all the tests in court were made with dry cloth. It is claimed that:

"With the cloth wet the pressure must be very high between the outside rolls and the inner rolls, and so strong that there would be practically no yield to it."

To support this contention the defendants cite *Union Steam Pump Co. v. Manton-Gaulin* (D. C.) 272 Fed. 773, which held that, where there was *no yield* in the conical surface of defendants' device, there was no infringement, and at the same time attempt to distinguish that case from *Manton-Goulin v. Dairy Mach. Co.*, 247 Fed. 317, 159 C. C. A. 411, a case in the Second Circuit Court of Appeals, which held the defendants' structure an infringement where there was a *yield*. However, tests were made upon the trial of the case at bar which showed that fabric of various thicknesses, and even hard materials, like rubber or leather of various thicknesses, would easily pass between the feed rolls and the idler rolls without undue pressure. These tests showed clearly that the feed rolls, in contact with the idler rolls as actually used, will yield, and the machine does contain the "yielding means." The machine is enabled to operate by reason of yielding means whenever pressure such as would naturally be brought to bear upon the feed roll shafts in the ordinary and usual operation of the machine is applied. The fact that the yielding means is not obtained by the use of a coiled spring in the same way as in the Palmer patent does not enable the defendants to escape infringement. *Union Paper Mfg. Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

[3] The adaptability of the idler rollers of the E. Z. Waist Company machine to perform additional work beside that described in the Palmer patent does not enable the defendant to evade infringement. *Electric Smelting Co. v. Pittsburgh Reduction Co.*, 125 Fed. 933, 60 C. C. A. 636; *International Co. v. Recording Co.*, 159 Fed. 464, 469, 86 C. C. A. 494. The conclusion follows, therefore, that the defendant E. Z. Waist Company's machine infringes the plaintiff's patent.

But the defendant raises an additional defense in this case, the essence of which is that the plaintiff is estopped from asserting that the E. Z. Waist Company machine is an infringement by reason of a letter which one of the plaintiffs wrote concerning a similar machine on May 22, 1912. This letter is as follows:

"Greenwich, N. Y., May 22, 1912.

"Grand Rapids Textile Machinery Co., Grand Rapids, Mich.—Gentlemen: Yesterday the writer examined your new turning machine in the mill of the Utica Knitting Company, at Utica, N. Y. The slip joint, with rolls in the end of same for the cloth to pull over when being turned, is old in the art. The new feature of your device is the loading of the cloth onto the pipe in an inverted condition, and the inner surfaces of the rolls in the pipe acting upon the fabric to assist in pulling of the cloth through the pipe. We believe that we can furnish you our machines complete, with feed rolls, and a slip with iron idler rolls in same that coact only with the feed rolls, that will give you perfect satisfaction. The writer would like to have a talk with Mr. Shields on several points regarding the matter, and would like to have him call to see us in the near future, when he is in our vicinity. The folding machine has not as yet been received by the Jesse V. Palmer Company, and they would like you to start tracer at once. We are,

"Yours truly,

Palmer Bros., per J. V. Palmer."

Defendants assert that in this letter plaintiffs concede that the Utica machine, made by the Grand Rapids Company, and which is like the plaintiff's own machine, was old in the art. It is stretching the imagination almost to the breaking point to assume, as defendants in sub-

stance contend, that, shortly after the Circuit Court of Appeals had in 1911 declared the Palmer patent valid and infringed by the Jordan machine, the patentee would write to a competing firm and assure them in substance that the court erred in its judgment in upholding his patent; that in fact his machine was something which was old in the art, and therefore not patentable. It is clear that the part of the Utica machine referred to in the letter as old in the art was the "rolls" in the "end" of the "slip joint," and not the feed rolls, or any other essential feature of Palmer's patent.

Defendant further contends that the effect of Palmer's letter of May 22, 1912, was to admit that the Utica machine made by the Grand Rapids Company was old in the art, and not an infringement of his patent, and that, since the E. Z. Waist Company machine is just like the Utica machine, the plaintiff is estopped from now claiming that the E. Z. Waist Company machine is an infringement. Unfortunately the letter does not fairly bear this construction, as has been shown. The premise failing, the conclusion must fail.

The plaintiffs may have a decree.

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HENRY M. DAY & CO., Inc., v. SCHIFF, LANG & CO.

(District Court, S. D. New York. October 10, 1921.)

1. Removal of causes ¶114—Cause comes to federal court in same condition as when petition for removal was filed.

Where at the time a cause was removed a referee of the state court had filed a report on a motion to quash the service, such report is before the federal court for consideration on the motion.

2. Courts ¶14—Federal courts not bound by state decisions on question of validity of service of summons.

The validity of the service of summons in a suit in a federal court, whether commenced in or removed to that court, is to be determined in accordance with the decisions of the United States courts, and not those of the state in which the service is made.

3. Corporations ¶668(7)—Corporation held not "doing business" in another state because officer went to state to adjust controversy relating to its business, so as subject it to suit by service on him.

The fact that an officer of a California brokerage corporation, through which orders had been placed with a California fruit-packing company for goods to be delivered f. o. b. in that state for shipment to customers in New York, came to New York for the purpose of adjusting a controversy between the shipper and one of such customers, held not to constitute doing business by defendant in New York, which subjected it to suit in that state by a third party by obtaining service on such officer while there.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

At Law. Action by Henry M. Day & Co., Inc., against Schiff, Lang & Co., a corporation. On motion by defendant to set aside and vacate summons. Granted.

Greenbaum, Wolff & Ernst, of New York City (Terence J. McManus, of New York City, of counsel), for plaintiff.

H. & J. J. Lesser, of New York City (Abraham Tulin, of New York City, of counsel), for defendant.

HOUGH, Circuit Judge. This case was removed after an official referee (sitting like a special master) had filed a report which was intended to present the facts as to the business relations of the parties plaintiff and defendant and the reason for the presence within the state of New York of that officer of defendant upon whom physical service of the summons was made.

[1] Of course the case comes to this court in the same plight and condition that it was in when the petition and bond on removal were filed in the state tribunal. Consequently I have now before me a master's report, together with certain evidence. It is to be treated just as if this court had ordered the reference. That this should be done is the burden of the affidavit filed on this motion by plaintiff's attorney. The making of that affidavit was wholly unnecessary; the matter is one of law.

The facts shown are few and simple. Plaintiff is a corporation of New York, defendant one of California; both are engaged in the business of brokerage—they may have other branches of business, but that is immaterial. Stern & Sons is likewise a California corporation, whose business is the canning of fruit and vegetables.

Shortening corporate names for the sake of brevity, Schiff appears to have a rather close, if not confidential, relation with Stern, so that through Schiff Stern endeavored to market much, if not all, of his canned product. In the search after customers, Schiff proposed in substance to Day that in respect of whatever business Day might pick up for Stern he (Day) could order through Schiff, and then Schiff and Day would split the commission. But every possible customer, whether discovered by Schiff or Day, was subject to the approbation of Stern, the actual sale was by Stern to the customer, and the goods were shipped f. o. b. a point in California. Whether the commission on a sale to a customer accepted by Stern depended in any degree upon the question whether the customer paid up or not does not appear.

Considerable amounts of goods were thus sold in and near New York—at all events to persons in New York. One, at least, rejected a considerable consignment of canned fruit on the ground of quality; an officer of the Schiff corporation came to New York, undoubtedly to straighten the thing out if he could. He says he came as "special representative of Stern"; whether this legal inference is true or not is in my judgment immaterial. While in New York City this officer also visited firms or places of business other than that of the recalcitrant customer and of Day; he doubtless would have been glad to pick up any other business that he could, but it is plain that the rejection of the above referred to canned fruit was a sufficient reason and *the* reason for his visit to the city.

The ordinary indicia of "doing business" in any given locality are all lacking in respect of defendant's activities in New York. It has no

office here, no agent, no salesman. Of course, it had never taken out any license to do business in this state. Its relations with plaintiff amounted to this: That if plaintiff could find customers who would buy of Stern and take delivery in California, plaintiff and defendant would split a commission. When defendant's officer came to New York City for the purpose above set forth plaintiff served a summons in the state Supreme Court upon him. The exact nature of the plaintiff's alleged cause of action does not appear, for no complaint has ever been served; but it is admitted all round that it grows out of differences of opinion as to the amount or extent of the fractional commission to which plaintiff conceived itself entitled.

[2] When a motion was made in the state court to set aside this service the judge then presiding in the motion part sent the matter to the official referee to ascertain whether the facts brought the matter within *Tauza v. Susquehanna, etc., Co.*, 220 N. Y. 259, 115 N. E. 915, and the learned referee has briefly said that he thinks that case applies. The *Tauza* Case is not the last word from the Court of Appeals of New York. The process of receding from the doctrine of *Pope v. Terre Haute Car Co.* is still going on; but it is not necessary, nor is it permitted, for me to speculate on the question as to whether this service was good under the latest state decisions. The last word from the Supreme Court of the United States is *Chipman v. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172, 64 L. Ed. 314. That was a removed case from this district and (251 U. S. at page 379, 40 Sup. Ct. 173, 64 L. Ed. 314) the Supreme Court said:

"We do not wish to be understood that the validity of [the] service would not be of federal cognizance whatever the decision of a state court."

In other words, the rules for good or bad service of the summons in even a removed case is something to be passed on in accordance with the decisions of the United States courts and not those of the state wherein the service is made.

[3] What is meant by doing business in a given state or other locality is something approached from so many angles that the subject appears a mass of confusion. "Doing business" for purposes of taxation; doing it within a statute requiring licenses, and doing enough business to justify the service of process are quite different things. The use of the same phrase makes confusion.

On the subject of service of process it has been consistently held in this circuit that occasional, sporadic, or single pecuniary transactions by foreign corporations in a given locality do not constitute doing business within the rule as to service of process, for that rule declares that "the essential thing is that the corporation shall have come into the state." *Chipman v. Jeffrey*, supra, 251 U. S. page 379, 40 Sup. Ct. 173, 64 L. Ed. 314. What constitutes coming into the state is a question of fact, and how absurd is the proposition that when business relations are normally carried on by mail a visit of adjustment "brings the corporation within the state" is fully shown by Judge Lacombe's recital of facts in his master's report (*Bank of America v. Whitney, etc., Bank*) found in the *Law Journal* of August 25, 1921. The course of decisions in this circuit may be instanced by the following cases: *New*

Haven, etc., Co. v. Downingtown Co. (C. C.) 130 Fed. 605; Cody, etc., Co. v. Warren, etc., Co. (D. C.) 196 Fed. 254; Wilkins v. Queen, etc., Co. (C. C.) 154 Fed. 173; Buffalo, etc., Co. v. Manufacturers, etc., Co. (C. C.) 142 Fed. 273; Hunau v. Northern, etc., Corp'n (D. C.) 262 Fed. 181. The decision in Chipman v. Jeffrey affirmed this court in proceeding along the lines of the cases just cited. Judge Rose's opinion in Noel, etc., Co. v. Smith & Co. (C. C.) 193 Fed. 492, etc., is a thoughtful summary of the decisions down to date.

As Judge Lacombe in his master's report points out, the Supreme Court has purposely (it would seem) refused to attempt hard and fast definition of just what "doing business" is. Every case stands on its own facts. But one point may be asserted positively, viz. that even the president of a corporation which does not do business in a given locality does not carry his corporation around "under his hat"—which was the doctrine of Pope v. Terre Haute Car Co.

One must be able to say that a foreign corporation is doing business in New York when every officer, agent, or servant of that corporation is outside the state, before it can be said to be doing business in the same state when the president comes to town to settle some point with a correspondent. Any other view would (as has been well said) subject almost every incorporated concern doing a large business to suit all over the country unless all that corporation's officials religiously stayed at home.

It follows that the question may be put this way: Was Schiff's company doing business in New York before any representative of it came into the state? It was not, unless one thinks that every New Yorker who orders goods from California is thereby doing business in California. In a certain sense he is doing business by the act mentioned, but not in the legal sense, nor for purposes of service upon corporations within the cases cited.

The question is always one of fact; things small in themselves may incline the scale one way or the other. This point is well illustrated by Judge Knappen's discussion of the matter in Empire, etc., Co. v. Lyons, 257 Fed. 890, 892, 169 C. C. A. 40.

The motion as made is granted, and final judgment of dismissal is ordered for the defendant.

### THE HALLFRIED.

(District Court, E. D. New York. July 22, 1921.)

**1. Salvage ⚡38—Distribution of award for services to burning vessel.**

A salvage award for services rendered to a steamship, which took fire while lying in a slip, distributed between the different vessels participating.

**2. Salvage ⚡10, 31—Towing ship from slip near burning vessel held salvage service.**

Services rendered to the steamship Halvorsen, worth with cargo about \$2,160,000, in towing her from a slip when another vessel across the pier was burning, and she was in danger and requested help, held salvage services, and an award of \$30,000, made therefor, to be divided between

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

different vessels contributing in proportion to the value of their respective services.

3. **Salvage** ~~§~~23—Carrier held not liable for salvage award against cargo.

A railroad company, under a bill of lading providing that it should be liable only as warehouseman for loss or damage by fire to the goods after 48 hours from the time it gave notice of their arrival at destination, where by direction of the consignee and as provided in the bill it transported the goods by lighter to a steamship and gave notice of their arrival, held not liable for a salvage award made against the cargo for services rendered in saving the lighter and cargo from danger from fire ten days after such notice.

In Admiralty. Suit by the John E. Moore Company and others against the Steamship Hallfried, with other suits for salvage service. Decree awarding and distributing salvage.

Herbert Green, of New York City (Leo J. Curren, of New York City, of counsel), for libellant.

Haight, Sanford, Smith & Griffin, of New York City, for claimant.

GARVIN, District Judge. [1] A number of actions have been tried together, some for services rendered to the steamship Hallfried and others in connection with the steamship Halvorsen and three smaller vessels. The rendition of salvage services to the Hallfried is admitted, and by the agreement of the parties their value has been fixed; the only matter before the court, therefore, so far as that vessel is concerned, being the question of distribution. In each action against the Halvorsen and the smaller vessels there is a denial that services of a salvage character were rendered.

On April 19, 1920, the Norwegian steamship Hallfried was moored on the north side of Pier 5, Bush Docks, Brooklyn, at about the middle berth of the pier, lying bow in. There was a strong northwest wind blowing toward the shore. Shortly after noon, at about 12:50 p. m., a serious fire broke out in her forward hold. Her cargo was inflammable and of an explosive character. The officials of the fire department, who arrived shortly, considered the fire dangerous and soon sent in four alarms, which is unusual. Conditions became so serious that the fire chief in charge ordered all off the Hallfried. Almost immediately thereafter a series of heavy explosions occurred. The chief then ordered the Hallfried taken out into the river. At this juncture the steam tug Erickson came into the slip, and those in charge, at what seems to have been considerable danger, made fast to the Hallfried and started to pull her out of the slip. The fire was raging fiercely and burning debris was being thrown in all directions by the explosions. After a short time the tug Leonard Richards came to the assistance of the Erickson, and these two tugs started out of the slip with the Hallfried in tow. Capt. Fort, the captain of the Erickson, went aboard the burning vessel and took charge. His position was one of great peril. As the steamer was towed out of the slip, one of the explosions loosened the anchor catch, so that the anchor went overboard when she was about opposite the end of the piers. Without these two tugs the Hallfried would probably have been lost. They undertook her

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

rescue at great risk to themselves, and should have a substantial share of the award. It may not be too much to direct that these tugs receive one-half the award, as requested by their owners; but I am of the opinion that, as valuable services were rendered by other boats, to which I shall presently refer, it will be a sufficient proportion of the entire award to allow 40 per cent. thereof to the Erickson and to the Richards. Of this amount, after deducting a special award of \$1,000 to Capt. Fort, the Erickson will receive three-fifths and the Richards two-fifths—this because the Erickson was the first to respond, and was working some time, alone, before the Richards arrived.

When the anchor of the Hallfried went overboard, a new danger developed. The tide was apt to swing her around against one of the piers. If this occurred and the pier took fire, there was great danger that the boat would be a total loss. A number of other craft assisted in holding her up against the tide. They all performed services of merit, and in some cases it is difficult to differentiate the value of what they did. These vessels are the tug Campbell and Stewart, the Thomas Flannery, the Reichert Brothers, the James McDonough, the William Flannery, the Harold Richert, the Carroll, the Richmond, the steam lighter W. J. Gillen, the W. F. Dalzell, the Edward G. Dalzell, the J. Fred Lohman, the Phil. J. Miller, the Charles A. Fox, the Edwin M. Millard, the Champion, the Commissioner, the Relief, and the Gustav Ackerman. Of these vessels, the Edwin M. Millard arrived very shortly after the Hallfried had been pulled out opposite the end of the pier, and for some time helped the Erickson and the Richards prevent the ship's stern from sagging down, and up against the end of the pier. This was a very valuable service, was accompanied by danger, and should receive recognition. The photographs in evidence make it clear that the Millard was for some time the only boat performing this particular work. Except for the Champion, the Commissioner, and the Relief, each of the vessels mentioned (whose participation has not been specifically described) assisted in the work of holding up the Hallfried against the tide, or threw water on her as she lay at the entrance to the slip. Their services were not all of equal value, nor were they of exactly the same character, but all were standing by, and each participated in the work of putting out the fire and keeping the boat from the piers. The work of no one of these vessels stands out with any prominence, and they should each receive the same share of the award.

After the Hallfried had been lying for what seems to have been about half an hour, held by her anchor as indicated, two boats owned by the Merritt & Chapman Derrick & Wrecking Company arrived on the scene—the tug Relief and the wrecking steamer Champion. The latter is a powerful, well-equipped wrecking steamer. Both boats set to work to throw water on the flames, which were still pouring out of the forward part of the vessel. A thick smoke made the work more difficult. These two boats not only rendered valuable service to the Hallfried in getting the fire under control, at considerable risk to themselves, but one of them, the Champion, was the boat to release the anchor of the Hallfried, being apparently the only vessel equipped to do this. As a result it was possible to tow her to a place of safety—

the flats opposite, where she could rest on the bottom. If she had not been towed from the entrance to the pier, she would have sunk there, as one of her seacocks was open and she was settling in the water. The Champion should receive 25 per cent. and the Relief 5 per cent. of the total award. The wrecking steamship Commissioner arrived after the Hallfried had been beached on the flats, and stood by all night to see that she did not drift off into deep water and sink. The Commissioner suffered some damage, not considerable, to her equipment. She was at no time in any danger whatever. She is entitled to receive 2 per cent. of the award. The libel filed by Merritt & Chapman Company claimed for services rendered to the Hallfried by the Caddie and the Consul, but they did nothing. The balance of the award should be divided equally among the other vessels which have been mentioned. The sum awarded to each of the boats participating in these operations will be divided, three-fourths to the vessel and one-fourth to the members of the crew in the proportion of their respective monthly wages.

[2] The steamship Halvorsen, with her cargo, worth about \$2,160,000, was moored on the south side of the same pier, opposite the Hallfried, perhaps somewhat further out. She signaled for help and requested to be towed to a place of safety. The boats which responded and came to her assistance were the tug Nonpariel, the tug Richmond, the steam lighter W. J. Gillen, and the steam tugs Robert Palmer, Barton Bros., and John Nichols, and they all assisted in towing her to a safe anchorage out into the river. Only a short time was required, hardly half an hour. Whether or not the Halvorsen would have been destroyed, if she had not been moved, it is clearly established that her position was considered by all exceedingly dangerous. Deputy Chief Langon testified that, if he had had her in charge, he would possibly have moved her. This, I take it, means that he considered her safety threatened, and inasmuch as at least one of the rescuing boats—i. e., the Nonpariel—was placed in some danger, there has been established the basis of an action for salvage services.

I am of the opinion that the award in this case should be substantially less than in the case of the Westmount, in which \$85,000 was allowed. Nor are the services of equal value to the services rendered to the Hallfried. The Westmount lay just astern of the Hallfried—i. e., toward the river, at the same pier—and the Hallfried could not be moved until the Westmount was first taken out of the slip. If the latter had been left at the pier, the Hallfried would in all probability have been a total loss, the pier would have taken fire, and the conflagration would have spread to and destroyed all the vessels in immediate proximity, including the Westmount. Thus the removal of the latter was imperative to prevent a great disaster. The peril of the Halvorsen was by no means as great as that of the Hallfried. She was not on fire at any time. However, burning debris was falling on and about her, a number of smaller craft, lying near, had inflammable cargoes, and there was danger that the fire would spread directly to the Halvorsen across the wooden pier which separated her from the Hallfried.

The sum of \$30,000 will be awarded as salvage, and an additional

sum to Capt. Deakin, as herein specified. The Nonpariel arrived first on the scene, and towed the Halvorsen for some distance before the other vessels arrived. She should therefore receive 50 per cent. of the \$30,000; the other assisting boats each to receive an equal share of the remainder. When the Nonpariel first came up to the Halvorsen, Capt. Deakin, of the Nonpariel, was requested by the second officer of the Halvorsen to come aboard, take her in charge, and direct the work of towing her out of the slip. He did so, and as he assumed the responsibility of directing the operation and performed the task with great skill, he will be awarded an additional sum, one-half of the amount found due him when the award is divided. The awards to the rescuing vessels will be divided, three-fourths to the vessels and one-fourth to the crew, which will be divided among them proportionately to their respective monthly wages.

To the Halvorsen were moored three barges, the Central Railroad of New Jersey No. 206, the Liberty No. 26, and the Dauntless. The value of these and their cargoes has been stipulated, except the value of the hull of the Dauntless, which is hereby found to be \$500. It has been further stipulated that the amounts to be awarded against these vessels and cargoes shall be in the same ratio as the award made by the court in the case against the Halvorsen. The values upon which the awards will be based are as follows:

<b>Liberty No. 26:</b>	
Hull by stipulation.....	\$ 9,000.00
Cargo by stipulation.....	16,473.36
Total .....	\$25,473.36
<b>Central Railroad of New Jersey No. 206:</b>	
Hull by stipulation .....	\$ 5,000.00
Cargo by stipulation.....	9,725.00
Total .....	\$14,725.00
<b>Dauntless:</b>	
Hull as found by court.....	\$ 500.00
Cargo by stipulation.....	22,455.17
Total .....	\$22,955.17

[3] But a single question remains to be determined. The Central Railroad of New Jersey is before the court as claimant of the lighter C. R. R. No. 206 in the action brought against it for salvage, and as respondent, brought in by petition by the claimant of the Halvorsen and by the owners of the cargo of the lighter 206 to pay an award that may be made against the cargo for salvage. The liability of the Central Railroad arises because of its having issued its bill of lading, which provides:

"For loss, damage, or delay caused by fire occurring after 48 hours (exclusive of legal holidays), after notice of the arrival of the property at destination or at port of export, (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

And in section 3:

"Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the

point of destination; but, if such diversion shall be from rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail."

The consignee directed that the goods be delivered to the steamship Halvorsen at Pier 5 on or before April 12. The lighter arrived on April 9 and reported to the receiving clerk. The salvage services were rendered April 19, ten days after notice of the arrival of the property at destination. The liability of the Railroad Company was therefore that of the warehouseman only; i. e., for negligence. There was no negligence, and the petition must be dismissed in each case. Other reasons are urged for the dismissal of the petition, but in view of the conclusion just reached they need not be considered.

In view of the various interests involved, the decrees to be entered upon this decision may be presented at one time for settlement. All counsel may appear before me on July 29, 1921, at 10:30 a. m.

### HART v. AMERICAN CONCRETE STEEL CO.

(District Court, E. D. New York. July 9, 1921.)

1. **Contracts** ⇨170(1)—Construction by parties may govern where provision is ambiguous.

Where a provision of a contract is susceptible of two meanings, the interpretation given it by the parties may properly be adopted.

2. **Contracts** ⇨305(1)—Delay in work is waived by permitting contractor to proceed and complete contract.

Delay in doing work under a contract is waived, where the contractor is permitted to proceed and complete the work, and cannot be set up as a defense to an action for the contract price.

3. **Account stated** ⇨7—Demand for less amount held not to bar recovery of amount justly due.

A demand for a less amount does not preclude recovery by a contractor of the amount due under the contract for work done.

4. **Contracts** ⇨289—Failure to obtain architect's certificate held not to bar recovery.

Failure of contractor to obtain the architect's certificate of work done, even though required by the contract, does not bar his recovery, provided he was not at fault.

5. **Contracts** ⇨127(2)—Agreement for arbitration not binding.

An agreement in a contract for arbitration of disputes thereunder, which would exclude the parties from recourse to the courts, is not binding.

6. **Contracts** ⇨303(4)—Implied agreement that work will not be delayed by other party.

In every contract for the doing of work there is an implied agreement that the contractor will not be delayed or obstructed by the person for whom the work is to be done.

7. **Damages** ⇨40(2)—Contractor for work held entitled to damages for delay caused by the other party.

A contractor for excavation work held entitled to recover damages sustained through delay in his work caused by the other party.

8. **Interest** ⇨19(2)—Not allowable on unliquidated demand.

Interest may be allowed where the sum due is ascertainable by mere computation, but not on a demand for unliquidated damages.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

At Law. Action by Charles F. Hart against the American Concrete Steel Company. Judgment for plaintiff.

L. W. & A. B. Widdecombe, of New York City, for plaintiff.  
William S. Haskell, of New York City, for defendant.

GARVIN, District Judge. Plaintiff made a contract with defendant, whereby plaintiff agreed, among other things, to excavate, pump, and backfill in connection with a building erected at Clifton, Staten Island, by Louis De Jonge & Co. A jury was waived by the parties, and the case has gone to trial, on a somewhat complicated state of facts, with defendant practically admitting that an undetermined amount is due. The suit is therefore in the nature of an accounting. The complaint sets forth four causes of action, which will be considered in order.

By the first, plaintiff asserts the right to recover \$5,999.95 under a contract which provides that defendant will pay 90 cents per cubic yard for all material excavated to the underside of the first floor and \$1.90 per cubic yard for all material below. Plaintiff claims that altogether 18,896 cubic yards were excavated, of which 6,507 are within the former class and 12,359 are in the latter. Defendant admits 18,627 cubic yards, but contends that 8,699 fall within the first class and 9,928 within the latter. The important question is the agreement of the parties. The contract was made in writing August 10, 1916, and provides that plaintiff shall furnish labor, etc., "in accordance with the plans and specifications prepared for same by Valentine and Kissam, architects, as follows: All work to the underside of the first floor to be done at 90 cents per cubic yard. All other excavation at \$1.90 per cubic yard."

The court must determine what meaning is to be given to the expression "underside of the first floor," and what line of division was thereby intended; the question being whether the material included in the space between the top and lower surfaces of the floor falls within the 90-cent or \$1.90 class. It may be fairly assumed, unless the contrary clearly appears, that the parties intended to provide for a definite line of division. Plaintiff contends that this is a uniform line, to wit, elevation 105.73. Defendant, on the other, hand, advances the claim that the lower surface of the first floor was intended, notwithstanding the fact that the floor varied in thickness, which would make the line of division inconstant. Plaintiff's construction finds support in a statement appearing in the estimate of quantities to be excavated, attached to and made a part of the specifications, which, with the plans, are a part of the contract and must be read in connection therewith. This estimate contains the expression "to underside of first floor level." Both the foundation and power house foundation plans show only one elevation, to wit, the first floor elevation 105.73. Defendant claims the elevation should be 100, but no such elevation appears in the plans.

[1] Some of defendant's witnesses, on cross-examination, admitted that excavations were made with reference to the elevation 105.73, which is a circumstance to be considered in favor of plaintiff's contention. While the work was in progress, defendant's engineer gave

plaintiff's representative a plan showing certain depths to which the excavation was to be carried, all determined with reference to the elevation 105.73. The evidence discloses, therefore, that "underside of the first floor" was used to indicate "underside of the first floor level"; i. e., elevation 105.73. It is quite clear that the provision in the contract that work "to the underside of the first floor" may mean either to the upper or lower surface thereof, and therefore it is helpful and permissible to ascertain the interpretation given by the parties themselves. *Insurance Co. v. Dutcher*, 95 U. S. 269, at page 273, 24 L. Ed. 410; *Beaver E. & C. Co. v. City of New York*, 192 App. Div. 662, at pages 667 and 668, 183 N. Y. Supp. 386. There is also direct testimony in the case that plaintiff himself called defendant's attention to this expression in the contract, and that the parties agreed that the meaning intended was as plaintiff claims. This was denied, but as plaintiff's proof depended largely upon plaintiff's testimony and that of his son (to both of whom I shall later refer), I find for the plaintiff upon that disputed question of fact, and likewise as to the quantity of material excavated.

[2] It now must be determined whether the proof establishes that plaintiff duly performed what was required of him under the contract. This involves a consideration of (1) whether he did the work called for by the contract, as modified; (2) whether the work was done with promptness and diligence; and (3) whether the failure to obtain the architect's certificate bars recovery. From all of the testimony I have been able to reach no other conclusion than that after January 1, 1917, progress was almost continuously impeded and delayed by defendant's failure to lay out the work (which was concededly its duty), and by the presence of rubbish, ice, snow, water, and articles of various sorts in such quantity as prevented plaintiff from carrying forward the excavation and removal of material. If there was delay on plaintiff's part prior to January 1, defendant's conduct in permitting plaintiff to proceed with the contract estops it from interposing the delay as a defense to an action for the agreed price. *Deeves & Son v. Manhattan Life Ins. Co.*, 195 N. Y. 324, 88 N. E. 395.

[3] Letters from plaintiff, written to defendant in May, 1917, which may be interpreted to mean a demand then made for a sum less than he now seeks, do not preclude him from a recovery of his just due. The case of *Williams v. Glenny*, 16 N. Y. 389, is in point in the determination of this question in a controversy such as is involved in the instant case.

[4] The failure to obtain the architect's certificate, even if it is required by the contract, does not bar recovery, provided plaintiff was not at fault. *Gearty v. Mayor, etc., of New York*, 171 N. Y. 61, 63 N. E. 804; *Caldwell & Drake v. Schmulbach (C. C.)* 175 Fed. 429; *Wilson v. Curran*, 190 App. Div. 581, 180 N. Y. Supp. 337. The architects were requested by plaintiff to furnish a certificate. They did not refuse to do so on the ground that plaintiff had failed to do the work as required by the contract, and the evidence does not justify a finding that such failure in fact existed.

The second cause of action is not disputed, except that a small amount should be deducted from the amount claimed by consent.

The third cause of action is based upon a breach of defendant's agreement to give plaintiff access to the work, for which plaintiff demands damages. The fourth cause of action is similar, except that it is based upon what plaintiff contends was defendant's implied agreement to the same effect. By the terms of the contract, should plaintiff be delayed by defendant, his time would be extended, provided he presented a claim in writing therefor within 48 hours after the delay occurred. I think the provision referring to the delay was intended to mean that the party who is delayed, should a day be fixed for performance, may relieve himself from the possibility of having his contract terminated, on the day of performance. The contract itself fixes no date for completion of the work.

[5] All this is upon the merits. But plaintiff's failure to present a claim was not pleaded, and therefore cannot be considered in any event. The arbitration agreement reads:

"In case of failure to agree in relation to matters of payment, allowances, or loss referred to in this contract, or failure to agree under any of the stipulations of this contract, then the matter shall be referred to a board of arbitration."

Even if the arbitration agreement had been pleaded (it was not), this would completely exclude the parties from a recourse to the courts, and is not binding. *Seward v. City of Rochester*, 109 N. Y. 164, 16 N. E. 348; *Mitchel v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205. The third cause of action is based upon the following provision of the contract:

"The American Concrete Steel Company agrees to provide all labor and materials essential to the conduct of this work, not included in this contract, in such manner as not to delay its progress, and in the event of failures so to do, thereby causing loss to you, agree that they will reimburse you for such loss; and you agree that, if you delay the progress of the work, so as to cause loss for which the American Concrete Steel Company shall become liable, then you shall reimburse the American Concrete Steel Company for such loss."

[6] The court finds that the defendant delayed plaintiff's progress, and hence a recovery may be had for such damages as are proved. By the same finding a recovery will be allowed under the fourth cause of action, the damages being, of course, identical. In every contract of this nature there is an implied agreement that the contractor will not be delayed or obstructed by the person for whom the work is to be done. *Ryder Building Co. v. City of Albany*, 187 App. Div. 868, 176 N. Y. Supp. 456; *Del Genovese v. Third Avenue Railroad Co.*, 13 App. Div. 412, 43 N. Y. Supp. 8, affirmed 162 N. Y. 614, 57 N. E. 1108; *Norcross v. Wills*, 198 N. Y. 336, 91 N. E. 803.

[7] Under these causes of action plaintiff demands:

Loss sustained from April 6 to November 10, 1917, due to delay and increased cost of labor paid during that period.....	\$1,039.74
Superintendent's services, same period.....	1,496.00
Usable value of derrick from January 20 to August 20, 1917.....	2,715.00
Loss due to suspension of work of steam shovel from June 13, 1917, to June 26, 1917.....	1,580.78
Loss due to enforced idleness of men.....	287.91

These items of damage were proved. May they be allowed? The plaintiff's work had to do with the excavation. It is reasonable to assume that, the less time he was required to give to the work, the more profitable the contract would become. It is certainly apparent, I think, that unless unusual conditions existed, not here disclosed, he could have had no object in voluntarily prolonging the completion of work of this kind more than a year over the time reasonably required.

Without reviewing the evidence in detail, I shall content myself with the statement that I am satisfied that the proof establishes that plaintiff was ready, willing, and able to complete his part of the work within 30 days, or at most 6 weeks, after January 1, 1917, and that all delays thereafter were caused by incumbrances for which defendant was responsible, and because of defendant's failure to lay out work. In this connection I deem it appropriate to observe that I have accepted as substantially correct the testimony of the plaintiff and his son. Each impressed me as a careful and reliable witness, conscientiously endeavoring to give a truthful statement of the matters concerning which he was questioned, even where the truth was prejudicial. It appears clearly that from January until November, 1917, plaintiff or his son was asking, and even urging, defendant for work and for the removal of incumbrances. These requests were of frequent occurrence. Indeed, at times they were almost daily. The damages proved will therefore be allowed.

This conclusion disposes of defendant's set-off for work done by the latter, which, it is claimed, plaintiff failed to perform. Furthermore, defendant's proof failed to identify with reasonable certainty the work for which defendant seeks a recovery, and therefore does not warrant a finding that the set-off has been established. As an additional reason for the conclusion reached, the contract provided that the defendant give plaintiff a three-day notice, requiring the latter to proceed by a day fixed and indicating the precise work done. The alleged notices were either less than three days, or did not refer to work included in that for which defendant seeks to be allowed a set-off.

[8] Plaintiff demands interest on the entire amount claimed. The rule by which the court must be guided is that interest may be allowed, if the sum due is ascertainable by mere computation; otherwise, not. The first cause of action is for an amount which can be readily ascertained by computation, and it is proper to allow interest thereon; the second cause of action is for a definite amount, and carries interest; the third cause of action, for damages made up of various items, is necessarily, I think, unliquidated, and incapable of determination by market values or arithmetical calculation, and therefore will not carry interest. There is ample authority for the rule stated. See *General Supply & Construction Co. v. Goelet*, 149 App. Div. 80, 133 N. Y. Supp. 978, and *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493, and cases therein cited.

If the foregoing conclusions are correct, plaintiff is entitled to judgment for \$13,175.77, with interest on \$5,999.95 from April 15, 1918, and interest on \$18.55 from January 13, 1917, all to the date of entry of judgment herein; no interest being allowed on \$7,157.27.

**CITIZENS' SAVINGS & TRUST CO. et al. v. NEW YORK & N. S. TRACTION CO.**

(District Court, E. D. New York. July 16, 1921.)

**Street railroads 455—Forfeiture of franchise not enforceable in foreclosure suit.**

In a suit to foreclose a mortgage given by a street railroad company, in which receivers have been appointed for defendant's property, a city, which is not a party, will not be granted permission to take possession of and operate so much of defendant's line as is within its limits, on the claim that it has summarily forfeited defendant's franchise and that under the contract the city becomes owner of the property.

In Equity. Suit by the Citizens' Savings & Trust Company and another against the New York & North Shore Traction Company. On motion by the City of New York for modification of injunction. Denied.

John P. O'Brien, Corp. Counsel, of New York City, for the motion.  
Frueauff, Robinson & Sloan, of New York City, for plaintiffs.  
John E. Brady, of New York City, for defendant.

GARVIN, District Judge. The city of New York has moved for an order modifying the injunction granted by this court on January 18, 1921, which restrains public officers and public authorities and their representatives from interfering in any way with the possession or management of the property in the hands of the receivers heretofore appointed in this action, and also permitting the city of New York to institute an action or actions against the said receivers in any court of competent jurisdiction.

The petition upon which the motion is made alleges that the defendant, a domestic corporation organized under the Railroad Laws of the state of New York (Consol. Laws, c. 49), formerly operated lines of street railroads within the city of New York and without said city in the county of Nassau; that the lines within the city were operated under franchises granted by the board of estimate and apportionment of the city of New York and contained in contracts dated February 1 and April 14, 1909, as amended by various other contracts and resolutions. Each of said contracts provided in section 2, subdivision thirty-second, as follows:

"Section 2. \* \* \* Thirty-second—In case of any violation or failure to comply with any of the provisions herein contained, this contract may be forfeited by a suit brought by the corporation counsel on notice of ten days to the company or at the option of the board by resolution of the said board, which said resolution may contain a provision to the effect that the railway constructed and in use by virtue of this contract shall thereupon become the property of the city, without proceedings at law or in equity: Provided, however, that such action by the board shall not be taken until the board shall give notice to appear before it, on a certain day not less than ten (10) days after the date of such notice, to show cause why such resolution declaring the contract forfeited should not be adopted. In case the company fails to appear, action may be taken by the board forthwith."

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Section 2, subdivision fourth, of each of the said contracts, provided:

"Section 2. \* \* \* Fourth—Upon the termination of this original contract, or if the same be renewed then at the termination of the said renewal term, or upon the termination of the rights hereby granted for any cause, or upon the dissolution of the company before such termination, the tracks and equipments of the company constructed pursuant to this contract within the streets, avenues and highways, shall become the property of the city without cost and the same may be used or disposed of by the city, for any purpose whatsoever or the same may be leased to any company or individual. \* \* \*"

The petition further alleges that on or about March 2, 1920, defendant in violation of the terms and conditions of said contracts, wholly discontinued the operation of street surface lines authorized by said contracts, and at no time between March 2, 1920, and about April 15, 1920, operated such lines; that on or about April 15, 1920, defendant resumed the operation of its lines authorized by said contracts, and continued such operation until on or about May 3, 1920, on which date said defendant again wholly discontinued such operation, and has never resumed the same; that, defendant having failed to comply with other of the terms and conditions of said contracts, the city of New York declared to be forfeited, null, and void the franchises, rights, and privileges granted by and contained in said contracts, and declared further that the tracks and equipment of the defendant constructed pursuant to said contracts within the streets and avenues of said city should become the property of the city of New York without cost, to be used and disposed of by the city for any purpose whatsoever, and that by reason of said forfeiture the tracks and equipment of the defendant within the streets and avenues of the city become the property of the city because of such terms and conditions of said contracts.

The petition further alleges, more briefly, that this is an action to foreclose a mortgage given to the plaintiffs to secure the payment of bonds issued by defendant in the amount of approximately \$800,000, which mortgage was made subsequent to the granting of said franchises; that by order of this court, made January 18, 1921, William Paul Allen and John G. Moran, were appointed herein as receivers of the property rights, assets, and franchises of the defendant, and that they took possession of the railway and other property covered by the mortgage; that petitioner understands that a decree of foreclosure will shortly be made herein; that on or about April 23, 1921, the city of New York, in order to secure protection of its rights applied to this court for permission to intervene in this action as a party defendant, which application was denied; that the order appointing the said receivers contained an injunction restraining all persons acting on behalf of the city from interfering with the receivers, because of which injunction (and the denial of the said application) the city is without redress, and is unable to protect its title and right to possession of the tracks and equipment of defendant within the streets and avenues of the city of New York; that large numbers of the residents of the section covered by defendant's railway within the city, inconvenienced by the discontinuance of service, have petitioned and requested the city to take over and operate the defendant's lines within the city limits, and that the city is ready, willing, and able so to do.

The petition concludes with a prayer for the modification of the injunction granted January 18, 1921, so that the city make take possession of the tracks and equipment of defendant within the city, and may operate the road upon said tracks pending final settlement of the rights of all parties, and for an order granting leave to institute an action against said receivers in any court of competent jurisdiction.

The plaintiffs and defendant present no affidavits in opposition, but join in a motion to dismiss the application upon the following grounds:

(1) That the court is without jurisdiction or power to grant a motion to permit the city to take possession of defendant's tracks and equipment and to operate the road pending final settlement of the questions involved.

(2) and (3) That the application to this court for leave to intervene, which was denied, precludes the consideration of the present motion.

(4) This application is not a submission to this court by the city of its claim of paramount title, which this court suggested might be proper, but is an application for leave to sue the receivers—perhaps before an entirely different tribunal.

(5) If this motion were granted, it would deprive plaintiffs and defendant of their property without due process of law, and would take private property for public use without just compensation, in violation of article 14 of the amendments to the federal Constitution, and would impair the obligation of contract, in violation of section 10 of article 1 of the federal Constitution.

(6) (a) The city's laches in applying for leave to sue the receivers warrants denying the relief sought; (b) if the motion for leave to sue were granted, the receivership would be unduly protracted, and the practical effect would be to transform the pending action from an action to foreclose a mortgage into one to determine a claim to paramount title; and (c) every right of the city can be protected by having the sale herein held subject to the rights of the city of New York, if any there be.

It appears to me to be clear that this application must be denied, unless this court is prepared to make an order granting even more than this court has already refused. The court declined to make an order permitting the city to intervene as a party to this action, and now the court is asked to turn over to the city property which is now in the possession of this court in this action, without the city being even a party thereto, or else to allow the city to bring an action in some tribunal, without specifying the same, which may result in a conflict between jurisdictions. The court in its former opinion suggested neither course, and the decision then made precludes this court from granting the motion now before the court.

The other objections to the application were argued at length and have been elaborately briefed. It may be that some—perhaps all—are valid, but I shall not pass upon them, in view of my conclusions just stated. I feel constrained to deny the application, because the relief sought has been heretofore in effect denied.

The rights of the city, if any, however, must be preserved by an ap-

propriate provision in the judgment of sale herein that such sale is made subject to all rights of the city of New York in the property and franchises sold.

Motion denied.

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UNITED STATES v. SHAFFER.

(District Court, W. D. Washington, N. D. August 20, 1918.)

No. 4062.

**Appeal and error § 459—Procedure in federal courts.**

Before a defendant can supersede a judgment against him, he must sue out his writ of error. If this is done, and the required security given within 60 days after rendition of the judgment, he may effect his supersedeas as matter of right, but after that time, under Rev. St. § 1007 (Comp. St. § 1666), only by permission of a judge of the appellate court.

Criminal prosecution by the United States against Frank Shaffer. On motions by the United States to commit defendant and by defendant for extension of time to file bill of exceptions. Motion to commit denied, and defendant's motion granted.

C. L. Reames, Sp. Asst. Atty. Gen., for the United States.  
Wm. R. Bell, of Seattle, Wash., for defendant.

NETERER, District Judge. The defendant was convicted on the 28th day of June, 1918. At the time, upon request of counsel, he was given 30 days within which to file a bill of exceptions, and at the time, with the consent of the government, the defendant was released on \$6,000 bond, with the usual conditions. No bill of exceptions has been presented, nor petition for writ of error filed. The government has filed a motion that the defendant be committed upon the judgment of conviction, for the reason that he is not prosecuting his appeal, and that the judgment may not be superseded, no writ of error being sued out. The defendant, by his counsel, appears in court and asks further time to file his bill of exceptions, and that the motion of the government be denied.

I think it might be beneficial to briefly state the law and the rules of court with relation to bills of exception, writs of error, and supersedeas. The federal judicial system proper embraces the District Court, the Circuit Court of Appeals, and the Supreme Court, the court of original jurisdiction, the intermediate appellate court, and the court of last resort in the order stated. The decisions of the District Court may be reviewed by the Circuit Court of Appeals (section 128, Judicial Code [Comp. St. § 1120]), except causes in which a direct appeal on writ of error may be taken to the Supreme Court (section 238 [Comp. St. § 1215]). A review may, however, be had in the Circuit Court of Appeals of any judgment where the jurisdiction has attached by reason of diverse citizenship, except, where the jurisdiction is dependent upon a constitutional question alone, the jurisdiction of the

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Supreme Court is exclusive. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859.

Acts of Congress, rules of the District Court, and the practice and procedure prevailing in the courts of the state where the district court is held, made so by the Conformity Act of June 1, 1872 (section 914, Rev. Stat. [Comp. St. § 1537]), prescribe the mode of procedure. The Conformity Act provides that the practice, pleadings, and procedure in actions at law in District Courts shall conform "as near as may be" to that of courts of record of the state in which the court is held. "As near as may be" has been held to leave the adoption of state laws or rules to the discretion of the federal judges. *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602.

A state rule, to have full force, requires the adoption by act of Congress or the rules of the District Court. *Simkins, A Federal Suit at Law*, p. 7; *Erstein v. Rothschild* (C. C.) 22 Fed. 61. The discretion of the District Court seems to be bound only by the duty to observe the local rule for producing issues of law and fact. That is the method and order of pleading. *Simkins, A Federal Suit at Law*, p. 5; *Brown v. Cumberland Telephone & Tel. Co.* (C. C.) 181 Fed. 246.

Rule 75 of this district provides that a party wishing a bill of exceptions shall, 10 days after the ruling is made, or, if made during a trial, 10 days after the rendition of the verdict, serve his proposed bill of exceptions. The other party then has 10 days to serve his proposed amendments. Within 5 days thereafter the proposing party shall deliver the proposed bill and amendments to the clerk for the judge, who designates a time to settle the bill; the party being notified thereof by the clerk.

"In settling the bill, the judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments have been proposed to it. \* \* \*"

After the bill is settled, it must be engrossed by the party who proposed it, and the judge must thereupon attach his certificate, and it is thereupon filed with the clerk. The practice in this district has been not to prepare the proposed bill until after the petition for new trial is disposed of. The purpose of the bill of exceptions is to raise only issues of law, and each error relied on should be specifically pointed out. Rule 4, Supreme Court Rules (32 Sup. Ct. v); rule 10, Ninth Circuit (208 Fed. vii, 124 C. C. A. vii).

The method of obtaining a review of law issues is by writ of error. The practice is governed by federal statutes, rules of court, and, in the absence of these, by the common law. *Simkins, A Federal Suit at Law*, pp. 166, 167; *Ex parte Chateaugay*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508. The writ must be sued out within 6 months after the entry of the order or judgment to be reviewed. Section 11, Act 1891, 26 Stat. 829 (Comp. St. §§ 1647, 1651).

The following steps in seeking to obtain a writ of error are given by *Simkins, A Federal Suit at Law*, p. 177:

(1) A petition for the writ, addressed to the judge of the trial court in term or vacation; (2) the petition must be accompanied with an assignment of errors and a prayer for reversal; (3) the writ of error, bond, the approval,

and the signing of the citation by the judge allowing the writ; (4) order of the judge in writing allowing the writ; (5) issuing the writ by the clerk of the trial court or appellate court, usually the former.

These steps are provided by section 997, R. S. Rule 11 of the Ninth Circuit (208 Fed. vii, 124 C. C. A. vii) provides that an assignment of errors must be filed with the clerk of the trial court with the petition for the writ of errors, setting out particularly and separately the errors relied upon. When admission or rejection of evidence is alleged as error, the assignment must give the substance of such evidence; if charge of the court, the part of the charge alleged to be erroneous must be set out totidem verbis. The assignment should be so specific that the court can determine what the issue is without searching the record. The party should prepare a form of writ and present it to the clerk for issuance, and it must be served—depositing with the clerk of the trial court being considered as such. *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, 153 Fed. 163, 82 C. C. A. 337. The writ of error is not "brought," within the meaning of section 1008, R. S. (Comp. St. § 1649), until it is filed with the clerk. *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, supra.

The writ must be returnable at San Francisco within 30 days from signing. Rule 14, Ninth Circuit (208 Fed. viii, 124 C. C. A. viii). A form of citation must be presented to the judge, and signed on issuance of the writ of error, which is likewise returnable at San Francisco, and a copy of the citation must be served 20 days before the return day.

A defendant may obtain a supersedeas by suing out a writ of error within 60 days, Sundays excepted, after the entry of the judgment, and give the security required by law on issuing the citation. Section 1007, R. S. (Comp. St. § 1666). To supersede judgment as a matter of right, these provisions must be complied with within 60 days, and bond taken in amount and conditions pursuant to rule 13, Circuit Court. After the expiration of the 60 days, stay of execution may be obtained only in the discretion of the judge.

It is apparent, from the statutory provisions and court rules, that before the defendant can avail himself of the right to supersede a judgment he must sue out his writ of error. This, I think, is the uniform holding, and is likewise in harmony with *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424, and with *U. S. v. Hudson* (D. C.) 65 Fed. 68, and *Ex parte Harlan* (C. C.) 180 Fed. 119.

The defendant having agreed to file his bill of exceptions and sue out his writ of error within 5 days, and it being stipulated that the case shall be presented to the Circuit Court of Appeals at its ensuing session in this city, counsel for the government not objecting, the motion to commit the defendant is denied.

**BURNTISLAND SHIPBUILDING CO., Limited, v. BARDE STEEL PRODUCTS CORPORATION.**

(District Court, D. Delaware. February 15, 1922.)

No. 5.

1. Evidence  $\Leftrightarrow$  29—Statutes  $\Leftrightarrow$  279—Law of state judicially noticed, and need not be pleaded in federal court.

Federal courts take judicial notice of the public laws of every state, and the law of a state need not be pleaded.

2. Sales  $\Leftrightarrow$  267—Implied warranty may be excluded by express language of contract.

The provisions of New York Sale of Goods Act, respecting implied warranties in the sale of goods, do not preclude the seller by express agreement from excluding, or limiting the effect of, any warranty which would otherwise be implied under the act.

3. Sales  $\Leftrightarrow$  267—Seller held not liable on implied warranty.

Where a contract for the sale of steel, purchased by the seller and to be delivered to it by another, as was understood by the parties, expressly provided that "the quantity, quality, and description of steel is not warranted or guaranteed," the seller cannot be held liable on an implied warranty of quantity, quality, or description.

At Law. Action by the Burntisland Shipbuilding Company, Limited, for the use of Raeburn & Verel, Limited, against the Barde Steel Products Corporation. On demurrer to second count of declaration. Demurrer sustained.

Caleb S. Layton, of Wilmington, Del., for plaintiff.

James I. Boyce and Robert H. Richards, both of Wilmington, Del., for defendant.

MORRIS, District Judge. To the second count of a declaration filed in an action at law brought by Burntisland Shipbuilding Company, Limited, for the use of Raeburn & Verel, Limited, against Barde Steel Products Corporation, the defendant has demurred. In this count a contract between the parties, made in the state of New York, is set out in hæc verba, pertinent portions of which are as follows:

"The quantity, quality, and description of steel is not warranted or guaranteed, and it is understood that the same constitutes a part of the steel sold to us by the United States Shipping Board Emergency Fleet Corporation or Navy known as excess steel ordered for the war shipping program of the United States. The quantity, quality, and description as given below are taken directly from the certifications furnished us by the United States Shipping Board Emergency Fleet Corporation, and we make no representations with reference to same except to deliver if, as and when the steel is delivered to us, and that the quantity, quality and description shall be such as we are able to furnish under circumstances and conditions shown on the reversed side hereof.

"Quantity; Quality; Description.—As per specifications attached (always over—never under). \* \* \*

"Terms: Bank guaranty on signing. Cash against railroad bills of lading and Lloyd's certificate. \* \* \*

"1. The seller has bought from the Shipping Board all of the steel contracted for by the Shipping Board under its war ship building program, which is in excess of the amount required to complete such shipbuilding program. The amount, quantity, quality, description, and specifications of the steel so

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purchased by the seller is ascertainable only as and when certified to the seller by the Shipping Board. The seller therefore assumes no obligation to the purchaser except to deliver to the purchaser steel of the quantity, quality, and general description ordered, if, as, and when the said steel shall be delivered to the seller by the Shipping Board. \* \* \*

"5. The seller is not the manufacturer of the steel included under this order, and assumes no obligation to the purchaser for any defects or other faults that may be or become apparent in the said steel, it being understood that the steel has been purchased by the seller 'as is' and is to be delivered to the purchaser 'as is.'"

The specifications attached to the contract call for plates the length, breadth, and thickness of which are fixed to the fraction of an inch. The second count further alleges that by virtue of the laws of the state of New York the defendant thereby warranted the plates to be of the kind, character, and description set forth; that the warranty was relied upon by the defendant; that the plates shipped were of a kind and description totally unlike those specified in the contract; and that plaintiff within a reasonable time notified defendant thereof.

The causes of demurrer assigned are: (1) That the quality and description of the steel was not warranted; (2) that it is not alleged in what particular the plates shipped were unlike those alleged to be called for by the contract; (3) that it is not alleged that the plates shipped were "under" in any respect; and (4) that the law of the state of New York is insufficiently pleaded.

[1] The last will be first considered. In *Hanley v. Donoghue*, 116 U. S. 1, 6, 6 Sup. Ct. 242, 245 (29 L. Ed. 535), it was said:

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof."

This principle was reaffirmed in *Fourth National Bank v. Francklyn*, 120 U. S. 747, 751, 7 Sup. Ct. 757, 30 L. Ed. 825. In *O'Dell v. Southern Ry. Co.* (D. C.) 248 Fed. 345, 348, the rule was stated thus:

"Wherever a court takes cognizance of the law, it is not necessary to plead the law, or to refer to the law. It is only when a suit is brought in a court upon a cause of action arising in a foreign state that it is necessary to plead the law of the foreign state. The United States courts take judicial cognizance of the public laws of all the states in the Union. There is therefore no more necessity to plead the law of any state in the Union in a United States court than it would be in the state court to plead the law of that state."

The fourth cause of demurrer must, therefore, be overruled.

[2] The insufficiency of the second count specified by the first cause of demurrer is that the quality and description of the steel was not warranted. Inasmuch as alleged breach of warranty is the basis of the recovery sought by that count, it is manifest that, if the contract contains no warranty, the count is defective in substance. Whether the sale was made with or without warranty depends upon the language of the contract as governed by the law of the state of New York. The language of the contract is set out above. The particular statutes of that state depended upon by the plaintiff to establish that the sale was made with warranty are the following sections of the Sale of Goods Act (Laws 1909, c. 45; Consol. Laws, c. 41):

"Sec. 93. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

"Sec. 95. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description. \* \* \*"

"Sec. 130. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale."

"Sec. 150. 1. Where there is a breach of warrant by the seller, the buyer may, at his election: \* \* \*

"(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty. \* \* \*"

In applying these statutory provisions, it must be remembered, however, that at common law the parties to a contract may by agreement limit the effect of language which would otherwise be construed as a warranty, and that personal property may be sold without warranty if the contract clearly so provides. Ann. Cas. 1912D, 1079, note; 24 R. C. L. 173. These principles are equally true and applicable under the Sale of Goods Act. Williston on Sales, § 213. In fact, section 152 of that act expressly provides:

"Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived, or varied by express agreement. \* \* \*"

[3] As the contract in question contains the clear, express, and unequivocal provision that "the quantity, quality and description of steel is not warranted or guaranteed," it seems manifest that the first cause of demurrer must be sustained.

The demurrer does not raise the question of whether or not the plaintiff, in the absence of a warranty, is without remedy, if the steel delivered did not correspond with the specifications, and no opinion is expressed thereon.

The first cause of demurrer having been sustained, it becomes unnecessary to pass upon assignments Nos. 2 and 3.

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### In re NORTHERN HARDWOOD CO.

(District Court, N. D. New York. February 6, 1922.)

**Fixtures** ⇐21—Vendor held not to have lien on portable sawmill placed on land by licensee of purchaser.

A vendor of timber land by an executory contract giving the purchasers the right to cut timber thereon held not to have a lien on a portable sawmill and boiler placed on the land by bankrupt, a timber company, under a contract with the purchasers and with the knowledge and consent of the vendor; bankrupt not having assumed any of the indebtedness to the vendor, and the machinery having been placed on blocks and posts, and not permanently attached to the land.

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⇐ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Bankruptcy. In the matter of the Northern Hardwood Company, bankrupt. On review of order of special master disallowing claim of Christian Yousey. Affirmed.

Milton Carter, of Lowville, N. Y., for claimant.  
Grant & Wager, of Utica, N. Y., for trustee.

RAY, District Judge. The special master has made the following findings of fact:—

"First. On or about June 10, 1911, Christian Yousey, he then being the owner of 4,776 acres of timber land situate in the towns of Croghan and Diana, Lewis county, N. Y., entered into a contract in writing, dated on that day, with Alfred B. Grout, John Montgomery, Leon L. Southwick, and Charles H. Swift, Jr., to sell to them said land for the sum of \$28,656. A copy of said contract, marked Exhibit A, is set forth in the amended petition herein of said Christian Yousey."

The contract reads as follows:

"Articles of agreement, made this 10th day of June, in the year one thousand nine hundred and eleven (1911), between Christian Yousey, of the town of Croghan, Lewis Co., N. Y., party of the first part, and Alfred B. Grout, John Montgomery and Leon L. Southwick, of Ilion, Herkimer Co., N. Y., and Charles H. Swift, Jr., of Utica, Oneida Co., N. Y., parties of the second part, in the manner following: The said parties have and hereby do mutually covenant and agree as follows: The party of the first part to sell, and the party of the second part to purchase, all that tract or parcel of land, situate in the town of Croghan, county of Lewis, and state of New York, containing 3,969.50 acres of land, being the same lands described in a deed given by Lawrence J. Goodale to Augustus E. Maxwell and others, dated October 15, 1903, and recorded October 26, 1903, in Lewis Co. clerk's office, in Book 105 of Deeds at page 419; also all that piece of land situate in the town of Croghan, Lewis Co., N. Y., containing 155 acres, being the same conveyed to said Christian Yousey by Henry C. Hitchcock and others, by deed dated January 11, 1907, and recorded in the Lewis Co. clerk's office in Liber 113 of Deeds at page 211; and also all that other piece of land situate in the town of Diana, Lewis Co., N. Y., containing 651½ acres, being the same land described in a deed dated Dec. 25, 1889, given by Orrison Dean and wife to Augustus E. Maxwell, and recorded in the Lewis Co. clerk's office in Liber 107 of Deeds at page 546, making in all hereby contracted 4,776 acres of land, and reference is here made to the aforesaid deeds for a full and detailed description of said 4,776 acres—reserving mines and minerals and rights of way as reserved in former conveyances of said lands, and this contract is made subject to all highways on said lands—excepting and reserving from the lands above described all softwood timber growing and being on about 150 acres situate on southerly side of the lot owned by Slocum & Lefever, with the right to cut and remove said softwood timber at any time within three (3) years from the date hereof, for the sum of twenty-eight thousand six hundred fifty-six dollars (\$28,656.00), which sum the said parties of the second part hereby agree to pay to the party of the first part as follows: \$1,500.00 at the date hereof; \$1,500.00 on September 1, 1911, with interest thereon at 5 per cent. from date hereof; \$7,000.00 on January 1, 1912, with interest at 5 per cent. from date hereof on all sums due and to become due; \$5,000.00 November 1, 1912; \$5,000.00 November 1, 1913; \$5,000.00 on November 1, 1914, and \$3,656.00 on November 1, 1915, with interest at 5 per cent. from November 1, 1911, annually on all sums due and to become due. The parties of the second part are to have the right to cut and remove timber from said premises. But in case second parties shall cut more than 1,000,000 feet of timber on said premises in any year from date hereof, then they shall pay first party each year, in addition to the payments above mentioned, \$5.00 for each 1,000 feet cut each year in excess of 1,000,000 feet, to be applied as payment upon said

\$28,656.00. But if parties of the second part shall cut more than 2,000,000 feet in any year from the date hereof they shall pay party of the first part \$—— per thousand for all cut in excess of 2,000,000 feet, within 30 days after same is cut and the same shall not be removed from said premises till paid for and the title thereto shall remain in first party till paid for—payments to be applied on said \$28,656.00.

"Said parties of the second part also agree to pay all taxes and assessments which shall be taxed or assessed upon said premises from the date hereof until the said sum shall be fully paid as aforesaid. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall, at his own proper cost and expense, execute and deliver to the said parties of the second part, or to their assigns, a warranty deed of the above-described premises.

"It is agreed that the parties of the second part shall have possession of said premises from and after the date hereof. And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"Christian Yousey.	[L. S.]
"Alfred B. Grout.	[L. S.]
"John Montgomery.	[L. S.]
"Leon L. Southwick.	[L. S.]
"Charles H. Swift, Jr.	[L. S.]"

#### The remaining findings of fact are:

"Second. Thereafter the Northern Hardwood Company was incorporated, and by agreement with said vendees, and with the knowledge and consent of vendees and vendor, said Northern Hardwood Company entered upon said timber land and began to cut and remove timber therefrom, and continued so to do until about October 30, 1913, when said company was adjudged bankrupt. At the first meeting of creditors on December 5, 1913, Arleigh D. Richardson, of Illon, N. Y., was appointed trustee of said bankrupt, and since that time he has been the duly qualified and acting trustee in bankruptcy for said Northern Hardwood Company.

"Third. The said Christian Yousey is in possession and is the owner of said land, subject to the unencumbered interest, if any, of the vendees mentioned in said contract of sale, or their assignee, and upon which contract payments have been made to said Christian Yousey as follows: June 10, 1911, \$500; June 24, 1911, \$1,000; September 5, 1911, \$1,516.66; January 4, 1912, \$4,000; January 6, 1912, \$1,712.66; April 1, 1912, \$500; July 2, 1912, \$1,525; March 8, 1913, \$1,000; June 1, 1913, \$3,006.12.

"Fourth. In its lumbering operations upon said land, said Northern Hardwood Company placed and used thereon certain mill machinery and appliances, consisting of engine and boiler, sawmills, saws, lathe, boring machine, carriages, belting, and other articles of machinery appurtenant thereto, the same being the property of said Northern Hardwood Company and used by it for the purpose of cutting and manufacturing lumber, and remaining on the land, until after the appointment of said trustee in bankruptcy.

"Fifth. Thereafter, pursuant to the order of this court, the said mill machinery and appliances were sold by said trustee for the sum of \$347.40 over and above the expenses of selling the same, and the said sum of \$347.40 is now in the hands of said trustee, and is held by him subject to any lien which said Christian Yousey may have had against said mill machinery and appliances so sold.

"Sixth. The said mill was set upon posts, and was what is known as a portable sawmill, as distinguished from a stationary mill. The engine and boiler rested partly upon blocks and partly on the ground, and were portable. The boiler had been mounted on wheels, by which it was moved from place to place. The wheels had been temporarily removed, and lay on the ground at one side, while the boiler rested upon its axles upon the blocks.

"Seventh. The said mill machinery and appliances were personal property,

and neither the same or any part thereof was so attached to the land as to become part of the real estate, and no interest thereon or lien thereon ever vested in or was transferred to said Christian Yousey by reason of the said lumbering operations, assignment, agreement, or otherwise.

"Eighth. There was no agreement or transaction by or between said Northern Hardwood Company and said Christian Yousey, or the vendees named in said contract of sale, or any of them, or any other person, whereby said Northern Hardwood Company agreed or became obligated to pay to said Christian Yousey any part of the contract price of said land, or any of the payments due or to become due upon said contract of sale."

I have examined the evidence submitted and concur in the findings of the special master. I do not think the claims, or either of them, sustained by the proofs, and there will be an order in reference to each claim, affirming the decision of the special master, and disallowing the claims.

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RAMOPA CO. v. A. GASTUN & CO., Inc.

(District Court, S. D. New York. January 27, 1922.)

1. Trade-marks and trade-names and unfair competition ¶59(5)—The brand "Maropa" held to infringe word "Ramopa."

The trade-name "Maropa," when used in connection with coarse cotton, held to infringe the trade-mark "Ramopa."

2. Trade-marks and trade-names and unfair competition ¶93(3)—Trade-mark held infringed from beginning of the use.

Evidence held to show that the trade-mark "Ramopa" was knowingly infringed by defendant from the beginning of the use by it of the trade-mark "Maropa," and that plaintiff was entitled to an accounting from that time.

In Equity. Suit by the Ramopa Company against A. Gastun & Co., Inc. Decree for plaintiff for accounting.

Munn, Anderson & Munn, John K. Brachvogel, and Orson D. Munn, all of New York City, for plaintiff.

Barry, Wainwright, Thacher & Symmers and A. C. Charles, all of New York City, for defendant.

LEARNED HAND, District Judge. [1] The first question in the case is whether there should be a decree of injunction. On that, I am of the same opinion as I was when the case was up for preliminary injunction. All the witnesses agree that these goods in the Levant are sold more by the name than by the "chop." When I say all of the witnesses, I should not forget the defendant Gastuniotis. He differs in that respect, but he is the only one. I find the fact to be that it is by the name that the goods are sold, by which I mean sold either to the consumer or to the small retailer. These are, of course unfamiliar with the English language, and probably relatively unfamiliar with the Latin script, and to them the rest of the words on the head end are entirely meaningless. But the word "Ramopa," although it is written in a language foreign to them, and even in a character foreign to Turks, they can fix in their minds. To argue that the difference arising from

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the transposition of the letters "R" and "M" is a sufficient distinction seems to me beyond any fair entertainment whatever. I have no doubt that confusion would be likely to arise, and, if so, the defendants must be prevented from imposing the risk of it upon the plaintiff.

[2] The question next comes up of the accounting. Of course, the accounting must go from the time of the notice on May 3, 1921; but that may well result in nothing. Perhaps the defendants shipped no more goods under that trade-mark after that time. The real importance of the case to both sides arises on the question whether the accounting shall go back further. There is no direct evidence of notice prior to May 3d of last year. Apparently the infringing word was devised and began to be used at the very end of 1918, so the defendants were using it about 2 years and 4 months before they got notice, and the issue is whether the circumstantial evidence is cogent enough to overbear the denial of Gastuniotis that he had any knowledge.

Just what was the situation in respect of this name? The plaintiff had a business of substantial amount in Constantinople and the Piræus in the year 1917. They sold a little short of 1,000,000 yards of coarse cottons under their trade-mark. That was a good business. In the year 1918 it fell to about half what it had been in 1917, but still it might well be supposed to have possibilities, and in fact subsequently realized possibilities beyond what I suppose were even their expectations. They marketed their goods, as apparently every one must in the Levant, by employing importing agents who got orders, which come direct to New York, where they are filled. The agents were themselves Greeks, and they circulated among the importers, drumming up business. The defendants are also exporters and importers, who have offices or agencies in the Piræus. Their business is done in the same way; they circulate among buyers, drumming up business.

It seems to me stretching credulity beyond its breaking point to suppose that, when they went into the business of selling coarse cottons, and when they in the nature of things probably got some of that business through the same people who bought from the plaintiff, they should not have become acquainted with the brands and the names under which the plaintiff was selling. We start, therefore, with the great likelihood that they did. We find them adopting a name which, if they had intended to use the plaintiff's trade-name, is just enough removed from it to make a colorable argument on which they might stand, a name which itself means nothing, and must have been invented as an arbitrary trade-mark. This name has just the same letters as the plaintiff's trade-mark, arranged in precisely the same order, except that there is a transposition of two of them, the "r" and the "m". Let us remember that this was done by people who were competing with the plaintiff, and who were in a position where the probabilities are nearly inevitable that they should have had knowledge of the plaintiff's name.

I come, then, to the explanation of how the word was devised. I am assured that it was made up of a Spanish word and a French word. The Spanish word was thought up by this gentleman when he was in Cuba. Salonica, as every one knows, is settled very largely by Spanish Jews; they form the merchant class there, and Spanish Jews would

know Spanish, and in Spanish the word for tunic or dress is "ropa." Then it would be desirable, as French is well known in the Levant, that there should be a combination of languages and the possessive French pronoun might be added to "ropa." I may assume that "ropa" is feminine in Spanish, though I do not even know whether Spanish has a gender. At any rate, we may combine "ma," the feminine of the possessive pronoun, "mon," which is "my" in French, with "ropa," the name in Spanish, and so we get a word which is to a certain extent descriptive. This is the explanation offered to meet a situation where every antecedent probability points to the fact that the plaintiff's trademark must have been known, and that the word actually devised was one apt to produce precisely the effect which apparently arose from its use. I say "apparently arose," because, by May of last year, the competition had already been felt, and has affected disastrously the plaintiff's business.

This is not a case in which I need make any characterization of the explanation. I need only say that the combination of these circumstances leads me to one conclusion only, unless I close my eyes and assume a credulity which no sensible man can in the face of those circumstances. I cannot accept the story of the supposed innocence of the defendants, and therefore I hold that the accounting shall go back to the beginning, and that any merchandising under the name "Maropa" shall be taken as a tort against the plaintiff, which falls within the ordinary rules governing these cases. I do not mean to indicate any opinion as to whether the plaintiff will be able to prove any damages, or even how far the use of the word alone will entitle them to all the profits if any. That is a matter which I prefer to leave to the master, after the proof is in.

Decree for an accounting before William Parkin, Esq., from January 1, 1919, with costs.

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UNITED STATES v. VANNATTA.

(District Court, E. D. New York. February 15, 1922.)

1. Conspiracy §43(5)—Overt acts charged in indictment may or may not be crimes.

The fact that the overt acts alleged in an indictment for conspiracy may or may not have been crimes in themselves has no bearing on the validity of the indictment.

2. Conspiracy §43(5)—Indictment must sufficiently charge conspiracy, independent of overt acts.

An indictment for conspiracy must be sufficient in its statement of the conspiracy, independent of the allegations of the overt acts, which must be charged as in pursuance of a conspiracy previously completely and definitely set forth.

3. Indictment and Information §125(5½)—Indictment for conspiracy not duplicitous, though overt acts are crimes.

If the charge of conspiracy is complete, allegations charging specific crimes as overt acts do not make the indictment duplicitous.

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⇒ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. Conspiracy ~~§~~43(6)—Indictment charging conspiracy between seller and buyer of whisky held sufficient, though buying was not an offense.

In view of Volstead Act, § 3, forbidding the transportation and possession of intoxicating liquor, except as therein authorized, and of regulation No. 60, forbidding the purchasing, etc., for nonbeverage purposes without a permit, an indictment charging conspiracy with F. and others to sell to F. whisky fit for beverage purposes, when defendant had no permit, and F. had none to make a further sale, sufficiently charges a conspiracy to commit an offense against the United States, though buying intoxicating liquor is not a crime.

5. Conspiracy ~~§~~43(1)—Indictment need charge only one of the alleged conspirators.

An indictment charging a conspiracy between defendant and another named individual and others to the grand jurors unknown is not demurrable, because it did not designate the named individual as a defendant.

6. Indictment and Information ~~§~~150—Whether transaction was conspiracy, as alleged, or participation in one act, is not raised by demurrer to the indictment.

A demurrer to an indictment, charging a conspiracy to sell a quantity of whisky to a named individual, does not raise the question whether the facts would establish the conspiracy, or would show merely a conscious participation in a single transaction.

John T. Vannatta was indicted for conspiracy to violate the Volstead Act. On demurrer to the indictment. Demurrer overruled.

Ralph C. Green, U. S. Atty., of Brooklyn, N. Y. (Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Morris Kamber, of New York City, for defendant.

CHATFIELD, District Judge. Demurrer to indictment charging conspiracy to commit an offense against the United States.

[1-3] The indictment alleges a number of overt acts, which may or may not have been crimes in themselves; but this has no bearing upon the validity of the indictment. A conspiracy indictment must be sufficient in its statement of the charge of conspiracy, independent of the allegations of the overt acts. An overt act must be charged, but this must be in pursuance of a conspiracy which has previously been completely and definitely set forth. Conversely, if the charge of conspiracy is complete, then the allegations of overt acts, involving possibly other specific instances of crime, do not make the indictment duplicious.

[4] In the case at bar the charge of conspiracy is alleged to consist of a plan with one Farrell and others, to the grand jurors unknown, to sell to Farrell a large quantity of whisky which was fit for beverage purposes, when the defendant had no permit to make such a sale, and also when the said Farrell had no permit to make a further sale. Objection is made that Farrell was buying rather than selling, and that *buying* intoxicating liquor is not a crime.

Section 2 of article 2, and section 6 of article 3, of Regulations No. 60, forbid the purchasing, possessing or using of intoxicating liquor for nonbeverage purposes, without a permit, while section 3 of title

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2 of the Volstead Law (41 Stat. 308) forbids the transporting and possessing of intoxicating liquor, except as authorized in the act. Such sale and possession are made misdemeanors, and a person accessory to a misdemeanor is chargeable as a principal. Hence the contention that buying liquor is not forbidden by the statute as a crime is a distinction without a difference in this case.

Evidently the pleader had in mind, however, the thought that Farrell was not a party entitled or qualified to deal in such liquor—that is, to sell it for medicinal purposes, or for any other valid use under the statute—and was intending to charge as a part of the conspiracy the intent to commit the crime of transporting or transferring the liquor for beverage purposes, as distinguished from what would be only an evasion of regulations and a technical violation of the statute, if transmitted—that is, sold—for nonbeverage purposes, or to a person who himself was qualified under the law and regulations to traffic, in a proper manner, in the liquor. But, so far as the charge of conspiracy is concerned, the indictment is sufficient, and any objection merely on the ground of indefiniteness or duplicity, in the sense that Farrell, perhaps, may have been conspiring also to commit another crime, is not borne out.

[5] The defendant also objects by his demurrer to the indictment on the ground that but one defendant is named, although Farrell is alleged to have been one of the conspirators. In the case of *Feder v. United States*, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370 (C. C. A. 2d Circuit), it was expressly held that a charge of conspiracy might be tried against one defendant alone, if two persons were shown to have been concerned in the conspiracy. The court also held that, if one of two conspirators should be found not guilty of conspiring, the charge must fall as to both. But in that case the indictment alleged that two defendants conspired with each other, and there was no charge in any form that others were concerned in the conspiracy.

In the case at bar, the indictment charges that others were concerned in the conspiracy, of whom Farrell alone is named, and Farrell is not made a defendant, for reasons known only to the grand jurors, or to the district attorney. A natural inference is that the government did not desire to arrest or arraign Farrell on the charge, perhaps with the idea of using him as a witness. But this does not affect the validity of the indictment. So long as the charge of conspiracy is an allegation that the defendant, Vannatta, was conspiring with one or more other persons, the charge of conspiracy will lie against him alone.

[6] Whether the trial may show that there was no conspiracy to commit a crime of a general statutory kind, of which the instance set forth was an example carried into effectuation, or whether the evidence upon the trial may show that there was no conspiracy, but only conscious participation in a single transaction, such that the defendant should not be made liable to the more severe sentence for conspiracy, while at the same time subject to the lower, but double, penalty for violation of the Volstead Law, is a matter which cannot be raised upon demurrer.

The demurrer will be overruled.

**In re WONG TOY.****Ex parte SULLIVAN.**

(District Court, D. Massachusetts. February 20, 1922.)

No. 2041.

**Aliens**  $\Leftrightarrow$  32 (8)—**Status established by fair preponderance of evidence.**

On an issue as to the United States citizenship of a person of the Chinese race, he is not required to establish his citizenship beyond a "substantial doubt," but only by a fair preponderance of the evidence.

**Habeas Corpus.** On petition of John G. Sullivan, on behalf of Wong Toy, against Irving F. Wixon, for writ of habeas-corpus. Writ granted.

John G. Sullivan, of Medford, Mass., for petitioner.  
The United States Attorney, opposed.

MORTON, District Judge. Habeas corpus to the Commissioner of Immigration. The petitioner is a Chinese, who has been excluded and is held for deportation. He claimed admission as the son of Wong Ah Jum, an American citizen. The immigration officials decided that the relationship was established, but that Wong Ah Jum's citizenship was not. The questions are whether the evidence on this point was so clear and convincing that the immigration tribunals acted unreasonably and arbitrarily in rejecting it, and whether they acted under fundamentally incorrect assumptions of law. The facts are as follows:

In 1891 a Chinese boy, giving the name of Wong Ah Jum, was discharged on habeas corpus proceedings in the United States District Court at San Francisco on the ground that he was a native-born American citizen. His tintype, taken at the age of 13, forms part of the record in that case. This adjudication established the status of the person affected by it. The father of the petitioner claims—and testifies—that he was the boy so discharged. He describes in detail—and, so far as shown, correctly—the events connected with the hearing and discharge. The only discrepancy is that he says his photo was on soft paper; whereas the record shows, as before stated, that it was a tintype.

In 1907 a person claiming to be the Wong Ah Jum of the habeas corpus proceeding applied in San Francisco for a certificate establishing his status, so that he might return to this country after making a visit to China. The certificate was issued. The certified copy of the habeas corpus record presented at that time to the immigration officials and retained by them during the owner's absence, and returned by them to the owner when he entered this country, is produced by the father. It bears an admittedly genuine indorsement across the face, showing departure from San Francisco October 23, 1907. In 1909 a person coming from China presented the travel certificate at San Francisco, and was admitted as being the person to whom it had been issued two years before, and there is a notation on the record that the habeas corpus

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

certificate was returned to him at that time. The father of the petitioner testifies that he is the man who made the trip to China, and there is nothing in his testimony which casts doubt on this statement.

So far the case would seem clear. But in 1910 a Chinaman, not the present father, sought admission at Boston, claiming to be the person who had been discharged in the habeas corpus proceeding 21 years before. Three San Francisco inspectors in the Immigration Service gave it as their opinion that he was not the same person. There was evidence to the contrary, based largely on a comparison of the applicant with the photographic copies of the tintype on the habeas corpus. The upshot was that the man was admitted as being the person who had been discharged in 1891. This person now lives in Buffalo, and in these proceedings has been referred to as the Buffalo claimant.

Obviously the record in the habeas corpus case is being fraudulently used, either by the Buffalo claimant or by the petitioner's father. The immigration inspectors at San Francisco are strongly of the opinion that the present claimant is the true one, and an inspector in the New York office of the department is "unquestionably" of the same opinion. The testimony of the father in these proceedings is straightforward and consistent to the same effect, except for the mistake about the tintype, which, considering that 30 years have intervened since it was taken, seems not a very weighty matter. He was accepted as the man discharged by the inspectors at San Francisco on a personal inspection in 1906 or 1907 and 1909. Commissioner Billings, who admitted the Buffalo claimant at Boston in 1910, against the opinion of the San Francisco official, said in his memorandum:

"I am inclined to believe, as are also Dr. M. V. Safford and the Chinese inspectors, that the applicant does bear a resemblance to the photo attached to the court record, and therefore instructions have this day been issued to admit him"

—not a very strong finding.

It seems clear that the weight of the evidence on the question of the father's citizenship is in his favor. This was sufficient to entitle the petitioner to a finding in his favor on the point. But the immigration tribunals apparently exacted a higher degree of proof, unwarranted in law, and on that account refused admission. The memorandum of the Assistant Commissioner General says:

"The very fact that experienced officers have reached different conclusions on the point at issue in the case, and that another party has already been admitted to the United States as being identical with the person represented by the photo on court record No. 9527 (the habeas corpus case), is evidence that there is substantial doubt as to the correctness of the claims now advanced by the present claimant. The burden of proof is by law placed upon the applicant, and it is manifest that it has not been sustained."

In other words, the petitioner has been held to establish beyond "substantial doubt" that his father is a citizen. This was plain and fundamental error in law. It was sufficient if the necessary facts were established by a fair preponderance of the evidence.

Referring to a similar situation, the Supreme Court recently said:

"It is better that many Chinese immigrants should be improperly admitted than that one naturalized citizen of the United States should be permanently

excluded from this country." *Kwock Jan Fat v. White*, 258 U. S. 454, 40 Sup. Ct. 568, 84 L. Ed. 1010.

On the evidence before the immigration tribunals the right of the applicant to admission was established. An order will be entered that the writ issue, and upon the return of it, unless the respondent desires to present further evidence, an order will be entered that the petitioner be discharged.

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**UNITED STATES ex rel. GOTTLIEB et al. v. COMMISSIONER OF IMMIGRATION OF PORT OF NEW YORK.**

(District Court, S. D. New York. March 3, 1922.)

1. **Allens §46—**Issuance and viséing of passport gave alien no vested rights as to admissibility.

The issuance of a passport and the granting of a visé by the American consul before Act May 19, 1921, went into effect, gave alien immigrants no vested right to admissibility, where the quota allowed to their native land by such act had been exceeded long prior to their arrival.

2. **Allens §46—**Wife and children of resident minister excepted from quota provisions.

Under Act May 19, 1921, § 2(d), excepting ministers of any religious denomination from the quota provisions of that act, section 4, providing that it is in addition to the provisions of the immigration laws, and Act Feb. 5, 1917, § 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b), excepting ministers and their wives or children from the exclusion provisions of that act, a minister's wife and children, as well as himself, are excepted from the quota provisions.

Habeas corpus by the United States, on the relation of Gittel Gottlieb and another, against the Commissioner of Immigration of the Port of New York, or other person having the charge, custody, or control of the bodies of the relators. Relators discharged.

J. G. M. Browne, of New York City (B. E. Kopelman, of New York City, of counsel), for relators.

William Hayward, U. S. Atty., of New York City (John Holley Clark, Jr., and James C. Thomas, Jr., Asst. U. S. Attys., and John M. Lyons, all of New York City, of counsel), for respondent.

**MACK**, Circuit Judge. The relators are the wife and child of a resident of the United States who had declared his intention to become a citizen of the United States, and who, at the time of their arrival in this country, was the minister of a congregation at a salary of \$2,000 per year. The sole ground of exclusion was that the quota allowed to their native land had been exceeded long prior to their arrival. The American consul had viséed their passports a few days after the Act of May 19, 1921, had been passed, and before it went into effect.

[1] 1. The issuance of the passport and the granting of the visé gave to the relators no vested rights. Under the law their admissibility depended upon the situation at the time of the arrival in this country. The language of the law is clear; the power of Congress in this respect is not questioned.

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[2] 2. The Immigration Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 959, 960, 4289<sup>1</sup>/<sub>4</sub>a et seq.), is the controlling law. Section 4 of the Act of May 19, 1921, expressly provides that "the provisions of this act are in addition to and not in substitution for the provisions of the immigration laws." Under section 3 of the Act of February 5, 1917, neither ministers nor their legal wives or children under 16 who accompany them, or who subsequently apply for admission to the United States, are within the exclusion provisions. Under the Act of May 19, 1921, section 2(d), ministers of any religious denominations are excepted from the quota provisions.

The question before me is whether, fairly interpreted, the act of 1921 is to be construed so as to limit the exemption to ministers, or more broadly so as to include, as does the act of 1917, in express words, the legal wife or children, under 16 years of age, of a minister. In my judgment, the entire scope of the legislation prevents the narrow interpretation. The separation of a man from his family is concededly a great hardship and dangerous to the welfare of society. The reasoning of the Supreme Court in *Holy Trinity Church v. U. S.*, 143 U. S. 457, 461, 12 Sup. Ct. 511, 36 L. Ed. 226, is applicable here. I believe that the act of 1921, interpreted in the light of the controlling Immigration Act of 1917, should be construed so as to include within the exceptions from the quota provisions the wife and children under 16 of a minister, as well as the minister himself. It is therefore unnecessary to pass upon the other contentions.

The relators will be discharged.

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THE MUSKEGON.

**OLSEN v. AMERICAN TRANSATLANTIC S. S. CO.**

(District Court, E. D. New York. September 26, 1921.)

**Interest**  **45—Respondent held liable for interest on sum admitted to be due from date when due.**

Respondent held liable for interest on the sum admitted by the pleadings to be due libelant, from the date when it became due, where under the rules of the court respondent could at any time have stopped the running of interest by a tender and deposit in court.

In Admiralty. Suit by Andrew Olsen against the steamship Muskegon, formerly the Gotland; the American Transatlantic Steamship Company, claimant. Decree for libelant.

Bullowa & Bullowa, of New York City, for libelant.

Barry, Wainwright, Thatcher & Symmers, of New York City, for respondent.

GARVIN, District Judge. Libelant moves for judgment on the pleadings, demanding a final decree for the sum of \$6,749.66, with interest from November 17, 1915, to date, and the costs of the action, the motion being based on the admission contained in the answer that

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libelant is entitled to recover that sum. The question involved is whether libelant is entitled to interest upon the amount conceded due.

The rules of this court provide as follows:

Rule XXXVI.

*"A tender inter partes before suit shall be of no avail in defense or in discharge of costs unless on suit brought and before answer, plea or claim filed, the same tender is deposited in the court to abide the order or decree to be made in the matter."*

*"At any time not less than 14 days before trial the respondent or claimant may serve upon the libelant's proctor a written offer to allow a decree to be taken against him for the sum of money therein specified, with costs to the date of the offer to be taxed, which the libelant may within ten days thereafter accept and enter judgment accordingly; if not so accepted, and the libelant fail to obtain a more favorable decree, he cannot recover costs from the time of the offer; but if the respondent or claimant deposits the amount of his offer, or tender, and the clerk's fees for paying out the same, with the clerk, the respondent shall recover costs from the time of deposit if the libelant does not recover a more favorable decree."*

Rule XXXVIII.

*"The libelant may at any time on notice take order for the withdrawal of so much of the tender or amount deposited as the court may allow, without prejudice to his subsequent litigation for a larger amount, leaving in the registry a sum sufficient to cover the defendant's costs, in case the amount deposited should be held in this court, or in any appellate court, to be sufficient to meet the libelant's demand."*

*"If the respondent serves on the proctor of the libelant written notice of consent that the whole, or any specific part, of the tender deposited be paid over to the libelant, the respondent shall not in any event be liable thereafter for interest on so much of the libelant's claim."*

Rule XXXVI makes no reference to interest. Reference must be made to rule XXXVIII in order to ascertain how the respondent may be relieved from liability therefor. That rule provides specifically for a deposit in court. Under a state of facts somewhat similar to those of the case under consideration, it was held that the libelant should not be relieved of interest and costs. *Donaldson v. Severn River Co.* (D. C.) 138 Fed. 691.

In view of the fact that the respondent has had the use of money concededly due the libelant since November 15, no equitable consideration is suggested why libelant should not receive interest. The latter could not compel the respondent to make the deposit, and the respondent could have effectually stopped the running of interest by payment into court or tender.

The motion is granted.

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IN RE STONE.

(District Court, N. D. New York. March 8, 1922.)

1. Bankruptcy  $\S$  391(3)—Enforcement of obligations not subject to discharge will not be stayed.

Under Bankruptcy Law,  $\S$  11 (Comp. St.  $\S$  9595), the power to stay obligations of bankrupts relates only to dischargeable debts, and the enforcement of obligations not dischargeable will not be stayed.

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**2. False Imprisonment** ⚡4—False and malicious injury essential.

In New York, a judgment for false imprisonment can only be obtained on a showing of willful and malicious injury to the complainant.

**3. Bankruptcy** ⚡424—Default judgment cannot be impeached, to show there was no malice or willful injury.

On application to stay an execution on a default judgment for false imprisonment, the bankruptcy court will not go beyond the judgment to determine whether there was malice or willful injury, as a judgment by a court having jurisdiction cannot be impeached by a collateral attack.

In Bankruptcy. In the matter of Fred Stone, bankrupt. On order to show cause why execution should not be stayed. Order vacated.

Charles B. Hane, of Herkimer, N. Y., for bankrupt.

Stanley A. Williams, of Syracuse, N. Y., for judgment creditors..

COOPER, District Judge. This is a return of an order requiring Thomas A. Van Bramer, a judgment creditor, to show cause why the execution upon a judgment obtained by him against the bankrupt should not be stayed and why said debt should not be discharged in bankruptcy.

Thomas A. Van Bramer recovered a judgment against the bankrupt by default in the sum of \$689 on the 13th day of December, 1921, in an action for malicious prosecution. The complaint recited, among other things, that the defendant falsely and maliciously, without any reason or probable cause whatever, well knowing the same to be false and untrue, charged Van Bramer with the crime of grand larceny. The bankrupt now seeks to have a body execution upon that judgment stayed, and also to have said obligation discharged under the provisions of section 17a of the Bankruptcy Act (Comp. St. § 9601).

[1] It is a settled rule that under section 11 of the Bankruptcy Law (Comp. St. § 9595) the power of the court to stay obligations of bankrupts relates only to dischargeable debts; that the enforcement of obligations which are not dischargeable will not be stayed. *Matter of Koronsky*, 170 Fed. 719, 96 C. C. A. 39; *In re Kalk* (D. C.) 270 Fed. 627, 631.

[2, 3] In this state, a judgment for false imprisonment could not have been obtained, except upon a showing of willful and malicious injury to the complainant. But the bankrupt asks this court to go beyond the judgment and establish the fact that there was no malice or willful injury to the judgment creditor. This it is without power or inclination to do. Where the court has jurisdiction to render judgment, it cannot be impeached by a collateral attack. *In re Kalk*, *supra*. See, also, *Peters v. U. S.*, 177 Fed. 885, 888, 101 C. C. A. 99, to the same effect.

The remedy of the bankrupt is to move to open the default. The order to show cause is therefore vacated.

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**THE WOULDRIEHEM.**

(District Court, E. D. New York. November 29, 1921.)

**Maritime liens ¶2—Lien for supplies to foreign vessel depends on law of country where furnished, which must be pleaded and proved.**

In a suit to establish and enforce a maritime lien for supplies furnished to a vessel in a foreign port, whether such lien exists, or whether the court has or will exercise jurisdiction, depends on the law of the country where the supplies were furnished, which must be pleaded and proved.

In Admiralty. Suit by the Furness Shipping Agency Company, Limited, against the steamship Woudrichem. On exceptions to libel. Exceptions sustained.

Rumsey & Morgan, of New York City, for libellant.

Bullowa & Bullowa, of New York City (Emilie M. Bullowa, of New York City, of counsel), for claimant.

GARVIN, District Judge. The claimant has filed exceptions to the libel, claiming, first, that no cause of action within the jurisdiction of this court is set forth; second, that no cause of action against the vessel is alleged; third, that it does not appear that any cause of action existed at the port of Rotterdam, where it is alleged that the advances for the purpose of paying claims for work, labor, and materials (upon which the action is based) are alleged to have been made; and, fourth, that it does not appear that under the laws of Holland (where it is alleged that the advances were made) a cause of action against the vessel existed.

As the libel does not allege the home port of the vessel, it does not appear whether the advances were made there or elsewhere, so that there is nothing to show where the maritime liens which are asserted were created. Jurisdiction is dependent upon where the maritime lien relied upon arose; i. e., whether at the home port of the vessel or at some other place. Libellant offered to amend the libel, by alleging the home port and by setting up where the repairs were made and supplies furnished; but it would seem that these amendments would indicate that the cause of action must have arisen in Holland, in which event the Dutch law, not only will determine whether this court has or will exercise jurisdiction, but must be pleaded and proved, in order that the court may determine whether the alleged maritime lien should be enforced here.

"The conclusion was there [in *The Scotia* (D. C.) 35 Fed. 907] reached that the question as to whether a lien, independent of express contract, exists for supplies or necessities furnished to a foreign vessel, depends on the law of the place where the supplies or necessities were furnished, and not on the law of the country to which the vessel belongs." *The Kaiser Wilhelm II* (D. C.) 230 Fed. 717.

It follows, therefore, that the exceptions must be sustained, and that the libel must be amended as suggested by the libellant, and further by pleading the maritime lien law of Holland.

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WASHINGTON LOAN & TRUST CO. et al. v. HAMMOND et al.

(Court of Appeals of District of Columbia. Submitted January 5, 1922. Decided February 6, 1922.)

No. 3552.

1. Wills  $\Leftarrow$ 476—Intention is to be ascertained from whole will.

In construing a will, the intention of testatrix controls, as gathered from the whole will, and not from detached paragraphs or phrases.

2. Wills  $\Leftarrow$ 98—Gift of chattels to be disposed of under instructions not found is ineffective.

A gift of household and personal belongings, with the understanding they shall be disposed of by the legatee in accordance with instructions left with the attorney of testatrix, is ineffective, where no instructions for the disposition were found.

3. Wills  $\Leftarrow$ 473—Bequest in "addition" to preceding is separate.

Where a will gave a legatee a share in the income of a trust for her life, and, in the same paragraph, "in addition to the above," gave the same legatee personal property, to be distributed by her in accordance with instructions, which were not found, the provision for distribution did not apply to the gift of the income, since it could be applied to that gift only if the testatrix wished to change the gift, which was improbable, and since the words "in addition," introducing the second sentence, indicate that the two bequests were distinct; "addition" being defined as the act or process of adding or uniting, especially so that the parts remain independent of one another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Addition.]

4. Wills  $\Leftarrow$ 472—Subsequent paragraph held not to affect construction of previous bequest.

Where one paragraph of the will gave a legatee a share of the income from a trust, and in addition certain personal belongings to be distributed in accordance with instructions of testatrix, a subsequent paragraph providing that, on the death of the legatee, her share in the net profits of the estate was to be paid to a home, does not indicate that the directions for distribution were intended to apply to the bequest of the share of the income, as well as to the personal belongings.

5. Wills  $\Leftarrow$ 439—Motive for clear bequest is immaterial.

The court has no concern with the motives of testatrix in making a bequest, where testatrix has made her intentions clear with respect thereto.

6. Wills  $\Leftarrow$ 858(2)—Subject of ineffective bequest goes with residue.

Under Code of Law, § 1631, providing that, unless a contrary intention appear, property comprised in any bequest which fails or is void shall be included in a residuary bequest, personal belongings of testatrix, which were bequeathed to a legatee, to be disposed of by her in accordance with instructions of testatrix which were never found, so that the legacy was ineffective, go to the residuary legatee, and not to the heirs or next of kin as intestate property.

7. Charities  $\Leftarrow$ 21(1)—Uncertainty of beneficiaries of bequest to "charity" does not invalidate it.

Since a charity is a gift for the love of God or the love of your neighbor in the catholic or universal sense, free from considerations that are personal, private, or selfish, one of the distinguishing elements of a charitable trust is the indefiniteness permitted as to beneficiaries, so that a trust to be used for assisting deserving applicants for admission to a

$\Leftarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

home, who are unable to furnish the necessary money to meet the requirements for admission, is not invalid for indefiniteness of beneficiaries.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charity.]

**8. Perpetuities ⇨8(7)—Charitable bequest for special purpose is within statute exempting from perpetuities.**

Within Code of Law, § 1023, exempting gifts to charitable uses from the law against perpetuities, a bequest to a home for the aged is no less a gift to charitable use, because it is not to the home for its general use, but for the special purpose of aiding needy applicants, who are unable to furnish the money necessary for admission to the home.

**9. Perpetuities ⇨8(1)—Rule not applicable to charitable gift, with no intervening gift.**

The rule against perpetuities does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation.

**10. Charities ⇨43—Chancery can supervise trustees' selection of beneficiaries for chancery trust.**

A bequest to a home, to be used in aiding applicants for admission, who are unable to meet the financial requirements for admission to be determined by the managers, is a charitable use to be administered under the superintendence of a court of chancery, and such court would have power to deal with the refusal of the managers to select deserving applicants entitled to the benefit of the bequest.

**11. Wills ⇨684(6)—Income not needed for designated purpose goes into residue.**

Where the whole income from a trust fund is not necessary to discharge the specific bequest to which it is applicable, and the balance is undisposed of under the will, such balance will go into the residue.

**12. Charities ⇨21(3)—Inaccurate designation of home as beneficiary held sufficient.**

Where testatrix for several years before her death was one of the board of managers of the Presbyterian Home of the District of Columbia, which was authorized to take both men and women, but had never had more than one man, a bequest in the will to "the Presbyterian Home for Old Ladies supported by the Presbyterian Churches" was clearly intended to be for the benefit of the Presbyterian Home; that being the only home in the District supported by Presbyterian Churches.

**13. Wills ⇨104—Courts are reluctant to avoid bequests for uncertainty.**

Courts are reluctant to hold a bequest void for uncertainty, and they only do so when actually compelled by the language used.

Appeal from the Supreme Court of the District of Columbia.

Bill by the Washington Loan & Trust Company, a corporation, as executor of the estate of Matilda J. Ramsey, deceased, and as trustee under the will of said decedent, against Ethel G. Blaine, formerly Ethel M. Garrigus, Harriet S. Ramsey, and others, for a construction of the will, and for instructions concerning the disposition of the property of the estate. From the final decree, the Trust Company and defendants Ethel G. Blaine, Harriet S. Ramsey, and another appeal. Decree modified and affirmed.

Julian W. Whiting, Arthur Peter, E. C. Brandenburg, and L. M. Denit, all of Washington, D. C., for appellants.

Julian W. Whiting, of Washington, D. C., for appellees.

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SMYTH, Chief Justice. The Washington Loan & Trust Company, as executor of the last will and testament of Miss Matilda J. Ramsey, and as trustee of her estate, filed its bill for a construction of the will and for instructions concerning the disposition of the property of the estate. It made all interested persons parties. The bill alleged that certain of the defendants charged that the will was void as a whole, or, if not, that stated parts were invalid, and that there were provisions with respect to which the Trust Company had doubts, and hence desired instructions. Some of the defendants answered; others defaulted. As to the latter a decree pro confesso was taken. From the final decree of the court the Trust Company and three of the defendants appealed. In this court the contestants are the Trust Company and Ethel G. Blaine, formerly Ethel M. Garrigus, upholding the will, and Harriet S. Ramsey and Eva M. Bowstead, who attack the will. For convenience we shall speak of the first-named parties as the Trust Company, and the last-named as the opposers. The points in dispute shall be considered in the order in which the opposers present them.

[1] The intention of the testatrix is the cardinal thing to be sought, and must be gathered from the whole will, and not from detached paragraphs or phrases. Rood on Wills, § 419 et seq. The fifth paragraph of the will is the first brought into question. It provides:

"I give, devise and bequeath to the aforesaid Ethel M. Garrigus during her life two-thirds of the net income derived from my estate by the said Trust Company, payable quarterly. In addition to the above I give, devise and bequeath to the said Ethel M. Garrigus all my household and personal belongings in my residence No. 1337 Q St., N. W., Washington, District of Columbia, and a box with the contents of said box to be marked with her name (Ethel M. Garrigus) in my safety deposit box, it being understood she will make such distribution of the aforesaid bequest to her as shall be made by me and met with my said attorney and executor, Franklin W. Brooks to be delivered to her which my said executor shall see my instructions and wishes fully observed and carried out by the aforesaid Ethel M. Garrigus."

[2] No instructions were found, and because of this the opposers say the last sentence of the paragraph is ineffective, and that the things described therein were not disposed of by it. This is not seriously denied by the Trust Company. Even if it were, it would have to be ruled that the sentence is without force. The instructions not having been produced, we do not know what Miss Ramsey's intention was touching the property referred to. Authorities bearing on the question are 1 Bigelow's Jarman, 98; Rood on Wills, § 250; Bryan's Appeal, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393; General Clergy Relief Fund v. Sharpe, 43 App. D. C. 126.

[3] But opposers go farther and contend that the failure to prove the instructions rendered the whole paragraph void. This is bottomed on the assumption that, according to the true meaning of the paragraph, the instructions relate, not only to the bequest mentioned in the last sentence, but also to that covered by the first sentence. The bequest of the first sentence has no condition attached to it in that sentence—it is for life. In the second sentence the bequest is not to the beneficiary absolutely as in the first, but to her to be distributed in accordance with instructions left by the testatrix with her attorney. It

is not likely that those instructions related to the gift made in the first sentence. Why should any instruction be given with respect to it, unless testatrix wished to change it, which is not probable. We are of opinion that the instructions, if any were left, did not deal at all with the bequest of the first sentence.

Besides, we are satisfied that the words "in addition," at the beginning of the second sentence, indicate that the bequest of the first is distinct from that of the second. The Century Dictionary defines the word "addition" as "the act or process of adding or uniting, especially so that the parts remain independent of one another." In a Vermont case the will gave to the testator's wife one-third of all his personal and real estate, "and in addition to that, \* \* \* one cow, ten sheep, and one hundred dollars in money, to have at her disposal during her natural life." The court said:

"The words, 'and in addition to that,' introduced new and distinct matter, and the qualification in the last member of the paragraph is not to influence what has gone before, which is perfect and sensible in itself." *Hart v. White*, 26 Vt. 260, 269.

In the paragraph we are considering it is clear that there are two bequests, one made by the first sentence and one by the last. If the instructions related to both bequests, the plural word "bequests" would have been employed in the last sentence. But it is not. Instead, the instructions are made to relate to the "aforesaid bequest," meaning undoubtedly the bequest provided for in the last sentence.

[4] Opposers seek to draw some aid for their position from the ninth paragraph of the will, but without success. The language relied upon reads:

"Upon the death of Ethel M. Garrigus my bequest to her being for her life, the two third interest in the net profits of my estate so bequeathed her," etc.

This, by reciting the gift of two-thirds of the income to Ethel M. Garrigus, emphasizes, rather than cuts down, the gift, as urged by counsel. The Presbyterian Home was to receive "upon the death of Ethel M. Garrigus" two-thirds of the net income—not the two-thirds which had been given to her. Argument could not make this clearer.

[5] It is claimed that the testatrix had but a very slight acquaintance with Miss Garrigus, and little confidence in her, because she was not willing to trust her to dispose of what are said to be the unimportant things mentioned in the last sentence of the fifth paragraph, but charged her attorney with the duty of directing her in that regard, and from this opposers argue that there is no reason why the testatrix should give to her two-thirds of the income of the estate to the exclusion of persons said to be nearer to her. Undoubtedly the persons referred to as nearer the testatrix are Harriet S. Ramsey and Eva M. Bowstead, the appellants. But their right to be regarded either as heirs at law or next of kin of the testatrix is seriously disputed by the Trust Company. Putting aside for the moment the contention of the Trust Company in this respect, it is sufficient to say that the record discloses that Miss Garrigus and the testatrix were cousins, that the former visited the latter for six or eight weeks in the spring of 1914, some three months

before the will was made, that they corresponded frequently, and that the testatrix sent to Miss Garrigus birthday and Christmas presents. In the third paragraph of the will the testatrix intrusted to Miss Garrigus, in the event of the death of the former's attorney, the performance of a duty which she first imposed upon the attorney. The court, however, has no concern with the motives of the testatrix in this connection, since she has made clear in her will what her intentions were with regard to Miss Garrigus.

[6] We are not able, though, to agree with the court below that Miss Ramsey died intestate as to the things covered by the second sentence of the fifth paragraph. The fourth paragraph gives to the Washington Loan & Trust Company, as trustee, all the estate of the testatrix not "otherwise specially devised or bequeathed," to be distributed as directed in the will. The property covered by the last sentence was not "otherwise specially devised." Section 1631 of the Code says:

"If a devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition be made or required by the will. Unless a contrary intention appear by the will, such property as shall be comprised in any devise or bequest in such will which shall fail or be void or otherwise incapable of taking effect shall be deemed included in the residuary devise or bequest, if any, contained in such will."

No contrary intention appearing, it must be held that the property fell into the residue provided for in the fourth paragraph.

[7] The next contention is that the bequest made by the ninth paragraph to the Presbyterian Home is void because of uncertainty. A part of this paragraph has already been given. We now set out the whole:

"Upon the death of Ethel M. Garrigus my bequest to her being for her life, the two third interest in the net profits of my estate so bequeathed her with any amounts derived from that source or any other, shall in the absence of later specific bequests I may hereafter make, be paid to the said Presbyterian Home, in semi-annual payments, for the purpose of assisting deserving applicants who are unable to furnish the necessary money to meet the requirements for admission to the Home which shall be determined by the Board of Managers acting for the different churches in Washington aforesaid, supporting said Home and for no other purpose whatsoever."

The Home is made the trustee to use the fund for "assisting deserving applicants who are unable to furnish the necessary money to meet the requirements for admission to the Home." The board of managers of the Home are to determine who are deserving applicants. These applicants are the beneficiaries, and are uncertain. Because of the uncertainty it is argued the trust is void. The trust is a charitable one. With approval the Supreme Court of the United States quoted the following definition of a charity:

"Whatever is given for the love of God, or for the love of your neighbor, in the catholic or universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish." *Ould v. Washington Hospital, etc.*, 95 U. S. 303, 311 (24 L. Ed. 450).

One of the essentials of such a trust is indefiniteness as to the beneficiaries. "If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." *Russell v. Allen*, 107 U. S. 163, 167, 2 Sup. Ct. 327, 330 (27 L. Ed. 397). This court quoted with approval from *Mr. Pomeroy* (2 Pom. Eq. Jur. § 1025) the following:

"One of the distinguishing elements of a 'charitable' as compared with an ordinary trust consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes of the beneficiaries." *Columbia University v. Taylor*, 25 App. D. C. 124, 131.

This case was affirmed on appeal in 226 U. S. 127, 33 Sup. Ct. 73, 57 L. Ed. 152. Other cases supporting the doctrine are *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Beach on Trusts and Trustees*, § 322; *Speer v. Colbert*, 200 U. S. 130, 26 Sup. Ct. 201, 50 L. Ed. 403.

The courts of Massachusetts, Maryland, West Virginia, and other states apply the same test of definiteness to charitable as to private trusts, but they are not in harmony with the great weight of authority, and certainly not with the holding of the Supreme Court of the United States and this court. The question here involved was not decided in *Dinwiddie v. Metzger*, 45 App. D. C. 310, for it was conceded by the parties in that case that the charitable trust which the will attempted to create could not be carried into effect. True, in the earlier days, long before this court was established, the Maryland rule prevailed here. *Barnes v. Barnes*, 3 Cranch, C. C. 269, Fed. Cas. No. 1,014; *Coltman v. Moore*, 1 MacArthur (8 App. D. C.) 197. That is not so now.

[8] According to our Code (section 1023) gifts to charitable uses do not come within the purview of the law against perpetuities. But counsel suggest that since the bequest is not to the Home for its general use, but for a special one, it is not protected by the Code provision and is void. We are unable to perceive the reason for this. The gift is to an institution for the benefit of needy persons, and comes fully within the definition of a charitable use. The circumstance that it is not for the general use of the Home is immaterial—it is for a charitable use and that is enough.

[9] The rule against perpetuities "does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation." *Hopkins v. Grimshaw*, 165 U. S. 342, 355, 17 Sup. Ct. 401, 406 (41 L. Ed. 739), and cases there cited. There is no intervening gift of that character here. Title to the bequest vests upon the death of Miss Garrigus. This of itself saves it from the operation of the rule against perpetuities. *Rood on Wills*, § 610, and cases cited in footnotes. The only case cited on the question by the opposers is *Matter of Will of O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53. It is not in point. There the bequest was to three individuals who were to administer the estate under instructions not embodied in the will. The court held that the instructions tied up the property for three lives and an uncertain period beyond, and thereby violated the rule against perpetuities. There is no feature of that character in the will before

us. The court also ruled that the trust was void because the beneficiaries were uncertain. According to the law of New York, definiteness is one of the essential characteristics in a valid charitable trust. *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; *Levy v. Levy*, 33 N. Y. 97. Such is not the law of this jurisdiction, as we have shown.

[10] Nor is there anything in *Dinwiddie v. Metzger*, *supra*, which supports the position taken by the opposers, to the effect that if the Home should refuse to select the deserving applicants there is no power in chancery to deal with the matter. The trust in that case was not a charitable one. When the founder of a charitable use describes the general nature of the trust, "he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." *Russell v. Allen*, *supra*, 107 U. S. 167, 2 Sup. Ct. 330, 27 L. Ed. 397. If a trustee refuses to perform his duty, a court of chancery has the power to remove him and substitute another. *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; *May v. May*, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

[11] Opposers say that the entire amount of the one-third of the income not given to Miss Garrigus will not be necessary to discharge the specific bequest to which it is applicable, and that whatever is left is undisposed of under the will. If there be any left, it will go into the residue under paragraph 4, and should be invested and disposed of as provided in the fifth finding of the decree.

[12] The beneficiary under the eighth and ninth paragraphs is described as the "Presbyterian Home for Old Ladies, supported by the Presbyterian churches of Washington, D. C." According to the proof, there is but one Presbyterian Home in the District and it is called "the Presbyterian Home of the District of Columbia." It is said that the last-named Home is not the designated beneficiary, and, as there is no other Presbyterian Home in the District, the bequest is void. The testatrix was one of the board of managers of the last-named Home from 1908 until she died, with the exception of one year, and was also a member of the Washington Heights Presbyterian Church. Her will was made, as we have heretofore stated, in August, 1914. In that year she attended seven meetings of the Board. The Home is authorized to take both men and women, but it never harbored more than one old man, and at the time a witness testified it was caring for 18 old ladies. In 1914 there were probably 14 or 15 there. Under these circumstances it is not unnatural that the testatrix should speak of the establishment as the Presbyterian Home for Old Ladies. We think the institution which she had in mind is the Presbyterian Home of the District of Columbia, and that it is entitled to take the bequest, notwithstanding the fact that she did not designate it by its proper name. A gift to the "Institution for the Relief of the Ruptured and Crippled in the City of New York" was held to sufficiently designate "the New York Society for the Relief of the Ruptured and Crippled." *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22. A gift to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church" was held sufficient to entitle the "Wo-

man's Foreign Missionary Society" of that church to the gift, it being the only society engaged in that work. *Woman's Foreign Missionary Society v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711. This court held in *Colbert v. Speer*, 24 App. D. C. 187, that a bequest to "Georgetown University," there being no institution bearing that name, sufficiently indicated "the President and Directors of Georgetown College," and that a bequest to "St. Joseph's Catholic Orphan Asylum" was valid as a gift to "the Trustees of St. Joseph's Male Orphan Asylum." This case was affirmed by the Supreme Court of the United States in 200 U. S. 130, 26 Sup. Ct. 201, 50 L. Ed. 403.

[13] Objections to other parts of the will, which make small bequests, are urged on the ground of uncertainty. We have considered them, but find they are devoid of merit. It is a well-established rule of law that courts are reluctant to hold a bequest void for uncertainty, and they only do so when actually compelled to by the language used. *Inglis v. Trustees*, 3 Pet. 99, 7 L. Ed. 617. No such compulsion exists in this case.

The right of the appellants Ramsey and Bowstead to contest the will is challenged, but, since we rule against all their contentions, it is not necessary to pass upon their right.

The decree must be, and it is, modified as heretofore indicated, with respect to the things covered by the last sentence of paragraph 5, and, as so modified, is affirmed; costs to be assessed against the appellants Harriet S. Ramsey and Eva M. Bowstead.

Modified and affirmed.

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### JANES v. JANES.

(Court of Appeals of District of Columbia. Submitted January 4, 1922. Decided February 6, 1922.)

No. 3508.

**1. Witnesses  $\S$  183—Court not required to call party to testify to transaction with deceased.**

Under Code, § 1064, prohibiting a party from testifying to any transaction with a deceased person, in a suit against an administrator, with certain exceptions, among which is the case where the party is called to testify by the court, the trial court should not call the party, except in extreme and special cases, and is not required to call him to testify whenever requested, which would defeat the manifest purpose of the statute.

**2. Appeal and error  $\S$  1056(3)—Witnesses  $\S$  176(1)—Party offering in evidence answer containing statement of deceased is not thereby entitled to testify, so that exclusion of answer was not prejudicial.**

In a suit for a partnership accounting against the representative of a decedent, the introduction by plaintiff in evidence of the answer, containing statements by decedent, would not be testimony by the adverse party, as to such statements, which would entitle plaintiff to testify in respect thereto, but would be evidence on behalf of plaintiff, and he was not prejudiced by the exclusion of the answer from the evidence.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Appeal and error  $\S$  232(2)—Contention that sworn answer in equity entitled plaintiff to testify as to certain matter not raised by objection to answer as evidence.

The contention that the sworn answer in proceedings in equity was evidence on behalf of the defendant, so as to entitle plaintiff to testify concerning statements by defendant's intestate, uncorroborated in the answer, cannot be first made on appeal, and will not be considered, where the objection below was to the exclusion of the answer as evidence.

4. Appeal and error  $\S$  662(1)—Record held to show party testified as to statement of attorney for deceased.

A complaint on appeal that the trial court erred in refusing to permit plaintiff to give a conversation he had with the attorney of defendant's intestate relative to the disposition of a balance he claimed was due from the intestate is not sustained by the record, showing that plaintiff testified that he asked the attorney about the balance, and that the latter replied the intestate had invested it in the subject of the alleged partnership.

5. Appeal and error  $\S$  1056(4)—Exclusion of evidence held not prejudicial under decree.

In a suit for an accounting of an alleged partnership, the exclusion of plaintiff's testimony that defendant's intestate had told plaintiff he would put him in partnership in the business when the war closed, was not prejudicial to plaintiff, where the decree was based on a finding of an agreement to form a partnership at the close of the war, which was not carried out, because intestate died during the war.

Appeal from the Supreme Court of the District of Columbia.

Suit by Frank Janes against Androneke Janes, administratrix of the estate of John Janes. Decree for defendant, and plaintiff appeals. Affirmed.

E. F. Colladay, P. H. Marshall, and B. B. Pettus, all of Washington, D. C., for appellant.

S. V. Hayden and Thomas H. Patterson, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant, plaintiff below, claiming that he was a partner of his brother John at the time of the latter's death, in a business conducted at 444 Ninth Street, N. W., Washington, filed his bill asking that the administratrix of John's estate be enjoined from disposing of the assets of that business, and that she be required to account for the assets to a receiver appointed by the court. She denied the partnership. After a trial, the court found that John had promised to make appellant a partner after the war, but that John died before the war was over, and hence that the promise was never carried into effect.

[1] Appellant, realizing that section 1064 of the Code prohibited him from testifying to any transaction with, or admission of, his brother, moved the court to call him as a witness, which it declined to do. This motion was based on the closing phrase of the Code section just mentioned, which says that the surviving party shall not testify, except under stated conditions, one of which is "unless called to testify thereto by the court." We held in *Ockstadt v. Bowles*, 34 App. D. C. 58, that the trial court should not call the party, except in "extreme and spe-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cial cases." This must be the correct construction of this very important statute. If we were to adopt the view advocated by appellant, and rule that it is the duty of the court to call a party to testify whenever he requests that it be done, we would thereby defeat the manifest purpose of the statute, and this a court may not do. *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U. S. 345, 40 Sup. Ct. 516, 64 L. Ed. 944; *Arthur D. King v. District of Columbia*, — App. D. C. —, 277 Fed. 562. We find nothing in the present case which would justify us in saying that it is extreme or special.

Appellant cites *Myers v. Manlove*, 53 Ind. App. 327, 101 N. E. 661, and *Parsons v. Wentworth*, 73 N. H. 122, 59 Atl. 623, as authorities for his contention. But they are not. In the *Myers Case* it was ruled that whether or not the surviving party should be called as a witness depended on "the particular facts in each case." There the surviving party was called, but it appeared that, while he denied liability on the note in suit, which was given by him to the deceased, his denial was based upon a transaction which he had with one of the plaintiffs, which she could deny, if she thought proper, and with respect to which the deceased had no knowledge. This distinguishes it from the case at bar, where the appellant, the surviving party, sought permission to give testimony with respect to conversations had with his brother, the deceased. The New Hampshire court, in the *Parsons Case*, said:

"It is a proper exercise of the court's discretion to allow the surviving party to testify to relevant facts occurring in the lifetime of the deceased party, as to which the latter could not testify, if living. The exercise of the court's discretion in this case, in allowing the plaintiff to testify to facts within the knowledge of himself and the surviving partner only, was in accordance with this rule, and the exception thereto must be overruled."

Manifestly this is not an authority for calling the surviving party to testify to statements made by the deceased.

[2, 3] Appellant offered the appellee's answer in evidence, but the offer, on objection, was rejected by the court. The purpose of the offer was to show that the appellee, by reciting in her answer a statement which she alleged her husband had made to her concerning the appellant, had thereby testified in regard to that statement, and that therefore it was competent for him to give testimony in relation to the same. This theory is rather attenuated, and not at all persuasive. If the offer had been accepted, it could not be said that thereby it had been established that, in the language of the statute, "the opposite party" had "first" testified "in relation to the same." The testimony would be charged to the appellant and not to the opposing party. While it is argued that the answer, being sworn to, was according to equity practice evidence in favor of the appellee, that is immaterial, since nothing was claimed on that hypothesis in the trial court. The question we have to deal with is whether or not the court erred in refusing to receive the answer in evidence. We think it did not.

[4] Complaint is made because the court did not permit the appellant to give a conversation which he had with Mr. Toomey, the attorney of his brother John, relative to the disposition of a balance which he claimed was due him from his brother. Mr. Toomey delivered to him two checks, for \$250 each, and other money, on account of what

was due from his brother to him. He claimed this did not discharge John's entire debt to him, and asked Mr. Toomey about the balance. The latter replied, according to appellant's story, that his brother John had invested it in a saloon [the subject of the alleged partnership], and that at the end of the war John would start a place and associate appellant with him as a partner. We think this shows that he was permitted to testify as to the disposition made of the remaining money, namely, that it had been invested in the saloon.

[5] Two witnesses testified, on behalf of the appellee, to a conversation between John and Frank in the kitchen of 514 Ninth street, a few months before the former's death. Appellant was permitted to rebut what they said. He went farther, however, and testified with respect to statements alleged to have been made by his brother, but to which no reference had been made by the two witnesses. This was stricken out, on the ground that it was prohibited by the Code section heretofore referred to. In it he said that John had told him that he would "put him in partners at 444"; that "when the war was stopped then he would draw the papers, and then the place—they would remodel it from a saloon, near-beer place—to a candy store"; that, "if he was satisfied, to sell the place or rent the lease, and whatever money they would get out of it, to divide it up," and that he was satisfied with that. No prejudice could have resulted from the exclusion of this testimony, for its only tendency was to show that there was an agreement between the brothers to become partners "when the war was stopped," and that Frank was satisfied with the arrangement. This is in harmony with the decree of the court. The place at 444 Ninth street was open for business before John's death in September, 1918, and his intention was to turn it into a candy store after the war. But appellant never worked in the place, nor had anything to do with the business conducted there.

We are satisfied that no prejudicial error was committed, and the decree is affirmed, with costs.

Affirmed.

**WEINSTEIN v. JULIUS LANSBURGH FURNITURE & CARPET CO.**

(Court of Appeals of District of Columbia. Submitted January 4, 1922. Decided February 6, 1922.)

No. 3505.

1. Reference  $\S$  100(7)—Failure to except to auditor's findings admits they are correct.

Under Code,  $\S$  254, authorizing judgment on the auditor's report, if no exceptions are taken thereto, failure to except to a finding in the report is equivalent to an admission it is correct.

2. Reference  $\S$  100(2)—Exceptions to subordinate finding unavailing, after admission of ultimate finding.

Exceptions to the action of the auditor in rulings on testimony and to a finding that plaintiff was not bound to account to defendant for certain moneys, if erroneous, are unavailing to defendant, where the ultimate findings by the auditor that the contract in controversy was absolute and not conditional, and that defendant was indebted to the plaintiff in the amount stated, were admitted by defendant's failure to except thereto.

3. Reference  $\S$  100(2)—Exceptions may be taken only to items found by auditor.

Under Code,  $\S$  254, requiring a party excepting to the report of the auditor to point out particularly the items which he wishes to challenge, and to state the grounds of his exception, exceptions can be taken only to the findings—items in the report, and not to matters outside of the report, such as erroneous rulings on evidence, though such rulings may be included as grounds for the exceptions to particular items.

Appeal from the Supreme Court of the District of Columbia.

Action by the Julius Lansburgh Furniture & Carpet Company against Morris Weinstein. Judgment for plaintiff, on overruling defendant's exceptions to the report of the auditor, and defendant appeals. Affirmed.

Joseph T. Sherier and J. W. Cox, both of Washington, D. C., for appellant.

Edmund L. Jones and Frank J. Hogan, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The Julius Lansburgh Furniture & Carpet Company, a corporation, called here for convenience the company, sued Weinstein for \$1,447.23, the balance of an account claimed to be due for furniture sold and delivered to the latter. Weinstein stated that he had purchased from the company furniture valued at \$385, upon which he was entitled to certain credits that would reduce the amount to \$119.56; that, in addition to the furniture just mentioned, he had purchased from the company other furniture for which he was to pay the net cost to the company, plus 12½ per cent., and that the amount due was to be determined from invoices received by the company from the manufacturers; that he gave the company notes in the sum of \$11,459.83 for the estimated cost of the furniture last purchased, and paid them when they became due; that the estimated cost was taken because the company could not supply the invoices at that

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time, but agreed to produce them later, and that when it did, if the amount shown to be due thereby was less than the sum for which the notes had been given, the company would return the excess to him; that he frequently called upon the company to produce the invoices, but it refused to do so; and that, if the invoices were produced, they would show that he was entitled to a credit of at least \$1,000. He asked judgment for such sum as might be found due him after a just accounting.

On motion of Weinstein, without objection of the company, the case was referred to the auditor, to audit and state the accounts and dealings between the parties, and to report to the court. Testimony was taken before him, who in due time made a report. Exceptions filed by Weinstein were, save one, overruled by the court, and the case was referred to the auditor for another report, which he later filed. In this he found, among other things: (a) That the invoices were delivered to Weinstein; (b) that the transaction in which the notes passed was closed by their delivery, that it was not a settlement based on a mere estimate or approximation of the amount due, as claimed by Weinstein, but that the company and Weinstein had agreed that the latter owed at that time the amount for which the notes were given, and that they were paid as alleged by Weinstein; and (c) that when the action was instituted there was a balance of \$1,353.87 due from Weinstein to the company. Six exceptions were filed to this report. They were all overruled by the court, and judgment for \$1,353.87, with interest, was entered for the company. Weinstein appeals.

[1] No exception was taken to either finding (b) or (c). Section 254 of chapter 4 of the Code, under which the case was referred, provides that judgment may be entered upon the auditor's report if no exceptions are taken thereto, but that, if exceptions are taken, the person excepting must point out particularly the item or items excepted to. *Lincoln v. Virginia Portland Cement Co.*, 49 App. D. C. 33, 258 Fed. 505. Failure to except to a finding, as we understand the statute, is equivalent to an admission that it is correct. Consequently Weinstein admitted both findings (b) and (c). In other words, he has confessed that the transaction involving the notes was not conditional, but final, and that he is indebted to the company in the sum of \$1,353.87.

[2] Exceptions were taken to the action of the auditor in rejecting certain testimony, and in admitting other testimony; also to an alleged finding made by him that the plaintiff was not bound to account to Weinstein for money expended by the company in his behalf. Suppose the auditor did err in those respects; what difference does it make to Weinstein, since he admitted the amount found due was correct?

As we understand chapter 4, the party defeated before the auditor must except to his ultimate finding, and to every other finding which he believes prejudicially affects that finding, and must state with particularity the grounds of each exception. In other words, he must show the relation between the subordinate finding and the ultimate

one, and that, if his theory is correct, the ultimate one is wrong in whole or in part. This he cannot do if he admits, as Weinstein did here, that the ultimate finding is free from vice.

[3] According to section 254, only actions "grounded upon an account, or in which it may be necessary to examine and determine upon accounts between the parties," may be referred to the auditor. His report should contain a finding or findings showing the condition of the account. The exceptant must point out particularly the item or items—the findings—which he wishes to challenge, and "state the grounds" of his "exception." If in this statement he raises a question of law, counsel must certify that in his opinion it is "well founded." If he raises a question of fact, the litigant must swear "that the exceptions are not filed for delay, and that the allegations \* \* \* in said exceptions are true to the best of his knowledge and belief." Whether or not a question of either law or fact exists is to be determined from the statement of the "grounds of the exception," assuming them to be true. This is why the certificate is required to the one and the oath to the other. The question of law, of course, is for the court; the question of fact, briefly, but clearly and definitely, set forth, for the jury.

In the present case, exceptions were taken, as we have remarked, to the rejection of proffered testimony, and to the acceptance of testimony, though there is nothing in the report concerning either. We repeat, the exceptions must be to findings—items—in the report, and not to matters *dehors* the report. The statute so ordains, and it must be followed. Of course, "the grounds" for the exception may disclose matters not in the report which it is proper to consider, as, for example, if it is made to appear therein that the auditor erroneously excluded or admitted testimony, and that this action affected the result, the court may, if it thinks proper, re-refer the case, with proper instructions. But this does not affect the fact that the exception must be to the things, the items, the findings found in the report.

For the reasons given, the judgment is right, and is affirmed, with costs.

Affirmed.

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#### **E. McILHENNY'S SON v. B. F. TRAPPEY & SONS (two cases).**

(Court of Appeals of District of Columbia. Submitted January 12, 1922.  
Decided February 6, 1922.)

Nos. 1468, 1469.

1. Trade-marks and trade-names and unfair competition § 3(4), 9—"Tabasco Pepper Sauce" is a geographical and descriptive name.

The words "Tabasco" and "Tabasco Pepper Sauce," as applied to a sauce composed principally of Tabasco pepper, are geographical and descriptive, and are not registrable as a common-law trade-mark.

2. Trade-marks and trade-names and unfair competition § 21—Substantial adverse use prevents registration under ten-year clause.

A substantial adverse use by the opposer, even if an infringing use of mark, prevents the registration of a trade-mark under the ten-year clause of the Trade-Mark Act (Comp. St. § 9490).

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3. Trade-marks and trade-names and unfair competition ¶45¼, New, vol. 7A Key-No. Series—Disclaimer of descriptive words unavailing, if they are dominating feature.

Where the descriptive words constitute the distinctive and dominating feature of a trade-mark, a disclaimer of such words is not availing to prevent cancellation of mark.

4. Trade-marks and trade-names and unfair competition ¶45¼, New, vol. 7A Key-No. Series—Parties not simulating trade-mark label can have trade-mark canceled as descriptive.

A petitioner for the cancellation of a registered trade-mark, whose dominating feature is a descriptive word, is entitled to the relief asked, where his label uses the descriptive word, but shows that it was not an attempt to simulate the label of the registrant.

Appeal from the Commissioner of Patents.

Two petitions by B. F. Trappey & Sons against E. McIlhenny's Son, for the cancellation of two trade-marks. From decisions of the Commissioner of Patents, canceling the trade-marks, the registrant thereof appeals. Affirmed.

Francis M. Phelps, of Washington, D. C., and E. S. Rogers, of Chicago, Ill., for appellant.

William L. Symons, of Washington, D. C., for appellees.

ROBB, Associate Justice. These are appeals from decisions of the Patent Office sustaining appellees' petition for the cancellation of two trade-marks registered by appellant under the so-called ten-year clause of the Trade-Mark Act (Comp. St. § 9490). We here reproduce the mark involved in No. 1468, which differs from the mark in No. 1469 merely in the coloring employed:

In appellees' petition for cancellation it is averred that since 1896 it has continuously manufactured and sold in interstate commerce tabasco pepper sauce, and that since about 1898 it has used the following label on its goods:



In its answer appellant, while admitting that its registration was under the ten year clause of the Trade-Mark Act, denies "that the words 'Tabasco Pepper Sauce' are properly applicable to petitioners' said product, and denies that the same have ever been used by petitioners, except in violation of McIlhenny Company's rights." It further avers that "independently of said registration it has and claims the exclusive right to the words 'Tabasco' and 'Tabasco Sauce.'"



[1] In *McIlhenny v. New Iberia E. of T. P. Co.*, 34 App. D. C. 430, which involved an application for the cancellation of the word "Tabasco" registered by the appellant herein, we ruled that the word, being geographic and descriptive, could not be appropriated as a technical trade-mark. This view was adopted by

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the Supreme Court of Louisiana. *New Iberia E. of T. P. Co. v. E. McIlhenny's Son*, 132 La. 149, 61 South. 131.

We directed attention in our former opinion to the significant fact that no application for registration of the word "Tabasco" was made by the McIlhenny Company until after the expiration of the term of its monopoly under the patent dated September 27, 1870, for improvement in pepper sauce. In the specification of that patent it is stated that the invention "relates to a new process of preparing an aromatic and strong sauce from the pepper known in the market as Tabasco pepper. This pepper is as strong as Cayenne pepper, but of finer flavor. \* \* \* One or two drops of it will be sufficient for any dish."

In *McIlhenny Co. v. B. F. Trappey*, — App. D. C. —, 277 Fed. 615, present term, our attention was invited to an article entitled "Pepper" in the *Western Horticultural Review* of March 7, 1853 (in the Library of Congress), in which it is stated that a Col. White of Louisiana had "introduced the celebrated tabasco red pepper, the very strongest of all peppers of which he has cultivated a large quantity with a view of supplying his neighbors, and diffusing it through the state. \* \* \* It is exceedingly hot, and but a small quantity of it is sufficient to pepper a large dish of food." The article then states that Col. White had "made a sauce or pepper decoction of it, which possesses in a concentrated and intense form, all the qualities of the vegetable, *a single drop of this sauce will flavor a whole plate of soup or other food.*" It thus appears that, as applied to pepper sauce composed principally of tabasco peppers, the words "Tabasco Pepper Sauce" are aptly descriptive, and hence not registrable as a common-law mark. In other words, we adhere to our earlier decision.

[2] It is now contended that appellees' use of the word "Tabasco" during the ten-year period (1895-1905) was an infringing use and therefore not a bar to registration under the ten-year clause. This contention is without merit, since appellees' use was substantial, open, and adverse. *Dauids Co. v. Dauids*, 233 U. S. 461, 466,<sup>1</sup> citing *In re Cahn, Belt & Co.*, 27 App. D. C. 173, 177; *Worster Brewing Corp. v. Rueter*, 30 App. D. C. 428, 430, 431; *In re Wright*, 33 App. D. C. 510.

[3] In *Beckwith v. Com. of Patents*, 252 U. S. 538, 40 Sup. Ct. 414, 64 L. Ed. 705, cited by appellant, there was a disclaimer of the descriptive words of the trade-mark. Here the right to the exclusive use of the descriptive words is asserted. Moreover, in this case the descriptive words constitute the distinctive and dominating feature of the mark, so that a disclaimer would not help appellant. In the *Beckwith Case* it was recognized that the design of the trade-mark may be "so simple as to be a mere device or contrivance to evade the law and secure the registration of nonregistrable words," as in *Nairn Linoleum Co. v. Ringwalt Linoleum Works*, 46 App. D. C. 64, 69, cited by the Supreme Court. In other words, if the descriptive words dominate the mark a mere disclaimer will avail nothing.

[4] An examination of appellees' label shows that it is not attempting to simulate the label of appellant; that is to say, so far as this record discloses appellees are selling Trappey's Tabasco Sauce, as dis-

<sup>1</sup> 33 Sup. Ct. 618, 58 L. Ed. 1048.

tinguished from McIlhenny's Tabasco Sauce. Appellees therefore have the right to seek the cancellation of appellant's mark. *Levy & Co. v. Uri*, 31 App. D. C. 441. A refusal to cancel appellant's mark would amount to a ruling that no one other than appellant is entitled to sell, under its proper name, sauce made from tabasco peppers.

The decisions are affirmed.  
Affirmed.

Mr. Justice HOEHLING, of the Supreme Court of the District of Columbia, sat in the place of Mr. Chief Justice SMYTH in the hearing and determination of this appeal.

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CHALMAN v. DE VOE.

(Court of Appeals of District of Columbia. Submitted January 10, 1922. Decided February 6, 1922.)

No. 1462.

1. Patents §91(1)—Junior applicant has burden of proof in interference proceeding.

In interference proceedings, the junior party has the burden of proof.

2. Patents §113(7)—Judgment of office tribunals on question requiring knowledge of drawings is entitled to great weight.

Where the question whether drawings of the senior party in interference proceedings, in connection with the statements in the specifications, disclosed the claims in issue was very close and its determination required a thorough knowledge of drawings, supplemented by the ability to apply specifications to drawings, as to which the Patent Office tribunals were experts, their judgment is entitled to great weight.

3. Patents §113(7)—Concurrent findings of three tribunals as to priority not reversed unless clearly wrong.

Where the three tribunals of the Patent Office concurred in holding that the senior party was the prior inventor, their finding will not be reversed unless it appears to be clearly wrong.

Appeal from the Commissioner of Patents.

Interference proceedings between John E. Chalman and Albert H. De Voe, senior applicant. From a decision of the Commissioner of Patents awarding priority to the senior applicant, the junior applicant appeals. Affirmed.

C. L. Sturtevant and E. G. Mason, both of Washington, D. C., for appellant.

Gifford & Bull and George F. Scull, all of New York City, for appellee.

SMYTH, Chief Justice. This is an interference proceeding relative to an attachment for sewing machines having a folding device for use in forming a hem around the edge of a circular garment. Counts 1 and 4 illustrate the four counts of the issue. They read thus:

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1. In combination with stitch-forming mechanism, a hemmer having a hem folding cavity defined by an upwardly turned guide-wall terminating in an overhanging flange and an oppositely arranged guide-wall and lip, said lip being lower than said overhanging flange and retractable whereby a circular hem may be completed without stopping the stitch-forming mechanism.

4. In a hemmer having a hem-cavity, a lip defining a portion of said hem-cavity and means including a spring for permitting said lip to be bodily retracted horizontally to enable the uninterrupted completion of a circular hem.

[1] Chalman is the junior party, and therefore has the burden of proof. He moved to dissolve the interference on the ground that De Voe could not make the claims of the issue. There were five counts at that time. His motion was sustained by the law examiner, who was overruled on appeal by the Board of Examiners in regard to all the claims save No. 1. No appeal was taken with respect to the ruling on the last-named claim, and the original counts 2 to 5 were renumbered 1 to 4, inclusive, which now constitute the claims of the issue.

As to De Voe's right to make the claims, it is contended that he cannot do so because the movable lip shown in his application is not so arranged as to be in the line of stitching when the stitching of the hem is nearly completed, and that this lip is movable only for the purpose of permitting the work to be withdrawn from the attachment. In De Voe's original application occurs this:

"When the hem is completed, retraction of guide plate 19 will expose the hem cavity and permit the work to be withdrawn from the attachment, as will be understood without further explanation."

The law examiner, basing his conclusion largely upon this statement, said that since De Voe's drawing did not unmistakably disclose the construction and operation covered by the counts, it must be held that the statement governed, and consequently he sustained the motion to dissolve.

The examiners in chief did not attach as much importance to the statement as did the law examiner. They held that the drawing illustrates a structure which forms the seam at the edge of the hem so that the lip 19 must be retracted before the hem can be completed. They further pointed out that there are other statements which are inconsistent with the one relied on by the law examiner, and which tend to support the drawings, and from a consideration of the drawings and the statements they reached the conclusion that De Voe was entitled to make the claims. The matter then went back to the examiner of interferences, who, of course, followed the judgment of the examiners in chief with respect to the right to make the claims, and, having decided that Chalman had failed to overcome De Voe's date, awarded the latter priority. Upon appeal from his decision the examiners in chief again thoroughly considered the question of De Voe's right to make the claims, but refused to recede from their former holding. For substantially the same reasons as those given by the examiners in chief, the Commissioner affirmed their decision.

[2] The question involved is very close. To determine it requires a thorough knowledge of drawings, supplemented by the ability to apply specifications to drawings. The Patent Office tribunals are expert in this line, and their judgment is entitled to great weight. We have

studied the case in the light of the arguments made in behalf of Chalmers, and we believe that the conclusion of the Commissioner is correct.

[3] Concerning the question of priority, the three tribunals of the Office concurred in holding that De Voe was the prior inventor. We will not reverse such a finding, according to our well-established rule, unless it appears to be clearly wrong (*Flora v. Powrie*, 23 App. D. C. 195; *Bourn v. Hill*, 27 App. D. C. 291; *Gammeter v. Thropp*, 42 App. D. C. 564; *Jobski v. Johnson*, 47 App. D. C. 230), and it does not appear so in this case.

The decision of the Commissioner of Patents is affirmed  
Affirmed.

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CLEMENT v. McQUARRIE et al.

(Court of Appeals of District of Columbia. Submitted January 10, 1922. Decided February 6, 1922.)

No. 1464.

1. Patents ¶113(7)—Decision of three office tribunals sustained unless clearly wrong.

Where the three tribunals of the Patent Office concurred in a finding in interference proceedings, the opposing party cannot prevail on appeal unless he establishes clearly and convincingly that the Commissioner was wrong.

2. Patents ¶92—Objection joint applicants did not show joint conception is technical.

A contention in interference proceedings that joint applicants had failed to establish joint conception is technical and is not favored by the law.

3. Patents ¶91(1)—Joint invention presumed from joint application.

A presumption of joint invention arises from the filing of joint application, which cannot be overcome except by clear and unequivocal evidence.

4. Patents ¶91(4)—Evidence held to show joint invention by joint applicants.

Evidence that joint applicants were employed by the same company and that they began working together on the device prior to the conception by the adverse party in interference proceedings held to establish a joint conception by them prior to the conception of the adverse party.

5. Patents ¶91(4)—Evidence held to show diligence by prior inventors.

Evidence that prior inventors were preparing their applications at the time the subsequent inventor entered the field and continued their efforts in that direction without unreasonable delay, though they may not have pursued the most expeditious course, shows reasonable diligence, which is all they were required to exert.

6. Patents ¶113(7)—Diligence is a question of fact.

Whether there was diligence by the senior inventors is a question of fact, as to which the concurrent findings of the three Patent Office tribunals will not be reversed unless palpably wrong.

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¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the Commissioner of Patents.

Interference proceedings between Edward E. Clement and James L. McQuarrie and another. From a decision of the Commissioner of Patents awarding priority to McQuarrie and another, Clement appeals. Affirmed.

Horace A. Dodge, of Washington, D. C., and William G. McKnight, of New York City, for appellant.

J. G. Roberts and G. Willard Rich, both of New York City, for appellees.

SMYTH, Chief Justice. Clement complains of a decision of the Commissioner of Patents in an interference proceeding involving semi-automatic telephone systems. The issue consists of 28 counts, of which the following are examples:

1. In a telephone exchange system, the combination with a number of operators' connecting circuits, of mechanical line switching mechanism for each connecting circuit adapted to connect said circuit with the desired line, a controller for operating any one of said mechanisms, means for associating said controller with any one of said connecting circuits to operate its individual switching mechanism, and means actuated when said controller is taken for use by one connecting circuit for automatically locking out the other circuits therefrom.

2. The combination with a plurality of connecting circuits, of switching mechanism associated therewith, a sending device, said circuits being all normally in operative relation to said sending device, and electromagnetic means operated when said sending device is taken for use by one circuit for removing the remaining circuits from operative relation to said sending device.

13. The combination with a plurality of connecting circuits of switching mechanism associated therewith, a series of sending mechanisms, and means whereby the first idle sending mechanism of the series may be automatically associated with any one of said circuits.

14. The combination with a number of connecting circuits, of a mechanical line switching mechanism for each circuit, a series of sending mechanisms, and means whereby the first idle sending mechanism may be automatically associated with any one of said circuits taken for use.

[1] There are two applications of McQuarrie and Bullard's, and one of Clement's. McQuarrie and Bullard's first was filed September 27, 1906, and the second, February 5, 1907. It is conceded that Clement is entitled to March 15, 1906, as the date of his conception and constructive reduction to practice. The three tribunals of the Patent Office found against Clement. He cannot prevail here unless he establishes clearly and convincingly that the Commissioner was wrong. *Chalman v. De Voe*, — App. D. C. —, 278 Fed. 585, this day decided. Clement took no testimony, but stood on the date just mentioned. He challenges the correctness of the Commissioner's decision upon two grounds, namely: (a) That McQuarrie and Bullard failed to establish joint conception prior to his date; and (b) that, if they did establish it, they were not diligent when he came into the field.

[2] The first contention is technical, and is not favored by the law. *Sieber & Trussel Manufacturing Co. v. Chicago Binder & File Co.* (C. C.) 177 Fed. 439; *De Laski & Thropp Circular Woven Tire Co.*

v. William R. Thropp & Sons Co. (D. C.) 218 Fed. 458; Selectasine Patents Co. v. Prest-O-Graph Co. (D. C.) 267 Fed. 840.

[3] There is a presumption of joint invention flowing from the filing of a joint application which cannot be overcome except by clear and unequivocal evidence. Consolidated Bunting Apparatus Co. v. Woerle (C. C.) 29 Fed. 449; Selectasine Patents Co. v. Prest-O-Graph Co., *supra*; Lemp v. Randall, 33 App. D. C. 430; Yemiker v. Nesbitt, 48 App. D. C. 250.

[4] Moreover, there is testimony, apart from the applications, that supports the conclusion of joint invention. At the time when it is said the invention was conceived by them they were employed by the Western Electric Company. McQuarrie was in charge of telephone exchange development, and Bullard was a telephone engineer who reported to him. McQuarrie said that he and Bullard began to work together on semi-automatic systems in the latter part of 1904 or early in 1905; that in 1904 they had formed some idea with regard to the equipment, prepared some circuits, and made a few demonstrations in the laboratory; and that the system described in the joint applications involved in this case gives a detailed description of the one they were working on at that time. Nothing in the record is sufficient to overcome the effect of the applications coupled with this testimony, nor even of the applications when taken alone.

[5] With respect to the question of priority, it is clearly established that McQuarrie and Bullard had knowledge of the invention before March 15, 1906. This is not seriously denied. As to their diligence, the record shows that they were at work preparing their applications before and at the time Clement entered the field, and continued their efforts in that direction without unreasonable delay until their applications were filed. Perhaps, as was observed by the examiner of interferences, they did not pursue the most expeditious course, but they were doing something towards the end in view from the date of conception until the cases were actually filed. Being the first to conceive, they were not required to exert more than reasonable diligence. Dickinson v. Swinehart, 49 App. D. C. 222, 263 Fed. 474. There is no analogy between the present case and Clement v. Roberts (App. D. C.) 273 Fed. 757. There the court found that Roberts did nothing for nearly nine months upon the invention in issue. He devoted his time to an improvement not called for by the claims of the interference.

[6] Whether there was diligence is a question of fact. We certainly cannot say on this record that the concurring opinions of the three tribunals of the Patent Office on this question are palpably wrong. Thomson v. Pearsons, 50 App. D. C. 273, 270 Fed. 1013; Anglada v. Moyer, 50 App. D. C. 395, 273 Fed. 359.

The decision of the Commissioner of Patents is affirmed.  
Affirmed.

**In re PRESCOTT et al.**

(Court of Appeals of District of Columbia. Submitted January 9, 1922. Decided February 6, 1922.)

No. 1460.

**1. Patents  $\S$ 26(2)—Combination of three types of tire changing devices in one wheel held invention.**

The combination in one wheel of the three existing systems of tire changing device, demountable wheels, demountable rims, and quick detachable rims, produced a new result and disclosed invention entitling the inventor to a patent.

**2. Patents  $\S$ 36—Doubt as to invention is resolved in favor of applicant.**

Where the question as to invention or mere mechanical skill is close, the doubt is resolved in favor of the applicant.

**3. Patents  $\S$ 113(8)—Applicant limited to 1 claim out of 16.**

Where 1 claim out of the 16 erroneously rejected by the Patent Office completely covered applicant's contribution to the art, the rejection of the other claims will be affirmed to avoid inviting controversy and litigation.

Appeal from the Commissioner of Patents.

Application by Sydney I. Prescott and another for a patent for an automobile wheel equipment. From a decision of the Commissioner of Patents rejecting 16 claims, the applicants appeal. Affirmed as to 15 of the 16 claims, and reversed as to the other claim.

Robert F. Rogers, of New York City, for appellants.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Patent Office rejecting claims 1 to 6, inclusive, 13, 18, 22, 23, 24, and 26 to 31 inclusive in an application. Claim 28, in our view, fairly covers what applicant has done, and therefore is here reproduced:

"28. In a wheel equipment standardizing device, the combination with a hub, of a disc body removably mounted on said hub and having an integral seat for fully supporting a tire rim, and a quick-detachable tire rim removably mounted on said seat, whereby a tire may be removed either alone, or with the rim as a unit, or with the rim and body as a unit."

In their specification applicants say:

"Heretofore passenger motor cars have been equipped with one of three distinct types of wheels, one type having nondemountable bodies and nondemountable rims, another having nondemountable bodies and demountable rims, and the other having demountable bodies and nondemountable rims. Some car users prefer one type, some another. To meet the demands of the trade it has heretofore been necessary to manufacture several sizes of each type, and this necessitated the manufacture of as many sizes of tires, with numerous oversizes. The cars of each maker are supplied with wheels of one of the above mentioned types as standard equipment. In so far as the wheels are concerned, each car satisfies only one of the three classes of users. To satisfy the other classes the wheels must be changed. To change the type of wheels on a built car involves not only the cost of the new wheels but the cost of refitting their hubs. This is an expensive proceeding which takes time and is usually a source of considerable annoyance, but it has been unavoidable. \* \* \* The present

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

wheel obviates all of these difficulties by including in a practical single wheel organization the heretofore distinguishing features of all three types, the wheel being capable of use in either of the three ways without change, loss of time, or additional cost. \* \* \* The present wheel is in a broad sense a practical wheel of a new type, which, since it is capable of use without change on all passenger cars and in either of the three ways desired, may be termed a universal type."

The question at issue was thus tersely stated by the Commissioner:

"The gist of this case appears to be whether or not it is invention to provide a wheel with three 'tire changing systems' and thus so fit out a car that the buyer may obtain as standard equipment his preference of tire changing device. The three 'systems' are: Demountable wheels, demountable rims and Q. D. or quick detachable rims, each of which is in common use and is preferred by some operators."

[1-3] In applicants' combination certain material capabilities of three wheels of the prior art are combined. While it is true that each element of the new combination is old, we do not think it may be said that each of these elements functions independently of and without reference to the others, for in combination they form a unitary structure wherein each element necessarily supports and supplements the others. Through the combination a new result is effected, namely, a wheel possessing certain essential characteristics of three wheels of the prior art. In this respect the case differs from *Grinnell Washing Mach. Co. v. Johnson Co.*, 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. Although the question is close, we incline to the view that the idea involved something more than mechanical ability. In such a case we resolve the doubt in favor of the applicant. In *re Huff*, 48 App. D. C. 258. Inasmuch, however, as claim 28 completely covers applicants' contribution to the art, there is no reason for allowing a large number of claims and thus inviting controversy and litigation.

The decision therefore will be affirmed as to claims 1 to 6, inclusive, 13, 18, 22, 23, 24, 26, 27, 29, 30 and 31, and reversed as to claim 28.

Affirmed in part and reversed in part.

**QUAKER CITY CHOCOLATE & CONFECTIONERY CO., Inc., v. KERNAN.**

(Court of Appeals of District of Columbia. Submitted January 11, 1922.  
Decided February 6, 1922.)

No. 1466.

**Trade-marks and trade-names and unfair competition** ¶43—"Quaker Maid" held likely to be confused with "Quaker City" as mark for candy.

The use of the words "Quaker Maid" as a trade-mark for candy is likely to create confusion in the trade with an existing trade-mark, "Quaker City," which was placed in the same position on the package and in similar letters, so that the owner of the latter mark is entitled to prevent the registration of the former as a trade-mark.

Appeal from the Commissioner of Patents.

Application by Christine M. Kernan for registration of a trade-mark, opposed by the Quaker City Chocolate & Confectionery Company, Inc. From a decision of the Commissioner of Patents against the opposer, the opposer appeals. Reversed.

Charles H. Howson and Rennard N. Ware, both of Philadelphia, Pa., for appellant.

Joshua R. H. Potts, of Chicago, Ill., for appellee.

VAN ORSDEL, Associate Justice. This is a trade-mark opposition, in which appellant company opposes the registration by appellee of the words "Quaker Maid" as a trade-mark for candy.

It appears that, long prior to appellee's use of the mark appellant had used the words "Quaker City" as a trade-mark for candy. The marks are both printed in script, and similarly situated on the packages; hence the only question here presented is the likelihood of their use creating confusion in trade.

The Examiner of Interferences sustained the opposition, but was reversed by the Commissioner. We think the Examiner was clearly right. The goods on which the respective marks are used are the same, and would, undoubtedly, be known to the trade as "Quaker Candies."

The distinguishing features of the marks and the manner in which they are used are not so pronounced as to insure the purchasing public against deception.

The decision of the Commissioner is reversed.

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— For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HAMILTON COUNTY, TENN., v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1922.)

No. 3531.

Counties ~~vs~~ 124(3)—Contract with bridge engineer in excess of amount authorized held not ratified.

Where a county, which was authorized to expend a limited amount for the construction of a bridge, contracted with an engineer to superintend the construction and to pay him a percentage on the contract price, with the understanding that his plans would not be adopted unless the bridge could be constructed under them within the limit fixed by statute, and thereafter it was found necessary to contract for additional work not called for by the specifications, which additional work cost more than the amount originally limited, and, on ascertaining that fact, the county dismissed the engineer, Private Acts Tenn. 1917, c. 26, ratifying the county's contracts in excess of the original cost of the bridge, did not ratify the contract with the engineer, if that could be construed to provide for commission on the amount of the cost in excess of the original limit.

In Error to the District Court of the United States for the Eastern District of Tennessee.

Action by Benjamin H. Davis against the County of Hamilton, Tenn. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

The county in which the city of Chattanooga is located desired to build a bridge across the Tennessee river. For that purpose the county employed Mr. Davis, the defendant in error, as consulting engineer, and agreed to pay him for his services in planning the bridge and supervising its erection a 5 per cent. commission upon its cost. In the course of the erection it was found that extensive changes were necessary in the plans and much expense was incurred beyond that contemplated. A controversy arose between the county and the engineer. He was discharged, and the work was completed under other supervision. Thereupon he brought this suit against the county in the court below, claiming that his total compensation, for his commission and extras, should have been about \$73,000, admitting payments and offsets amounting to about \$25,000 and asking judgment for the balance of \$48,000.

Upon a jury trial he recovered a verdict of \$15,000, and had judgment for that amount. The county brings the case here under a writ of error, relying in one form or another upon the defense that there had been no authority on the part of the county or its agents to make a contract for a commission upon any sum in excess of \$500,000, and that, if any such more extensive contract had been made, it had not been ratified.

The basis of the controversy is found in chapter 25 of the Private Acts of 1913 (Extra Session) of the Tennessee Legislature. It provides in section 1 that the county "is hereby authorized and empowered to construct a bridge \* \* \* and to issue and sell for the purpose of paying for the same its negotiable coupon bonds in an amount not exceeding \$500,000." Upon the one side, it is claimed that the authority of the county and of its agencies was thereby limited to the erection of a bridge within the specified cost. Upon the other side it is insisted that other statutes gave the county general authority on this subject, and that the only effective limitation of this particular statute was as to the amount of bonds which could be issued for this purpose.

Shortly after the passage of the act, the proper county authority (being the county court) appointed a committee, known as the "Tennessee River Bridge Committee," with specified powers and restrictions, among which were: "(4) After the design of the said bridge is adopted by the committee and approved by the War Department, to advertise for bids for the erection of same and to

let the contract for the building of said bridge to the lowest and best bidder, provided the total cost of the erection should not exceed five hundred thousand dollars."

Thereupon the committee advertised, requesting bridge engineers to submit competitive designs and estimates, and stated in the advertisement that the county had voted a bond issue of \$500,000 for the erection of such bridge. Davis wrote the committee requesting some information, and the committee replied, saying among other things, "cost of structure complete must not exceed \$500,000." On March 27, he submitted to the committee a letter in which he said: "For 5 per centum of the total cost of the bridge and approaches, inclusive of movable span, I agree to do the full and complete engineering of the structure." He then specified what the services would be, and among other things said: "Your committee shall have its own free choice as to which type of movable span it prefers and the appropriation will permit."

To this the committee replied with a letter to Davis, saying that: "Conditioned on your securing the approval of the War Department of a span for a concrete bridge, acceptable to our committee, within a reasonable length of time to be determined by the said committee, you will be awarded the contract as consulting engineer for the construction of said bridge, as per your proposal contained in your letter of the 27th of March."

Thereafter, under Davis' supervision, borings were made at points on the bank and in the river, to determine the foundation conditions for the piers, and he prepared complete plans and specifications. He reported to the committee that there were going to be several bids, and he thought they would be low enough so as to build the bridge within the appropriation. Somewhat later he applied to the committee for a payment on account of his services. In reply the committee recited the understanding between them that, if it was found that the bridge which he was designing could not be built within the appropriation, he should be paid a reasonable price for his services so far rendered, and further reciting that, since it could not be ascertained until the bids were in whether the bridge could be built within the appropriation, an advance payment was thereby offered to him, to be considered as a part of the proposed reasonable compensation in case the bridge could not be built for the sum named, or as a payment on account of the 5 per cent. commission in case a contract should be made with a bidder to construct the bridge for a price within the \$500,000 limit. This payment was accepted by Davis without question as to the conditions.

When the bids were opened they were such that it was apparent that contracts could be let to responsible bidders for about \$460,000 based upon Davis' estimate of quantities, and computed upon the unit plan. A formal contract was then made between Davis and the committee, by which his duties as consulting engineer were specified and the committee agreed to pay him a commission of 5 per cent. "on the total cost of the entire construction and completion of the bridge." The contract contains no reference to the proposed cost of the bridge, excepting as it says: "Upon the award of any contract or contracts for the construction of said bridge and approaches, the estimated amount of the full commission shall be determined, and one-half of the same, less total previous payments, shall then be paid."

Thereupon the committee reported to the county court that it had employed Mr. Davis at a fee of 5 per cent. of the cost of the bridge and that contracts had been negotiated with bidders for its erection at a cost of not more than \$460,000, and the county court thereupon passed a resolution ratifying these building contracts. The contract with Davis is dated October 26, 1914, and the contracts with the bidders are dated one October 31st and one November 23d, but they are pursuant to the informal awards made by the committee, prior to or simultaneously with the contract with Davis; all three contracts were practically part of one transaction, and the bridge contracts included the Davis plans and specifications.

It turned out that the bridge as completed cost more than \$1,000,000. Some changes were made by the committee, and for which Davis carried no responsibility, but these did not take the cost substantially above \$500,000. The chief trouble was that the borings for the pier foundations, put down under Davis' supervision, had either been made unskillfully or else he had

failed to draw the right conclusions therefrom. It became necessary to carry these foundations very much deeper and to make them larger than Davis planned, and these changes gave rise to the bulk of the additional cost.

Frank Spurlock, of Chattanooga, Tenn. (Brown, Spurlock & Brown and Bartow Strang, all of Chattanooga, Tenn., on the brief), for plaintiff in error.

Carlyle S. Littleton, of Chattanooga, Tenn. (Littleton, Littleton & Littleton, of Chattanooga, Tenn., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). The questions which are specially presented are whether the committee had authority to make with Davis a contract which would entitle him to commission upon more than \$500,000, and whether, if there was lack of authority, there was subsequent ratification. We take up the latter question first.

As the necessity for additional work developed, the committee accepted the situation and proceeded with the work, some of it by application of the unit clauses in existing contracts, and some of it by new and additional construction contracts. After the proceeds of the \$500,000 bond issue were exhausted, the county court, on the credit of the county, borrowed from New York banks an additional \$550,000, and gave the notes or obligations of the county therefor, and thereupon paid, as far as this fund would go, the surplus cost. The county accepted and used the bridge. However, at about the time the \$500,000 limit was reached, Davis was discharged, and he rendered no further service, although continually offering to do so. It is not clear—to say the least—that the county ever received the benefit or result of Davis' services beyond the extent to which they would have been due under a contract limited to \$500,000.

In this situation the Legislature of Tennessee passed chapter 26 of Private Acts of 1917, the pertinent parts of which are as follows:

"Whereas, said Hamilton county, Tennessee, also owes a balance of \$550,000.00 for the work of completing the Market Street bridge across the Tennessee river at Chattanooga, which amount it is obligated by contract to pay: \* \* \*

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that the several contracts and obligations of said county, as set forth in the preamble thereto, be, and the same are hereby in all things ratified, validated and confirmed.

"Sec. 2. Be it further enacted, that for the purpose of paying its said indebtedness, and meeting its said obligations, the said county of Hamilton, in the state of Tennessee, through its quarterly county court, be, and it is hereby authorized, empowered and directed to issue and sell four separate issues of its negotiable coupon bonds, as follows: \* \* \*

"\$550,000.00, the proceeds of which shall be used in paying off the balance of expense of completing the work of building the Market Street bridge across the Tennessee river at Market street."

The bonds were issued and sold, and with the proceeds the New York loans paid off. It is in this conduct of the county, and in this act of the Legislature, that the trial court found unquestionable ratification. We think this finding did not sufficiently distinguish between the contract with Davis and the construction contracts for the bridge,

which construction contracts had been developed into and succeeded by the New York loans.

The invalidity of the Davis contract, on the theory of *ultra vires*, cannot be determined once for all by the mere words of the contract. They disclose no excess of promise beyond power. There was no doubt of the authority to make the contract to pay commissions upon any sum not exceeding \$500,000. It is only after the contract has been rightfully applied to an expenditure of that amount, and it is sought to apply the general language to a further sum, that the question of *ultra vires* arises. There is no necessary inconsistency between a concession that the contract was, for certain applications, valid from the beginning, and the claim that, for the application now involved, it was invalid from the beginning. It might need ratification for the latter effect, though not for the former.

Undoubtedly, by accepting and using the bridge (if not before), the county ratified the action of the committee in building the greater structure. Undoubtedly the Legislature ratified the—perhaps—unauthorized acts of the county in borrowing the additional \$550,000 and pledging its credit therefor. But if, in truth, the committee had been authorized only to make a contract with Davis to pay him not to exceed \$25,000 in commissions, and if, in truth, it had made a contract under which he might become entitled to claim \$50,000, we see nothing in the action of the county, or of the state, which would ratify the expanded or unauthorized portion of that contract. The proposition seems to be that where the committee had agreed to pay Davis commissions on \$1,000,000, and where it had power to agree to pay him only half that amount, and where it had pledged the credit of the county to others than Davis for \$550,000 more than it had any right to do, but had not used his continuing services during the excessive expenditure, the ratification of the latter unauthorized act is also a ratification of the former. We cannot accept that conclusion. We think the court was in error in charging that there had been ratification as matter of law, and in withdrawing from the jury the question of original lack of authority. Of course, in reaching this result we have recited only the tendency of the evidence.

It does not seem advisable to undertake to determine the question of authority by the county or by the committee to make a contract which would be valid upon any basis of computation above the \$500,000 limit; nor to determine whether, when all the transactions are taken together, a limitation of this kind ought to be read into the contract as being a part of the identification of the bridge about which the parties were dealing. We cannot be sure that this record satisfactorily and completely presents any issue save that of ratification.

Accordingly, the judgment is reversed and the case remanded for a new trial.

TENNESSEE FINANCE CO. v. THOMPSON.

In re MOSELEY.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1922.)

No. 3621.

1. Bankruptcy ⚡440—Claim of forfeiture of assignment of wages because of usury presents "controversy arising in bankruptcy."

A petition by the trustee in bankruptcy, setting forth a claim to wages earned by the bankrupt under an assignment of such wages, which the trustee alleged was void, because an evasion of the usury statute, presents a "controversy arising in bankruptcy," reviewable by appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Controversy Arising in Bankruptcy Proceedings.]

2. Usury ⚡18—Nature and not form is considered.

In determining whether a transaction whereby an employee assigned his wages to another was void for usury, under Shannon's Code Tenn. § 3522a21, or sustainable as a bona fide sale of wages, the real nature of the transaction is to be considered, and not the form adopted by the parties, and the nature of the transaction is a question of fact.

3. Bankruptcy ⚡467—Findings of referee, affirmed by District Judge, not set aside, except for plain mistake.

A finding by the referee in bankruptcy, affirmed by the District Judge, will not be set aside on appeal, on anything less than a demonstration of plain mistake.

4. Usury ⚡117—Evidence held to sustain finding assignment was usurious loan.

Evidence held to sustain the finding of the referee in bankruptcy, confirmed by the District Court, that an assignment of wages by the bankrupt, which in form was an absolute sale thereof for cash, was in fact intended by the parties as a loan at a rate of interest exceeding that permitted by Shannon's Code Tenn. § 3522a21.

5. Bankruptcy ⚡314(3)—Usurious claim is void as to all genuine creditors.

A usurious claim is void as to all genuine creditors, so that the trustee in bankruptcy, in seeking to avoid such claim, need not show that he represented creditors whose claims antedated the claim in controversy.

6. Bankruptcy ⚡467—Petition for rehearing is addressed to District Court's discretion.

A petition for rehearing of a claim in bankruptcy, which amounted to no more than a request for reargument or reconsideration, was addressed to the discretion of a District Judge, and is not reviewable.

Appeal from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

In the matter of the estate of Frank G. Moseley, bankrupt. Petition by Robert W. Thompson, as trustee in bankruptcy, against the Tennessee Finance Company and others, to have determined the right of the respondents to the wages earned by the bankrupt, under assignment of such wages. From an order denying the right of respondents to the earned wages, the named respondent appeals. Affirmed.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

R. C. Boyce, of Nashville, Tenn., for appellant.

Bass & Sims and Byrd Douglas, both of Nashville, Tenn., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. At the time of bankruptcy the Nashville Terminals owed the bankrupt a sum of money as wages earned by the bankrupt as its employee. The bankrupt had assigned specific portions of this indebtedness to each of three companies, styling themselves, respectively, as a "finance company," a "brokerage company," and a "trading company." The indebtedness from the Terminals Company was scheduled among the bankrupt's assets. The three companies named were scheduled as unsecured creditors. The trustee obtained from the Terminals Company the wages in question, with notice of the assignments, and three days after the adjudication filed his petition, stating in general terms the situation referred to, and that the three companies claimed title under written instruments purporting on their face to be unconditional sales or assignments of wages or salary, but that all were "mere devices to evade the usury statutes," and the so-called sales "mere shams and frauds, intended only to cover up the loan of moneys at usurious rates of interest"—both principal and interest being thus forfeited to the borrower under the laws of Tennessee. Such forfeiture, in case of interest charged in excess of 6 per cent. per annum, is created by section 3522a21 of Shannon's Tennessee Code of 1917.

The Tennessee Finance Company answered, denying that its transaction was a loan or device to evade the usury statutes, and asserting it a good-faith purchase of such wages to the extent of \$22, for a cash consideration of \$20, paid the bankrupt therefor.<sup>1</sup> After hearing upon pleadings, oral proof, and arguments of counsel, the referee found that the assignment of wages in question was "merely a colorable scheme for the purpose of loaning money at a usurious rate of interest," and so declared the funds in question subject to the payment of the common creditors of the bankrupt. In his certificate on review the referee summarized the evidence as to the method of business "usually followed by these brokerage companies" substantially thus:

One wishing to obtain money made application in writing on a printed form, which purported to be an application to sell his wages to such company; the applicant, on another printed form, consented to assign to such company a stipulated amount of his earned wages, and instructed his employer to pay to such company the amount set out in the assignment. It was specifically stated, throughout the papers in question, that the "transaction was not a loan, but a conditional sale of the bankrupt's wages, to the extent set out in said assignment or transaction." The companies charged \$1 for the use of \$10, and \$2 where the wages amounted to \$20, and a similar ratio for sums above that amount. The Terminals Company paid off twice a month. The

<sup>1</sup> As the other two companies have not appealed, their pleadings are omitted from the record.

almost invariable practice was for the bankrupt to draw the money and himself pay his debts to the brokerage companies. Since January 29, 1921, the Tennessee Finance Company filed notice of assignment with the employing company, but not before that date. Should the bankrupt refuse or fail to pay his debt after drawing his pay, the Terminal Company was notified not to pay him his next pay check, and the same would be tied up until the controversy was settled. It was a common custom for the bankrupt to make a new contract at the time of paying his then existing debt.

The District Judge held the controlling question to be one of fact, viz. whether the assignments of wages were in fact absolute sales as purported on their face, or whether they were loans, and the assignment a device to cover up loans at usurious interest rates. The court held the referee's conclusion to accord with the greater weight of the evidence, and so affirmed the referee's order.

[1] The case presents a controversy arising in bankruptcy, and is properly before us on appeal. *National Discount Co. v. Evans* (C. C. A. 6) 272 Fed. 570, 573. The question of jurisdiction to determine the controversy arising under adverse claims was specifically waived below.

[2] In our opinion the conclusion that the transaction was usurious, and that the form of sale was adopted merely to evade the usury laws, should be sustained. The section we have cited is a part of the so-called "Loan Shark Act," being chapter 31a of the Tennessee Code of 1917. It is the settled construction of this statute, that the courts will look through the forms adopted, and will ascertain from the evidence generally the real nature of the transaction, whether one of good-faith sale or of loan at usurious interest, and that this question is purely one of fact. *McWhite v. State*, 143 Tenn. 222, 225, et seq., 226 S. W. 542;<sup>2</sup> *Nashville Terminals v. Tennessee Finance Co.*, decided by the Tennessee Court of Civil Appeals, November 27, 1920 (not reported); *Id.*, decision by the Supreme Court of Tennessee, January 29, 1921 (not reported).

If the finding of facts below is to be accepted, the order made was correct. *McWhite v. State*, supra, is directly in point. We find nothing conflicting with this proposition in either of the Tennessee decisions cited in which a contrary conclusion was reached on the facts,<sup>3</sup> nor in the previous case of *Spicer v. King*, 136 Tenn. 413, 189 S. W. 865, referred to in the *McWhite Case*, supra, 143 Tenn. at pages 225, 226,

<sup>2</sup> This case was a criminal prosecution for the violation of the criminal statute relating to usury (being section 6732 of Shannon's Tennessee Code of 1917), upon a state of facts generally similar to that found by the referee in the instant case. It was held that "the jury were fully justified in concluding that the real transaction was a loan, and that the assignment was a device to cover up the loan."

<sup>3</sup> In *Nashville Terminals v. Tennessee Finance Co.*, supra, in which the transaction was sustained as a sale, the decision of the Court of Civil Appeals is based on the proposition that the findings of fact by the Circuit Judge are sustained where there is any material evidence to sustain them, as in the case of verdict by jury, and that of the Supreme Court of Tennessee on the ground that that court is, by the concurrent judgment of the Circuit Judge and the Court of Civil Appeals, barred from further considering the facts.

226 S. W. 542. Our conclusion is also supported generally by *Home Bond Co. v. McChesney*, 239 U. S. 568, 36 Sup. Ct. 170, 60 L. Ed. 444, and *National Discount Co. v. Evans*, supra, 272 Fed. at pages 573, 574, each of which cases involved usury statutes of states other than Tennessee.

[3] We accept the finding of facts made below. It is the settled rule in this court that a finding by a referee in bankruptcy, affirmed by the District Judge, will not be set aside on appeal on anything less than a demonstration of plain mistake. *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; *In re Sweetey*, 168 Fed. 612, 615, 94 C. C. A. 90; *Deupree v. Watson*, 216 Fed. 483, 485, 132 C. C. A. 543. Such is also the rule in case of concurrent findings of master and judge. *Firestone Co. v. Riverside Co.* (C. C. A. 6) 247 Fed. 625, 160 C. C. A. 35, and cases cited. There is, to say the least, no such demonstration of mistake.

[4] The only oral testimony was that of the bankrupt. His testimony, fairly construed, was to the effect that the same course of practice was pursued by him in dealing with each of the three companies in question; that when he got \$20 he "got it for two weeks, and paid \$22 for it"; that he obtained the money in question from appellant on the same terms, getting it "under the condition that I was to pay back every two weeks," that is to say, that in the case of all three companies the transaction could be extended every two weeks by his drawing his pay check and then paying them the amount of the loan plus the charge therefor (10 per cent. for two weeks' use), and again drawing the original amount, and so on; and that when he made his payment he was asked if he wished to use it again at the same rate. He testified explicitly that the three transactions in question "were for borrowed money." The effect of this testimony is not overthrown by the fact that on cross-examination he testified that the written documents represented the real transaction between him and appellant, and that the transaction immediately in question (which was on January 26, 1921) was the first he had had with appellant since August 8th previous, and that in his transactions with appellant and others each payment closed the previous transaction, and the question of whether he wanted to renew was not taken up until such closing. The method was consistent with an attempt to cover up an usurious contract of loan. The cross-examination did not neutralize the examination in chief. It went to its credibility. We think the examination, considered as a whole, and including the re-examination (and especially in the absence of oral testimony opposing it), was sufficient, if believed, to sustain the conclusions reached by the referee and the District Judge.

The question whether appellant gave the Terminals Company the statutory notice to perfect its claimed title is not of great importance. Not only is it not clear that such notice was given in this case previous to bankruptcy, but the giving or failure to give notice is significant only as it affects the question of the real nature of the transaction; and it appears that such notice was never given by appellant until after the decision in the *McWhite Case*, supra, which was less than a

month before Moseley's bankruptcy.<sup>4</sup> Nor is the conclusion of the District Judge discredited by his holding that the findings of the referee were presumptively correct. The District Judge did not content himself with this presumption, but held the referee's conclusion to be "in accordance with the greater weight of the evidence."

[5, 6] There is no force in the suggestion that it does not appear that the trustee represented creditors whose claims antedated that of appellant. *Martin v. Bank*, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. 441, is not in point. If appellant's claim is usurious, it was void as to all genuine creditors. It scarcely need be said that the petition for rehearing (which amounted to no more than a request for reargument or reconsideration) was addressed merely to the discretion of the District Judge, and is not reviewable.

The order of the District Court is affirmed.

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In re NEVIN.

In re GRABOWSKI.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1922.)

No. 3568.

**1. Bankruptcy §136(2)—Petition held to allege sufficient effort to purge of contempt for failing to turn over property.**

A petition by a bankrupt, who had been committed for contempt for disobedience to an order that he turn over property to his trustee, which alleged that the bankrupt did not, at the time the order was entered, have the money under his control, and had not paid it over to any one for him, that he was without funds and unable to comply with the order to turn the money over to the trustee, and that his brother had advanced the money necessary to pay the bankrupt's attorney and had supported the bankrupt's family during the months the bankrupt had been in jail under the order, *held* to contain a sufficient showing of effort to purge the bankrupt of his contempt.

**2. Bankruptcy §136(2)—Previous finding of indebtedness not conclusive as to present ability to pay.**

A previous finding that the bankrupt was indebted to the trustee, on which an order for his commitment for failure to turn the money over to his trustee was based, is not conclusive at a hearing on an application for release several months thereafter as to his present ability to pay.

**3. Bankruptcy §136(2)—Imprisonment should not be continued after it appears obedience cannot be enforced thereby.**

The commitment of a bankrupt for contempt, under Bankruptcy Act, § 2(13), being Comp. St. § 9586, to enforce obedience to an order to pay funds to the trustee, should cease whenever it appears that obedience to the order cannot be secured by that means, so that further imprisonment is useless, since the bankrupt should not be subjected to an indefinite imprisonment without the sanction and support of the verdict of a jury.

**4. Bankruptcy §136(2)—Discharge from commitment for refusal to turn over property rests in court's discretion.**

The determination whether the further imprisonment of the bankrupt to enforce obedience to an order that he turn property over to his

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<sup>4</sup> The McWhite decision seems to have been rendered January 15, 1921, instead of January 29th, as the referee evidently had in mind in stating the date when appellant began filing notice of assignment.

trustee, when the bankrupt claims an inability to comply with the order would be ineffective, involves judicial discretion.

**5. Bankruptcy ⚡136(2)—Release of bankrupt from commitment for refusal to turn over property sustained.**

An order releasing a bankrupt from further imprisonment under a commitment for contempt for failure to pay over money to his trustee, entered after two references in which the referees failed to find that the bankrupt had the ability to comply with the order, and where the bankrupt had been confined five months, and protested his inability to make the payment required, and the trustee had not located any property under the bankrupt's control, will not be reversed on petition to revise.

**6. Bankruptcy ⚡136(2)—Release from commitment for failure to turn over property does not bar other remedies.**

The release of a bankrupt from commitment to enforce an order requiring him to turn over property to his trustee does not preclude resistance to an application for a discharge in bankruptcy, nor proceedings to recover property thought to have been fraudulently conveyed or concealed, nor criminal prosecution for such disposition.

**7. Bankruptcy ⚡446—Facts cannot be reviewed on petition to revise release from commitment.**

On petition to revise an order releasing a bankrupt from commitment for refusal to turn over property to his trustee, the appellate court cannot review the facts.

Petition to Revise an Order of the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the estate of Walter Grabowski, voluntary bankrupt. On petition by Thomas D. Nevin, trustee in bankruptcy, to revise an order of the District Court releasing the bankrupt from imprisonment under a commitment for contempt. Affirmed.

B. J. Lincoln and Guy A. Birge, both of Detroit, Mich. (Clark, Emmons, Bryant, Klein & Brown, of Detroit, Mich., on the brief), for petitioner.

H. A. Behrendt, of Detroit, Mich., for respondent.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Petition to revise an order releasing the bankrupt from imprisonment under an order of commitment for contempt. On April 14, 1917, respondent was adjudicated bankrupt on his own petition. Later the referee in bankruptcy, on the trustee's petition, and after hearing respondent, ordered the latter to account for and pay over to the trustee \$16,404.87, "belonging to his said estate in bankruptcy and found to be in his possession, or under his control." The District Court affirmed the report of the referee, and found bankrupt guilty of contempt of court in disobeying the referee's order, and ordered the bankrupt committed for contempt until he should obey the "turn-over" order or "until the further order of this court." On October 23, 1920, the bankrupt was committed to jail. On December 20th following he presented his petition for release from imprisonment, which was referred to the referee.

Before report was made, and on February 23, 1921, an amended petition was filed. It stated petitioner's confinement in jail since October

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

23d; that when his schedules were filed in the bankruptcy proceeding he promptly turned over his assets to the trustee, and thereafter had not had in his possession or under his control, directly or indirectly, "any portion, large or small, of the proceeds of the business formerly conducted by" him; that he had not, with intent to defraud his creditors, "turned over to any \* \* \* person, partnership or corporation, any portion of his estate, large or small, nor did this petitioner transfer to any other person, partnership or corporation \* \* \* any portion of his estate in any manner whatsoever, with the exception of those transactions described in the testimony herein"; that it was physically impossible for him to pay the money demanded; that he was forced to get from his brother the money paid to his attorney; that his wife and family were existing only on the charity of his brother, who was supplying them with meat and groceries; that he has never had in his possession the money in question; that it was impossible to attempt to comply with the order because of his insolvency; and that longer imprisonment would amount "to punishment for crime without a trial by jury."

There was annexed to the petition an affidavit of bankrupt's brother, stating, in substance, that for some months previous to his commitment the bankrupt had been working in the brother's butchershop at a salary of \$25 per week; that because of the bankrupt's penniless condition the brother had, during the former's imprisonment, been supplying his family with meats and groceries, and frequently with a little money to provide "some of the necessities of life"; that bankrupt did not in any way turn over to his brother "any sum of money, property, stock, bonds," or any other assets; and on information and belief that the bankrupt did not turn over his assets to any one else, and that "deponent knows that at the time of going into bankruptcy, and for a considerable period of time prior thereto," the bankrupt's "business was in an insolvent condition by reason of credit arrangements with the customers."<sup>1</sup>

The referee recommended the denial of the petitions for release, for the reason that "no showing was made of any change in the status of the bankrupt's financial condition since the entering of said order

<sup>1</sup> Previous to bankruptcy respondent had been operating five meat markets at as many locations in Detroit. His asserted concealment of assets was largely based upon the proposition that during the last 45 days before bankruptcy he had bought merchandise in a specified amount and had sold the same; that he had made a given ratio of gross profit on such cost prices, but had subsequently accounted to the trustee for but little more than one-half of such gross sales so estimated. The bankrupt's answer to the application for the "turn-over" order denied that his gross profit was even approximately as large as claimed by the trustee; that, following the custom among Polish butchers, he was in the habit of giving credit to many of his customers; that during March and April (just before the Easter holidays) his Polish customers made heavy purchases of meat, necessitating correspondingly large purchases by bankrupt, and that many thousands of dollars of such retail purchases were still unpaid for, and were largely evidenced only by memoranda on slips or books retained by the customer. There was also denial of failure to make full accounting as far as was possible.

of commitment," and stating that "no testimony was introduced bearing on bankrupt's ability to comply with the order of the court other than bankrupt's sworn denial of his ability or inability to at this time comply with the order of the court." The testimony taken was returned to the District Court.

The judge, not being satisfied with this report, re-referred the petition to two referees, with directions "to take proofs, if required, and to report" the same, "together with the findings and recommendations of said referees thereon," and especially to answer the question whether bankrupt "has the present ability to comply with the order for contempt." The referees reported further consideration of the petition and of the testimony theretofore taken, a thorough and careful examination of the bankrupt, and of the hearing of additional arguments of counsel; that they were at a loss to make any other and further return than the one theretofore made, viz. "that the possession of a large amount of assets has by testimony which we have regarded and do regard as conclusive been established in the bankrupt as of the time of the bankruptcy, which assets he has thus far failed to turn over to the trustee or to account for"; that the only conclusion which they could reach is "that the bankrupt either has the said assets or knows where they are or what became of them, and that he is therefore properly in custody until he satisfies the court that they are not in his possession by divulging where they are or at least what he did with them"; that "the bankrupt under the severest questioning maintains that he 'has not any assets of the estate in his possession but that he turned everything he had over to the trustee,' " and his claim of the support of his family by his brother and of the latter's advancement of money to pay the attorney's fees in obtaining the desired release, and that he was practically destitute of money; that the bankrupt's position was the same as at the time of his commitment and at the previous hearing for release; "I have not the property, I cannot turn it over; I cannot comply with the orders;" that this contention rests on the bankrupt's unsupported word, and that it seemed to the referees that he "should furnish additional testimony or make some attempt to procure additional evidence to substantiate his claim and purge himself of the contempt." They stated that they did not believe that the bankrupt was telling the truth. They recognized the possibility that the bankrupt "has not at this time the property, the possession of which has, as stated, been established in him as of the time of the bankruptcy"—adding:

"He must know where it is or what became of it. His only answer is 'it was lost in the business.'"

They further stated that they realized that "he has been kept in confinement for an unusual length of time on civil process and that it should not continue indefinitely," adding that—

"The question is, we think: Has it continued long enough to warrant a belief that his alleged inability is real, in the face of the evidence in the bankruptcy proceedings and his own lack of frankness in the matter? We do not think it has been as yet of such duration."

Their reply to the court's question was:

"So far as any evidence brought before us is concerned, we believe and find that the bankrupt is as able now to comply with the order as when it was entered, and recommend that the petition be dismissed without prejudice."

The court entered this order:

"I find that from the testimony in this case the bankrupt is at this time unable to comply with the order of this court, and I hereby order that he be forthwith released from custody."

The reasons for this conclusion, as appearing in the colloquies between court and counsel on the hearing upon the referees' report, are: That while the referees think that the bankrupt "is a crook, and ought to be in jail, and kept there," they cannot on their official oaths "find that he is able to do it"; that while the court thinks the bankrupt "is crooked," it ought not to be found that he is able to pay when the referees state that they cannot "make a clear-cut answer" to the question submitted; that the referees have told the judge personally, "We cannot make that sort of a finding," that "we are satisfied that he has property concealed somewhere, and we think he could do it, but we cannot find it from this record"; that the referees were merely "giving reasons why they think something ought to be done with him," and that the court "should not put [keep] the bankrupt in jail," unless a finding could be made that he is "able to do the thing he was ordered to do, but just contemptuously does not do it."

[1] The trustee contends, in effect, that the previous order which resulted in the commitment must be taken as a conclusive finding of the bankrupt's ability to make payment in the absence of affirmative testimony to the contrary; that the burden was thus upon the bankrupt to show affirmatively a present inability to comply; that such burden is not met by a simple reiteration by the bankrupt of such inability; that the referees regarded as conclusive the previous testimony of the bankrupt's ability to comply, and did not believe his statement to the contrary; and that the court erred in putting upon the trustee the burden of showing such present ability. The petition is criticized as insufficient because not containing "sufficient showing of effort to purge the bankrupt of his contempt." We think this criticism not good. If the court believed it, manifestly release should be ordered.

Upon the question of burden of proof with respect to present ability, the authorities are not in harmony, some holding that the finding of failure by the bankrupt to account fully creates a presumption that he still has ability to pay. It logically follows from such rule that a mere denial of present ability by the bankrupt's oath is not necessarily sufficient to purge of the alleged contempt. Such is the rule in the Second Circuit (*In re Stavrahn*, 174 Fed. 330, 332, 98 C. C. A. 202, 20 Ann. Cas. 888; *In re Weber Co.*, 200 Fed. 404, 406, 118 C. C. A. 556; *In re Graning*, 229 Fed. 370, 372, 143 C. C. A. 490, Ann. Cas. 1917B, 1094; *In re Chavkin*, 249 Fed. 342, 344, 161 C. C. A. 350); and in the Ninth Circuit (*Power v. Fuhrman*, 220 Fed. 787, 791, 136 C. C. A. 393). Other authorities hold that the burden of showing present ability is upon the trustee, and that the evidence must affirmatively

demonstrate a present ability and wilful refusal to obey. Such is the rule in the First Circuit (*In re Cole*, 163 Fed. 180, 189, 90 C. C. A. 50, 23 L. R. A. [N. S.] 255); and apparently in the Eighth (*Henkin v. Fousek*, 246 Fed. 285, 159 C. C. A. 15). In the case of *In re Haring* (D. C.) 193 Fed. 168, 174, Judge Sessions discussed this conflict, and reached the conclusion that the burden was on the trustee. He accordingly denied an order for commitment. This court affirmed the order on the merits, but without mention of burden of proof. *In re Holden*, 203 Fed. 229, 232, 121 C. C. A. 435.

[2, 3] In our view, it is not necessary to determine which of these conflicting rules is the correct one, nor whether the court should have amended his order of release by reciting a proposed substituted finding that "the trustee has not affirmatively shown at this time the ability of the bankrupt to comply with the order for which he was committed." Manifestly, the previous findings of indebtedness to the estate and of present ability to pay are not conclusive as against an application for release. The order of commitment is presumably made under section 2 (13) of the Bankruptcy Act (Comp. St. § 9586), which empowers the court of bankruptcy to "enforce obedience by bankrupts, officers and other persons, of all lawful orders, by fine or imprisonment or fine and imprisonment." The object of such an order is merely to coerce compliance with the "turn-over" order. *In re Marks* (D. C.) 176 Fed. 1018, 1019. That it was specifically so intended further appears by the terms of the order in question, directing imprisonment until the turn-over order is obeyed, "or until the further order of this court." It logically follows that imprisonment should cease whenever it appears useless to continue it longer; that is to say, that the bankrupt "should not be subjected to an indefinite term of imprisonment based upon a finding of a seriously controverted fact reached without the sanction and support of the verdict of a jury."<sup>2</sup>

[4] In our opinion the decisive question is whether we can say that the District Court had no right to conclude, as it seems in effect to have done, that the imprisonment had been long enough to satisfy him that further confinement would fail to coerce payment. The determination of that question involved a measure of judicial discretion. The referee's statement of the account was to some extent only an approximation. Compare *In re Holden*, 203 Fed. at page 232, 121 C. C. A. 435. A conclusion that the bankrupt still has the money, or its control, must rest largely on presumption from former possession and on the previous findings, which did not amount to a permanent adjudication.<sup>3</sup> The referees were unable to answer categorically the court's

<sup>2</sup> *In re Taylor* (D. C.) 114 Fed. 607; 2 *Loveland on Bankruptcy* (4th Ed.) p. 1253; *In re Marks* (D. C.) 176 Fed. 1018, 1019, 127 C. C. A. 54; *In re Epstein* (D. C.) 208 Fed. 568; *Epstein v. Steinfeld*, 210 Fed. at page 239; *Collier on Bankruptcy* (12th Ed.) p. 695, note 74; *In re Heyman* (D. C.) 225 Fed. 1000, 1002.

<sup>3</sup> As generally illustrative of the control of a bankruptcy court over its own orders, or even upon its own motion, see the decisions of this court in *International, etc., Corp. v. Cary*, 240 Fed. 101, 105, 153 C. C. A. 137; *In re Veler*, 249 Fed. 633, 644, 161 C. C. A. 543; *In re De Ran*, 260 Fed. 732, 739, 740, 171 C. C. A. 470.

question respecting present ability. The court felt forced to conclude that to continue the imprisonment would be against conscience.

[5] We think the order of release should not be disturbed. When the petition therefor was filed the bankrupt had already been imprisoned nearly two months. When he was released he had been confined five months. Nearly four years had elapsed since the bankruptcy, and the trustee seems not to have definitely located any property. The only question in the minds of the referees was whether the imprisonment had been long enough to make the demonstration referred to. They thought it had not been. The District Judge thought it had. The latter was charged with the ultimate responsibility. The question is not which of these views we should prefer were we charged with the exercise of the duty imposed on the district judge. The validity of the release cannot be made to turn on the fact that the confinement had been but for four months rather than say six months.

[8, 7] That both the referee and the judge thought the bankrupt crooked is not controlling. Compare *In re Haring*, supra, 193 Fed. at page 173. If, as the bankrupt had insisted throughout, he did not have and had not had the money, it might well be that he could do no more than protest his innocence, with such corroboration as might be found in his brother's affidavit. *Trust Co. v. Wallis*, 126 Fed. 464, 466, 61 C. C. A. 342. Manifestly, failure to pay and continued insistence on inability to do so, notwithstanding the imprisonment to compel it, is some evidence of inability. It scarcely need be said that release from imprisonment cannot preclude resistance to application for discharge in bankruptcy, nor proceedings to recover property thought to have been fraudulently conveyed or concealed, nor liability to criminal prosecution for such disposition, provided, as to the latter, the statutory limitation has not already run. We cannot consider the asserted evidence of dispositions of property not satisfactorily explained. The testimony is not here, and, moreover, we cannot review the facts. In *re Holden*, supra, 203 Fed. at page 233, 121 C. C. A. 435.

For the reasons stated, the order of the District Court releasing the bankrupt is affirmed.

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VANDENBURGH v. CONCRETE STEEL CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 120.

1. **Patents** ¶312(1)—Burden of apportioning profits on accounting held on infringer.

Where the patented feature gives the whole value to an infringing structure, without which it would not be salable, the fact that the infringing article has also a collapsible feature, which effects a saving of freight in its shipment, does not impose on complainant the burden of apportioning the profits on an accounting for the infringement.

2. **Patents** ¶318(5)—Interest on recovery for infringement runs from date of master's report.

In an infringement case, where there is a genuine controversy, interest on profits recovered runs from the date of the master's report.

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¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeals from the District Court of the United States for the Southern District of New York.

Suit in equity by George E. Vandenburg against the Concrete Steel Company. From the final decree, both parties appeal. Affirmed.

See, also, 258 Fed. 143; 257 U. S. —, 42 Sup. Ct. 186, 66 L. Ed. —.

Carlos P. Griffin, of San Francisco, Cal., and O. Ellery Edwards, of New York City, for plaintiff.

Emery, Varney, Blair & Hoguet, of New York City (Lucius E. Varney, Thomas J. Johnston, and Manvel Whittemore, all of New York City, of counsel), for defendant.

Before ROGERS, MANTON and MAYER, Circuit Judges.

MAYER, Circuit Judge. This is the ordinary patent infringement suit, which now comes here on appeal from a final decree adjudging that plaintiff recover from defendant profits in the sum of \$15,918.33, with interest from the date of the master's report.

Originally the District Court dismissed the bill for noninfringement, but the decree was reversed, for the reasons stated in 258 Fed. 143. Thereafter, in due course, the usual interlocutory decree was entered. *inter alia*, referring the accounting to a special master. The special master reported that plaintiff was entitled to recover profits, but not damages. The District Court sustained this report. Both the District Judge and the master wrote opinions, fully and carefully discussing the questions involved.

1. The patent has been considered by several courts (Vandenburg v. Electric Welding Co. [D. C.] 259 Fed. 579, and [C. C. A.] 263 Fed. 95, certiorari denied 253 U. S. 497, 40 Sup. Ct. 587, 64 L. Ed. 1031; Vandenburg v. Truscon Steel Company, opinion of District Court for the Northern District of Ohio, Eastern Division, dated September 23, 1920, decree affirmed, 277 Fed. 345), and there have been differences of opinion. The law of this case, however, is that set forth in this court's opinion per Judge Ward in 258 Fed. 143, *supra*. The gist of the case may be recalled by the following quotation:

"These claims [3 and 5 of the reissue] should be construed consistently with the specifications, which are also literally the same in each patent, as meaning that the spiral coil is rigidly connected with the longitudinal bar at each point of contact. So construed, the claim describes a continuous spiral rigidly and integrally connected with kerfs and spurs in the bar, constituting a trusslike structure within the body of the concrete, resisting lateral and longitudinal strains, and which can be more cheaply manufactured than if the spiral were riveted or welded to the bar at each point of contact. The defendant's witness Cummings frankly admits that this form of reinforcing structure was new in cement work and has come into general use. \* \* \* The defendant's structure when set up to receive the concrete is exactly the same as plaintiff's except that the spiral coil is not rigidly fixed by kerfs and spurs on the bar. This enables the structure to be collapsed when not in use, a commercial improvement for purposes of shipment, but which does not justify the defendant's appropriation of the plaintiff's structure."

Defendant's collapsible feature thus did not avoid infringement, but merely added a commercial improvement for purposes of shipment.

[1] It is contended by defendant that the case is one for apportionment of profits, and that court and master erred when they ascribed (as did plaintiff) the whole value of defendant's structure as a commercial article to the Vandeburgh patent feature. The theory of defendant is that all—or, in any event, part—of the commercial value of defendant's structure was due to its collapsible feature, and, but for this, the structure would not have been salable. Therefore defendant contends that, when plaintiff has not adduced any testimony that the structure is salable when not collapsible, or of the profits due to collapsibility, plaintiff has failed to carry the burden of proof cast upon him. *Westinghouse v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222.

Defendant did not introduce any testimony in respect of apportionment. It relied on its contention that, because plaintiff failed to produce testimony upon which an apportionment could be based, he would be entitled to nominal damages only. It may be assumed from the testimony of plaintiff's witnesses that, if the structure were shipped, there would be a saving in freight. It may also be assumed that in some instances, owing to competitive conditions, the determining factor in a sale might be this saving. Yet it is entirely plain that there never would have been any sale whatever without this Vandeburgh feature. It was the Vandeburgh "form of reinforcing structure," infringed by defendant, which was new in the art. The advantage, according to the expert Thayer, over the method, in the prior art, of riveting or wiring, is that—

"The method of wiring uses up a good deal of the section of the bar. It was wasted that way, and riveting is also expensive."

Thayer also mentioned the collapsible feature as a part of what he called the "Vandeburgh method"; but with this we do not agree, in view of our former decision. It is entirely clear, however, that defendant would never have sold a dollar's worth of its devices, had it not availed of plaintiff's patent. The cheapness of manufacture was due to plaintiff's disclosure, which, therefore, created defendant's device as a commercial commodity. Because, then, in some instances, the additional feature of collapsibility saved freight, it cannot be said that this feature placed the burden of showing apportionment on plaintiff.

The test is whether the invention of the patent gives the whole value to the infringing device. Obviously it must, in a case where the sale of the article would be impossible without availing of the disclosure of the patent, and, where the additional feature had no relation to the structure, qua structure, or to its shipment, as such, but only to reduced expense in transportation, accomplished by means which in no manner changed the character of the structure when used for the purposes for which it was designed. If, therefore, the saving of freight was an accounting element, the burden of so showing was on defendant. *Westinghouse v. Wagner Mfg. Co.*, supra.

This is peculiarly illustrated in this case. Barbour, who is in charge of the details of the sales in defendant's New York office, was called by plaintiff. He testified as follows:

"Q. 41. In any event, these spirals are shipped collapsed, connected to some longitudinal bars; you understand that to be the subject-matter of this suit? A. I understand that to be the subject-matter of this suit; but the spirals are not all shipped in that way, not in my territory.

"Q. 42. What percentage are shipped in any other way? A. You mean the territory I know about; that is, within New York City, or a radius of 25 miles of New York City?

"Q. 43. Where you are selling? A. In New York City, or a radius of 25 miles from New York, they ship what we call field assembled; that is, the coil wire is shipped. It is coiled to diameter and shipped separate as a coil, then the angles are punched and shipped separate; that is on account of a restriction.

"Q. 44. Assembled by you, or assembled by the contractor? A. By the contractor on the job, what we call field assembly; that is on account of a restriction, I think it is, Metal Lathers' Union; they won't allow us—they won't allow; I don't know as I should say 'us,' but they won't allow the contractors to use spiral in any other way in New York City, or within a radius of 25 miles of New York."

The foregoing shows that a considerable business was done by defendant without the collapsible feature because of the "union" restriction, and thus destroys any contention that collapsibility was, in all instances, an indispensable requisite. From what has been said supra, there was no obligation upon plaintiff to apportion the profits between the Vandenburg features and the prior art. There was no standard of comparison, and, on the evidence in this case, there was no occasion for that reason to apportion profits. See *Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works*, 277 Fed. 171, recently decided by this court.

2. On the facts in the case, as clearly set forth by the master and approved by Judge Knox, there was no evidence which afforded any basis for fixing the amount of a reasonable royalty. We think this question was wholly one of fact, to be disposed of on settled principles which do not call for exposition.

[2] 3. Plaintiff urges that he is entitled to recover interest at 6 per cent. as to each item of profit from the date thereof as set forth in defendant's account. There is no evidence of wanton infringement. The mere fact that the courts held different views as to the claims of the patent is sufficient to negative any such suggestion. *Metallic Rubber Tire Co. v. Hartford Rubber Works Co.*, 275 Fed. 315; *Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works et al.*, 277 Fed. 171. In an infringement case, where there is a genuine controversy, it is settled in this circuit that interest runs from the filing date of the master's report. *Oehring v. Fox Typewriting Co.*, 251 Fed. 584, 163 C. C. A. 578; *Metallic Rubber Tire Co. v. Hartford Rubber Works Co.*, supra; *Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works et al.*, supra.

4. Plaintiff, contrary to defendant's contention, was not guilty of laches, and there were no intervening rights. Plaintiff has recovered profits only from August 15, 1916, the date of the reissue patent.

The decree is affirmed, without costs on this appeal.

In view of the result, there is no occasion to deal further with the master's motion to dismiss or affirm as to his allowance.

WILLIS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

**Criminal law §—768(1)—Instructions commenting on importance and nature of case not reversible error.**

While a trial court is without authority to use undue influence, or to coerce the jury, or to impose on them a constraint that will interfere with their independent judgment of the facts, it is not reversible error to direct their attention to matters of common knowledge and public concern, and to impress them with the seriousness of the case which is under consideration.

In Error to the District Court of the United States for the Northern Division of the Southern District of California; George M. Bourquin, Judge.

Criminal prosecution by the United States against J. W. Willis. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was convicted under an information which charged him with maintaining a common nuisance; that is to say, a building where intoxicating liquor, to wit, whisky, was kept and sold. The court, in instructing the jury, made the following remarks:

"In respect to the law involved in this case, the famous Volstead Act (41 Stat. 805), passed by Congress to carry out the provision for national prohibition, it is a constitutional amendment, and it is just as much a law as any other law upon our statutes. We all know that no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now; but that is only the more reason why it must be enforced, as long as it is the law, with diligence and faithfulness, so that this tendency to violate this law may not, as it inevitably will, if its violations are condoned or permitted to continue unpunished, tend to encourage the violation of other laws; because, when people discover that one law may be violated with impunity, that courts and juries are impotent to enforce the law, there is a general tendency to transgress other laws, a failure to give due observance to law, and, as a result, a breaking down of the morale. In other words, if a man may break the law and escape the consequences of his act, people say: 'What is the use? If one set of men can violate one law and escape, what is the use of the rest of us observing any law?' So it leads to the violation of other laws, and a breakdown of the morale of the people.

"Another thing in reference to this Volstead Act: People comment upon the fact that with many people it is not a popular law; many people are opposed to its spirit. They argue about this way—that if they are drawn in the jury box in a case involving a prosecution for the violation of its provisions, they will return a verdict of acquittal; that they are against the spirit and operation of the law; that it is not right, so they will fail to enforce the law, and will permit the offender to escape. They argue to themselves further: 'If I am accused of a violation of this law, it will only be necessary for me to swear to any sort of a fictitious defense to give the jury a plausible excuse in order to secure my acquittal.' Gentlemen of the jury, that is a thing that wants to be suppressed, as not well founded. I will say that in the federal court I have not found it to have any basis of truth, so far as juries are concerned. Of cases that have come up in this court, there have been as many convictions that were merited under this law as in any other case. Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases, as in any other question that may be brought before you, and that you give to it the same serious, thoughtful, and

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honest consideration; that you execute and carry out your duty, your obligation, and your oath, whatever the verdict may be."

The plaintiff in error excepted to that portion of the instructions in which the court commented upon the Volstead Law, and particularly to that portion in which it was stated that the law was being violated more than any other law at that time, and to the comments to the effect that violations of it "are breaking down the morale of the people in the general observance of law," and that there was a spirit not to enforce that law. Counsel further excepted to "that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence."

Lester H. Loble and McIntire & Murphy, all of Helena, Mont., and Frank Hunter, of Miles City, Mont. for plaintiff in error.

John L. Slattery, U. S. Atty., and Ronald Higgins and Wellington H. Meigs, Asst. U. S. Attys., all of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is urged that there was no evidence to support the statements made by the court in regard to the Volstead Act and the violation thereof, or to show that the failure to enforce the same would break down the morale of the people, or to indicate that the law was not popular with the people, etc. It is further contended that the remarks of the court were such as to impress the jury with the fact that the law had been flagrantly violated, and that its future efficacy depended upon convictions in that court, thereby placing the defendant in the position of persons whose conviction must be had in order to uphold that particular law in public esteem. *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841, and other decisions of like nature are cited. The court, in so instructing the jury, stated matters of fact which are of common knowledge. There is no contention that what was said was untrue. While a trial court is without authority to use undue influence or to coerce the jury, or to impose upon them a constraint that will interfere with the exercise of their independent judgment of the facts, it is not reversible error to direct their attention to matters of public concern, and to impress them with the seriousness of a case which is under consideration. What the court said in this case was not in any sense an appeal to passion or to prejudice. It can be regarded only as a wholesome admonition.

In *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, the court approved a charge in a bigamy case in which, speaking of the consequences of polygamy, the trial court said:

"I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children, innocent in the sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers: and as jurors fail to do their duty, and as these cases come up in the territory [of Utah], just so do these victims multiply and spread themselves over the land."

In *Hayes v. United States* (C. C.) 32 Fed. 662, Judge Brewer said:

"It is not to be wondered at under the circumstances that the learned judge who tried this case was indignant, and felt called upon to impress upon the jury the seriousness of the offense charged, and their duty to give careful attention to the testimony. It is painfully true that there are some violations of law, such as tampering with the ballot box, influencing of jurors, and matters of that kind, which to many seem trivial. They are often in common conversation laughed at when successful, and simply sneered at when a failure; but they are offenses which, although the punishment imposed by statute be not great, are of a most heinous character and affecting vitally the best interests of society. It is the duty of the trial judge, when cases of that kind are presented, to see to it that they are not laughed out of court, and that the jury are impressed with the seriousness of the accusation. It is a matter of congratulation, rather than of complaint, that there are judges whose personal weight of character, learning, and high ability are such that their earnest words compel the serious attention of jurors."

The exception to the charge on the ground that the court had told the jury that Smith was the agent of the defendant was not well taken. The court in charging the jury said:

"Ask yourselves this: \* \* \* Whether or not Smith was the agent of the defendant."

The evidence justified the suggestion of that question to the jury, and we find no merit in the exception.

The judgment is affirmed.

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HELFI CO. v. SILVEX CO. et al.

(Circuit Court of Appeals, Third Circuit. February 25, 1922.)

No. 2786.

Patents  $\Leftrightarrow$  328—1,061,915, for a spark plug, held not to involve invention.

The Johnston patent, No. 1,061,915, for a spark plug designed to produce a larger spark than heretofore obtainable, as limited by an earlier patent, *held* not to involve invention, but to show only such a mechanically progressive step as the constantly improving art would naturally take.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the Hefli Company against the Silvex Company, and others. From a decree for defendants (274 Fed. 653), plaintiff appeals. Affirmed.

Wallace R. Lane and George Mankle, both of Chicago, Ill., and Chester N. Farr, Jr., of Philadelphia, Pa., for appellant.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa. (Edward H. Schwab, of Bethlehem, Pa., of counsel), for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This case involves construction of the claims of a patent for a spark plug, alleged infringement thereof,

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and asserted unfair business competition in the sale thereof. Turning first to the patent phase thereof, we note that on February 4, 1911, Charles F. Johnston applied for, and on May 13, 1913, was granted, patent No. 1,061,915, here in suit, for a spark plug.

As will be seen from the statements in his specification, the object he had in view was to obtain a larger spark than had hitherto been possible, and the functional means to do so was the extension in parallel lines of the spark-emitting portion of the electrode, in a form that had not been theretofore used; and in such novelty of object and originality of means his disclosure was alleged to involve invention. These disclosures of object and means he thus stated in his specification:

"One of the objects of this invention is to produce an improved spark plug by means of which a considerably *larger* spark may be obtained than has heretofore been possible. \* \* \* The outer end portions *11a* of the electrodes, *11* are bent to be parallel with the central electrode, so that, instead of a spark being formed *at only the points* of each of the electrodes *11*, a large spark is formed. It will be seen that when a current passes through the spark plug it will jump the gaps from the electrode *5* to the *long end portions* of each of the electrodes *11* of opposite polarity, thereby producing a much *larger spark* than has heretofore been obtainable. \* \* \* Inasmuch as a large spark is drawn at a point freely accessible to the incoming charge of fresh gasses, the very best ignition is obtained."

Assuming for present purposes, as we will, the utility and operative value of this spark plug, the better ignition due to its length and zone of location, the minimum of wear upon it, due to the spark emanating from a parallel plane and not from a point, its lessened carbon clogging, the ease with which it can be cleaned, the breaking up of the incoming charge of gas in the cage or basket formed by the number, contour, and location of its electrodes, and its other points of excellence, we still revert to the underlying question whether the device involved invention. This issue the court below found against the patent, and after a study of the art we find no error in its so doing. When the application was made, the Patent Office rejected all the claims, in view of the patent to Bouldt, No. 5,899 of 1907, and other patents. Limiting reference there, we note that in spite of amendments, withdrawals of claims and arguments of counsel, the Office for two years persisted in rejections based on this Bouldt and other patents. And we are unable from the file wrapper to discover any change of view or grounds for change of view on the part of the Office from its steadfastly maintained position of these patents anticipating the application. Nor do we now see any reason why the Office should have abandoned its original position, and given to the applicant the governmental stamp of patentability and the consequent foundation for expensive litigation, which could only end in disappointment to the patentee.

Turning to Bouldt's patent, we note that his object, as was Johnston's, was to produce a large spark, and Bouldt's means, as were Johnston's, were long, parallel surfaces at the end of his electrodes. In relation to his object and his means, Bouldt says:

"This invention has reference to sparking plugs \* \* \* of that kind in which the parts between which the sparks pass present relatively *large surfaces*, in order that the wear on the parts may be diminished in comparison with that occurring in sparking plugs in which the spark proceeds from a

point of *small dimensions*. \* \* \* In the sparking plugs in accordance with this invention \* \* \* the outer electrodes are formed in such a manner as to form bars, rods or the like, which are so disposed that the surfaces opposed to the surface of the central electrodes are *parallel* to this latter and are relatively of *great length*. Thus a relatively *long range* of *sparks* is produced."

Bouldt also shows, not only the parallelism of his electrode ends, but the possible multiplication of their number (and thus Johnston's use of four electrodes was thus foreshadowed), in that regard saying:

"The electrodes 1, 2, \* \* \* are, as already stated, arranged *parallel* to the electrode 3 connected to the central conductor. \* \* \* The electrodes \* \* \* can, of course, be of any desired number, *provided that they present a long surface for the production of sparks*."

In Bouldt's parallelism and the resultant long spark, he carries into his claim in these words:

"A sparking plug of the kind referred to comprising a cylindrical central electrode and any desired number of electrodes arranged around and with *surfaces parallel* to the surface of said central electrode in such a manner that sparks are formed between the electrodes *over a relatively great length* substantially as described."

Eliminating from Johnston's specifications those elements in his device which Bouldt disclosed in his elongated and parallel surface at the end of his electrodes, and no substantial basis for invention remains in the lengthening of such a long spark electrode, parallel spark plug, and locating it in a zone where the spark would strike under better conditions. In view of the development of the art, it was but such a mechanical progressive step as this constantly improving art would naturally take.

It remains to consider the alleged error on the part of the court below in refusing to sustain the charge of unfair competition. Without discussing the proofs, we limit ourselves to stating we find no error in the court's action. Lest it appear we had overlooked that contention, we note that we do so, not because we have found the patent invalid, but because we find no sufficient grounds of simulation or deception on the part of the defendants to justify our finding that they had palmed off or so deceptively dressed or labeled their spark plugs as to mislead a purchaser who wanted, and thought he was buying, the plaintiff's, into accepting the defendants' spark plug in lieu thereof.

The judgment below is affirmed.

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PATERSON BREWING & MALTING CO. v. MESH & CO., Inc., et al.

(Circuit Court of Appeals, Third Circuit. February 24, 1922.)

No. 2752.

Trial  $\Leftrightarrow$  62(2)—Evidence of similar condition of other eggs stored with defendant held proper rebuttal.

In an action for damage to eggs while in cold storage, where the defense was that the damage resulted from the improper handling of the eggs by plaintiffs after they were first placed in storage, evidence that eggs placed by other parties with defendant for storage at the same time

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were in a similar condition to plaintiffs' eggs, though they had not been improperly handled, is competent to refute the defense, and its admission in rebuttal was not erroneous, though it had some tendency to sustain plaintiffs' case in chief, and could not have been admitted for that purpose for want of proof that the other eggs, when stored, were in the same condition as those of plaintiffs.

In Error to the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Action by Mesh & Co., Inc., and others, against the Paterson Brewing & Malting Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

William B. Gourley, of Paterson, N. J., for plaintiff in error.

McDermott & Enright, of Jersey City, N. J. (James D. Carpenter, of Jersey City, N. J., of counsel), for defendants in error.

Before WOOLLEY and DAVIS, Circuit Judges, and ORR, District Judge.

WOOLLEY, Circuit Judge. The one assignment of error which calls for discussion is directed to a ruling upon evidence. It had its rise in wholly opposite views as to the purpose and effect of the evidence offered and admitted. Whether error is involved depends, accordingly, upon which view is correct.

The facts of the case, as pleaded and proved, are shortly these:

Speaking of the parties as they stood at the trial, the plaintiffs, in June, 1919, placed in the cold storage warehouse of the defendant at Paterson, New Jersey, 2,076 cases of eggs, gathered from many points in Iowa. When, in January, 1920, the eggs were withdrawn it was found that a large portion of them had spoiled. Thereupon the plaintiffs brought this suit for damages, charging the defendant with negligence in violating the duty of reasonable care required of a cold storage warehouseman in that it stored the eggs in a room of excessive dampness and allowed the cases to become wet; that it covered the cases with tarpaulins and tar paper in a manner that excluded the air; and that it failed to maintain the room at an even temperature, thereby causing the eggs to mold and spoil. The defendant, by its answer, traversed these allegations of negligence and in addition pleaded that the eggs were not sound when placed in its care.

On these pleadings several issues of fact were raised and vigorously contested. The most of them now stand decided by the verdict which the jury rendered for the plaintiffs. As we read the record brought here on this writ of error, we find only one open to dispute. It is this:

At the trial, the plaintiffs introduced evidence tending to prove that when placed on cold storage with the defendant the eggs were commercially good and when withdrawn they were covered with mold and were commercially bad. For the cause of this change in their condition the plaintiffs also introduced evidence tending to prove that the defendant had, against good cold storage practice, allowed frost to accumulate for an undue period on the brine pipes and water to drip upon the cases and overflow from the drip pan upon the floor.

The defendant met the plaintiffs' case on the moldy condition of the

eggs by evidence which proved that in July, during very warm weather, employees of the plaintiffs took the eggs out of storage in lots of 12 cases, removed them to the top floor of the warehouse where they unpacked, handled and repacked them and then returned them to cold storage. On this conduct the defendant based the defense that, in the movement of the eggs from a cold atmosphere to warm and from a warm atmosphere back to cold, a film of moisture accumulated on them which later developed into the mold with which the eggs were covered when withdrawn from storage in January following.

In rebuttal, the plaintiffs offered the testimony of two witnesses to prove that 12 carloads of eggs collected in Minnesota, Kansas, Iowa, Illinois, Missouri and Tennessee and placed by them in the defendant's cold storage warehouse in the same month in which the plaintiffs stored their eggs and for substantially the same period had molded and spoiled. The court admitted this testimony over objection by the defendant that such testimony is not admissible except in the plaintiffs' case in chief and is admissible then only on showing a condition of witnesses' eggs similar to the condition of the plaintiffs' when put in storage. There was no evidence of similarity of condition. This is the principal error charged against the court on this writ. If this rebuttal evidence was offered in proof of the plaintiffs' case as pleaded, and if it was all the evidence so offered, there might be substance in the defendant's contention. But the testimony of the two witnesses as to the moldy condition of their eggs on withdrawal from cold storage was not introduced by the plaintiffs to prove their case as pleaded, but to meet the defense that the plaintiffs' eggs had acquired their mold when in July they had been resorted and rehandled in a warm room. The testimony of one witness was made relevant by his further testimony that his eggs had not been rehandled but had remained in the defendant's cold storage room continuously from the time they were deposited until they were withdrawn. The testimony of the other witness was made relevant by his further testimony that after placing his eggs in cold storage with the defendant he did, pursuant to prevailing practice, rehandle and repack them to prevent mold from breakage, and that, on withdrawing his eggs, they showed no breakage, yet were moldy. While, admittedly, this testimony strengthened the plaintiffs' case as pleaded in their complaint, it also raised a valid inference, if the jury chose to draw it, that the mold on the plaintiffs' eggs came not from rehandling, as the defendant had contended, but, as with the eggs of the two witnesses, it came from the defendant's alleged negligence in maintaining dripping pipes and a damp room. *Ruddell v. Cold Storage Co.*, 136 Mich. 528, 530, 99 N. W. 756. Being offered and admitted for this purpose, and with this effect, we are of opinion that the testimony was strictly in rebuttal and was admissible.

Finding no error in the trial we direct that the judgment below be affirmed.

## In re REISLER.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 132.

1. Bankruptcy ~~§~~ 404(1)—Act intended to be liberal toward bankrupt applying for discharge.

The intent of the Bankruptcy Act (Comp. St. §§ 9585-9656) is to be liberal toward the bankrupt applying for his discharge.

2. Bankruptcy ~~§~~ 407(1)—Delay in applying for discharge held excused.

Where a voluntary bankrupt filed a petition for discharge within one year, on which the referee refused to certify his discharge to the District Court, and no further steps were taken for nearly three years in the matter, a showing by the bankrupt that the delay was caused by the absence of his attorney from his office, due to a protracted illness, and to services during the World War, and that the bankrupt was led to believe that his discharge had been granted by the fact that no creditors appeared in opposition thereto and no trustee was elected and that he had gone West, out of touch with his attorney and creditors, is sufficient to excuse the delay, and entitle the bankrupt to his discharge.

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of John J. Reisler, bankrupt. From an order of the District Court, denying the application of the bankrupt for his discharge (275 Fed. 65), said bankrupt appeals. Reversed.

Arnold Lichtig, of New York City (Herbert A. Mossler, of New York City, of counsel), for appellant.

Robert A. Fosdick, of New York City, for respondent.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. John J. Reisler filed a voluntary petition in bankruptcy, and was adjudicated a bankrupt on the 27th of September, 1917. He filed a petition for his discharge on July 17, 1918, within the statutory period of one year. The referee refused to certify his discharge to the District Court. The bankrupt did not proceed further until March 12, 1921. On March 17, 1921, the referee procured an order to show cause to be issued on the bankrupt's petition for discharge, and on April 14, 1921, the referee issued the certificate of conformity. On April 18, 1921, the order to show cause why the bankrupt should not be discharged was made returnable in the court below. Thereafter a creditor filed specifications of objections to the bankrupt's discharge, which set forth in substance the failure of the bankrupt to prosecute his petition for a discharge within a reasonable time. The referee in bankruptcy passed upon these specifications, taking testimony, and reported that there was no unreasonable delay, and that the objection of laches or unreasonable delay was not one of the objections specified in the Bankruptcy Act (Comp. St. §§ 9585-9656) as justifying a refusal to discharge a bankrupt.

[1] On a motion to confirm the report of the referee, the District Judge denied the petition and application for a discharge. In answer

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to the specifications, the bankrupt proved that the delay was due to the fact that his attorney abandoned his office because of a protracted illness, and also that he served his country during the World War; that the bankrupt believed that his discharge had been granted, and was led into this belief by the fact that his creditors did not appear in opposition, and no trustee was ever elected. As a further excuse, he proved that he left the state, going to live in the West, and remained there, and was out of touch with his attorney and creditors. He further pleaded his poverty and inability to pay the fees required. These excuses were addressed to the discretion of the court below, and were held by the District Judge to be insufficient. The intent of the Bankruptcy Act is to be liberal toward the bankrupt applying for his discharge. *Matter of Rosenfeld* (C. C. A.) 262 Fed. 876; *In re Braus*, 248 Fed. 55, 160 C. C. A. 195.

[2] We think that the excuses set forth by the bankrupt for his failure to petition more promptly for his discharge were such as should have appealed successfully to the discretion of the court below. They were sufficient to excuse the delay, and his discharge should be granted. Order reversed.

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**WHITE, Commissioner of Immigration, v. YOUNG YEN et al.**

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922. Rehearing Denied March 27, 1922.)

No. 3751.

**Habeas corpus — 32(1)—Evidence not weighed on review of order for deportation of Chinese.**

In habeas corpus proceedings for the discharge of Chinese persons refused admission to the United States as citizens and held for deportation, it is not the function of the court to weigh the evidence; but, if petitioners were given a fair hearing and here is some evidence to sustain the decision of the immigration authorities, it must stand.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Habeas corpus by Young Yen and Young Soon against Edward White, Commissioner of Immigration at Port of San Francisco. From a judgment discharging petitioners, respondent appeals. Reversed.

John T. Williams, U. S. Atty., and Ben. F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

Geo. A. McGowan, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellees, upon arriving at the port of San Francisco from China, made application to enter the United States as citizens, claiming to be the foreign-born sons of Young Fai, a citizen of the United States. Their applications were denied after a hearing before a board of special inquiry, and on appeal to the Sec-

retary of Labor the decision of the board was affirmed. Upon habeas corpus proceedings the court below discharged the appellees. From that judgment the Commissioner of Immigration takes this appeal.

We are unable to see on what ground it can be held that the proceedings before the board of special inquiry were unfair. That board reached the conclusion that the proofs were insufficient to show that the appellees were the sons of Young Fai. Young Fai testified that they were his sons, and that he was married in China K. S. 19—1—16, which would be March 4, 1893. But it was shown that in 1897, on his return from China, when he was permitted to enter as a citizen of the United States, Young Fai testified: "I am not married." It was shown also that on March 17, 1909, Young Fai appeared as a witness for another of his alleged sons, Young Nin, at which time he testified that he was married K. S. 19—9—20, which would be October 29, 1893. Again in his testimony in this proceeding Young Fai testified that his son Young Soon was born K. S. 28—8—15, and that his son Young Yen was born K. S. 29—10—10. In 1907 he testified that Young Soon was born K. S. 28—1, and Young Yen was born K. S. 29—10—20.

Young Fai made no explanation of these discrepancies, although he was afforded full opportunity to do so. He denied that he had testified in 1897 that he was not married, but he admitted that in all other respects the record of his testimony taken at that time was correct. The discrepancies in Young Fai's testimony as to the dates on which his sons were born may be unimportant, but his contradictory statements as to the fact of his marriage and the date thereof may well have been deemed important by the board of special inquiry, and sufficient to discredit Young Fai's testimony that the appellees were his sons. We cannot say, in view of such statements of Young Fai, that the conclusion reached by the board was manifestly unfair. It is not the function of this court in habeas corpus proceedings to weigh the evidence or go into the question of the sufficiency of the probative facts. It is sufficient in such a case, if there is some testimony to sustain the conclusion reached. Here there was, we think, substantial ground to discredit the testimony which was adduced on behalf of the applicants.

The judgment is reversed, and the cause is remanded, with instructions to remand the appellees to custody.

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**ROBERT J. METZLER, Inc., v. WYOMING NAT. BANK et al.**  
and three other cases.

(Circuit Court of Appeals, Third Circuit. January 20, 1922.)

Nos. 2816-2819.

**Receivers** ➡ 139—Order setting aside sale in four lots held proper.

Where the order for sale by receiver of the property of motor car corporation directed the property first to be offered as an entirety and then in separate parcels or lots, as in the discretion of the receivers might appear most likely to obtain the highest price, a sale of the property in four lots, one of which consisted of 267 catalogue items and represented three-

➡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

fourths of the bid for the entire property, which sale was made after many of the attachments necessary to make the machines complete were not shown on the catalogue or advertisements of the receivers, and were not displayed with the machines, was properly set aside, especially where the sale price was only about 60 per cent. of the appraised value of the property.

Appeals from the District Court of the United States for the District of Delaware; Hugh M. Morris, Judge.

Suit in equity by Uri T. Hungerford against the Owen Magnetic Motor Car Corporation. From an order refusing confirmation of sales by the receivers, and directing a new sale, Robert J. Metzler, Inc., Daniel Dryer, Alfred Lamberg and Morey & Co., the purchasers, separately appeal. Affirmed.

Bilder & Bilder and Nathan Bilder, all of Newark, N. J., for appellants.

R. Satterthwaite, Jr., of Wilmington, Del., for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. Passing by, but expressing no opinion on the two preliminary questions of, first, the standing of the bidders to take these appeals; and, second, whether they are not estopped by their action in taking advantage of the condition in the order setting the sale aside, namely, the return of the hand money paid, and addressing ourselves to the third question, viz. the setting aside of the sale, we are of opinion that not only was there no abuse of discretion by the court below, but so far as the facts are before us, and as we are enlightened by the views of that court, which are reported in *Hungerford v. Owen Magnetic Motor Car Corp.*, 277 Fed. 244, we are of the opinion its action was entirely proper in setting aside the several sales.

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In re LEVY  
and five other cases.

(District Court, W. D. Texas, El Paso Division. February 8, 1922.)

Nos. 1759, 1775, 1780, 1785, 1792, 1799.

**Aliens** ¶62—**Claiming exemption from military service before declaration of intention not a bar to naturalization.**

The fact that an alien, within five years prior to his application for admission to citizenship, but before his declaration of intention, on registering under the Selective Service Act, in answer to an irrelevant question in the questionnaire, claimed exemption from military service as an alien, *held* not to show conclusively that he was not "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," which is a requisite to admission under Naturalization Act June 29, 1906, § 4 (4), being Comp. St. § 4352, but that question may be determined by other evidence.

In the matter of the separate applications of Henry Levy, alias Henry Lavis, of Stamatis Pantelis Angelastos, of Ernest Carlson, of

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Nicholas Hamrah, of Demetrios Panaghioton Metropoulas, and of Isabel Balderrama Garcia for naturalization. Petitions granted.

Zach Lamar Cobb, Breedlove Smith, and Wm. H. Fryer, all of El Paso, Tex., for petitioners.

M. H. Anthoni, Naturalization Examiner.

SMITH, District Judge. The above-named persons have presented petitions for naturalization. Hearings upon all of them have been had. The only question raised is whether or not applicants have shown that during the five years preceding the dates of their respective applications they were "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," as required by paragraph 4, section 4, of the Naturalization Act (Comp. St. § 4352). It is admitted that they have fully met every other requirement.

Within the five-year period, and while the late World War was in progress, but before petitioners made their respective declarations of intention, they registered under the Selective Service Law, and in answering questionnaires each claimed exemption upon the ground that he was an alien. At no time was any of them enemy alien, but friendly. Their declarations of intention were all filed after the armistice was signed. But for their claims of exemption from military service the evidence would amply show that petitioners, during the five years preceding their applications, were attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. During the war they bought Liberty Bonds to the extent of their financial ability. Hamrah was active in the sale of such securities, and Lavis was employed as tool maker in the manufacture of periscopes for American submarines, and other evidence showed that they were all friendly disposed to the United States.

It is not contended, and could not be, that applicants' claims for exemption as matter of law debarred them from admission to citizenship, for it is not so provided by any statute. The contention is that such action on their part conclusively evidenced a want of attachment on their part to the principles of the Constitution, and a want of a well disposal to the good order and happiness of the United States, which cannot be overcome by other evidence.

I do not think this contention tenable. Being friendly aliens, who had not declared their intention, petitioners were not subject to military duty in the army of the United States. They were not included in the Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k). They could have volunteered, but could not have been impressed into the service. Their status was such that there was no need to claim exemption, for, properly speaking, they could not be exempted from a duty that the law did not place upon them. All that the law required of them was that they should register and furnish satisfactory proof in the form prescribed that they were friendly aliens, who had not yet made declarations of intention; in other words, that they were not included in the Act as subject to draft.

It is true that the rules and regulations promulgated to carry the law into effect prescribed that aliens who had not declared their intention should be asked whether they claimed exemption on account of their being aliens. But my attention has not been called to any provision of law authorizing such inquiry, and I believe there is none. So at most such an inquiry could properly elicit only information as to whether the alien was or would be willing to volunteer for military service. The fact that the alien was nondeclarant of itself exempted him from the draft. It was not necessary for him to claim exemption. So far as he was concerned, there was nothing for him to claim exemption from.

Therefore, viewing the matter in the light of the law, petitioners did not claim exemption from military duty, because no such duty rested upon them. They merely declined, when asked to volunteer, to perform a duty which no law had imposed upon them. They were not citizens, and we had no right to expect them to assume the duties, the highest duties, of citizenship. And their refusal to do so, in my opinion, does not show, or at least does not conclusively show, that at the same time they were not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. It will be noted that the requirement is not that the alien shall show that, before declaration of his intention, he was willing to assume all the duties of citizenship with reference to the Constitution and government of the United States in order thereafter to secure citizenship. It is only required that he shall for the time required have an attachment for the principles embodied in the Constitution, and not the Constitution itself, and that he was and is well disposed to the good order and happiness of the United States; that is to say, that he preferred and was devoted to our form of government, and that he was himself obedient to our laws, and that he was not hostile, but friendly, to our government.

I believe each of these applicants has shown that he has fulfilled these requirements, and is therefore entitled to have his petition granted; and it is so ordered.

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THE BOSTON  
and nine other cases.

(District Court, E. D. New York. September 26, 1919.)

**Bankruptcy**  $\hookrightarrow$  1834, New, vol. 8 Key-No. Series—Right of lienors to proceeds of collision suit referred to court of bankruptcy having jurisdiction of estate of owner.

Where the trustees in bankruptcy of a dredging company claim to have succeeded to a right of action for injury in collision to a dredge owned by the company, a court of admiralty in which are pending suits to enforce liens against the dredge will not interfere on behalf of the lienors with the prosecution of such suit or with the primary right of the court of bankruptcy to dispose of the proceeds.

In Admiralty. Suit by William J. Gokey & Co., Inc., against the dredge Boston, with nine other cases. On motions by libelants for en-

$\hookrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

forcement of their right to any sum paid or collected as damages for injury to the Boston in collision. Denied without prejudice.

Haight, Sandford, Smith & Griffin, of New York City, for libellant Fidelity Deposit Co. of Maryland.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for ancillary receivers.

Harrington, Bigham & Englar, of New York City, for underwriters of the Boston.

Alexander & Ash, of New York City, for libelants Gokey and others.

GARVIN, District Judge. On August 5, 1920, the dredge Boston, then owned by the Boston Dredging Company, was injured by collision with the tug Bouker No. 3. Thereafter various admiralty suits in rem were brought against the Boston, which was sold to satisfy the liens obtained therein by the libelants. In the distribution of the funds realized at the sale two lienors were directed by the court to be paid in full (having made repairs which resulted in saving the boat from becoming a total loss), the remaining lienors receiving about 40 per cent. of their respective claims.

It was asserted upon the argument, and not disputed, that when these repairs were made the Dredging Company, in order to induce William J. Gokey & Co. to proceed with a part of the work, gave the latter company an assignment of the claim of the Dredging Company against the tug for damages arising out of the collision to the extent of \$14,250, being proximately the cost of the repairs made by Gokey & Co. The latter company, however, has been paid, as stated, for this work. The Boston Dredging Company later became bankrupt, and trustees in bankruptcy have been appointed by the United States District Court in Massachusetts.

This proceeding is a motion by lienors of the Boston to require and authorize the Bouker Contracting Company and/or their underwriters to pay to the clerk of this court all moneys intended to be used in payment of their liability to the Boston because of the collision aforesaid, to restrain them from otherwise disposing of this money, to restrain the underwriters of the Boston from paying the sums due under insurance policies on the Boston to the receivers of the said Dredging Company, to direct the marshal to collect and pay to the clerk of the court all moneys now or hereafter in the possession of the Bouker Contracting Company and/or their underwriters intended to be used in payment of their said liability to the Boston, and finally to direct the clerk of the court to distribute said moneys to the lienors in the same proportion as provided by the distribution order made by the court August 12, 1921.

The moving parties claim that the Bouker No. 3 was decreased in value by the collision, and that the money to be paid in damages therefore stands in place of the vessel, and is subject to the maritime liens which attached to her when the causes of action arose—citing *The John G. Stevens*, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969; *Shepard v. Taylor*, 5 Pet. 707, 8 L. Ed. 269; *Brown v. Lull*, Fed. Cas.

No. 2,018; *O'Brien v. Miller*, 168 U. S. 297, 18 Sup. Ct. 140, 42 L. Ed. 469; and *The George Prescott*, Fed. Cas. No. 5,339.

The trustees in bankruptcy distinguish these cases upon the ground that, because of the petition and adjudication in bankruptcy in Massachusetts, the District Court there obtained jurisdiction of the chose in action against the owners of the *Bouker No. 3* for the damage done by that boat to the *Boston*, which chose in action vested in the trustees in bankruptcy. The determination of this question is not free from difficulty, but in view of the fact that the trustees urge that they have a claim against the *Bouker No. 3* which has not yet been liquidated or settled, and in connection with which the underwriters of the *Boston* announce that they are about to file a libel against the *Bouker No. 3*, claiming on behalf of the *Boston* and the *Boston Dredging Company*, not only the amount of the repairs necessitated because of the collision, but other expenses, including the value of loss of services of the *Boston*, any action by this court which might have the effect of releasing the *Bouker No. 3* from any part of its liability because of the collision would be ill-advised.

The rights of all parties can be fully protected by the District Court of Massachusetts, which should supervise any settlement of the claim for damages. It is not necessary to make any determination at this time of the rights of any of the parties in connection with the pending application. If, after settlement of the claim for damages is made by the trustees, the bankruptcy court in Massachusetts shall hold that it is without power to pass upon the claim of the lienors sought to be asserted on this motion (*The Philomena* [D. C.] 200 Fed. 859), an appropriate application may be made to this court.

Motion denied, without prejudice to any of the parties to make such further application, here or elsewhere, as may be advisable.

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### In re GLORY BOTTLING CO. OF NEW YORK, Inc.

(District Court, E. D. New York. December 3, 1921.)

#### 1. Bankruptcy ☞77—Dividing claim against alleged bankrupt.

A single claim against an alleged bankrupt may not be divided, for the purpose of making the requisite number of petitioning creditors; but the mere fact that the claims of two of the petitioning creditors are based on trade acceptances received from the same source does not invalidate the petition.

#### 2. Bankruptcy ☞84—Court may permit amendment to make petition more specific.

The court may permit amendment of an involuntary petition, to make allegations which are too general more specific.

In Bankruptcy. In the matter of the *Glory Bottling Company of New York, Inc.*, alleged bankrupt. On motion to dismiss petition. Granted, subject to leave to amend.

Joseph G. M. Browne, of New York City, for bankrupt.  
William Hauser, of New York City (Max Rockmore, of New York City, of counsel), for petitioning creditors.

GARVIN, District Judge. The alleged bankrupt has moved to dismiss the petition herein on the ground that upon the face thereof it is jurisdictionally defective. The specific objections are, first, that it appears from the petition that a claim of the National Box & Lumber Company, which totals the sum of \$4,132.48, was divided into two parts for the purpose of obtaining the requisite number of petitioning creditors, two of whom, Prigg and Kopp, were described as assignees of the last-mentioned company; second, that the petition pleads the language of the statute in its references to the alleged acts of bankruptcy, without setting forth in detail the facts constituting the same; third, that the petition is based upon information and belief, the sources of information and grounds of belief not being stated; and, fourth, that the petition sets forth that the alleged bankrupt is insolvent, without pleading in detail the facts from which insolvency necessarily follows.

[1] It is quite true that the courts have disapproved of a creditor dividing his claim for the purpose of obtaining the number of creditors necessary under the Bankruptcy Act (Comp. St. §§ 9585-9656). *Stroheim v. Perry Co.*, 175 Fed. 52, 99 C. C. A. 68; *In re Tribelhorn*, 137 Fed. 3, 69 C. C. A. 601; *In re Halsey* (D. C.) 163 Fed. 118; *In re Independent Thread Co.* (D. C.) 113 Fed. 198. The petition discloses, however, that what two of the petitioning creditors have done is to acquire trade acceptances from one source. These acceptances are very common in the commercial world. Each represents a separate cause of action, and usually is originally delivered for the purpose of enabling the holder to realize upon the same by a further transfer thereof. It may develop upon the trial of the issues that the transfers were for the purpose of creating the necessary number of petitioning creditors, but the court is of the opinion that the mere fact that the claims of two of the petitioning creditors are based upon trade acceptances received from the same source does not invalidate the petition.

[2] With respect to merely pleading, in the words of the statute, the acts of bankruptcy, the failure to set forth the sources of information and the grounds of belief, and the statement in the petition that the bankrupt is insolvent, without setting forth facts from which insolvency necessarily follows, the court is of the opinion that the authorities justify the petitioning creditors being required to comply by amendment with the objections raised. The court believes that it has ample power to permit these amendments (*In re Plymouth Cordage Co.*, 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665), and in view of the fact that it is asserted, and not denied, that the effect of dismissing this petition will be to prevent the petitioning creditors under a new petition from attacking a mortgage made by the bankrupt within the prohibited four months period, the court is of the opinion that the interests of justice require that the petitioning creditors be allowed an opportunity to file an amended petition, in accordance with the foregoing suggestions.

The motion is therefore granted, unless an amended petition is filed within 10 days after the service of a copy of the order to be entered herein, with notice of entry thereof. It should be noted that the petition does not comply with General Orders in Bankruptcy XXI, subdivision 3 (89 Fed. ix. 32 C. C. A. ix). The amended petition must set forth the true consideration. In view of all the surrounding conditions, when the amended petition is filed, petitioning creditors must give a bond of \$500, and the amended petition must set forth the addresses of the petitioning creditors.

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**WARD BAKING CO. v. OAK PARK BAKING CO., Inc.**

(District Court, D. Delaware. January 25, 1922.)

No. 445.

**Trade-marks and trade-names and unfair competition §95(1)—Temporary injunction refused, on balancing of injuries.**

In a suit to restrain defendant corporation from using in connection with its goods the name of two of its principal officers, which was also used in the trade-mark of complainant, where it appeared that defendant and its affiliated companies had been using that name for years, and that no injury which could not be compensated could result to plaintiff from the continued use until the final hearing, while a preliminary injunction would require defendant to change all of its advertising matter, cartons, etc., the preliminary injunction will not be granted.

In Equity. Suit by the Ward Baking Company against the Oak Park Baking Company. On motion for preliminary injunction. Motion denied.

Pennie, Marvin, Davis & Edmonds, of New York City, and Herbert H. Ward, of Wilmington, Del., for plaintiff.

William S. Hilles, of Wilmington, Del., for defendant.

MORRIS, District Judge. The motion herein for a preliminary injunction, directed mainly to the use by the defendant of the word "Ward" in connection with its bakery products, has been heard upon bill, answer, affidavits, and exhibits.

Among the defenses to this motion are those of laches, acquiescence, unclean hands, right of defendant to use the family name of Ward, and that its use has been so accompanied by other words and marks as to distinguish its products from those of complainant. The affidavits are in conflict on practically every cardinal point. Even the validity of the registration by the complainant of the word "Ward" as a trade-mark is denied by the sworn answer of the defendant. The defendant is one of a number of subsidiary companies of "Ward Bros. Company," a New York corporation. Two brothers named Ward are officers and the dominant force in those companies. They have used the name "Ward" in the title of some of their corporations and in connection with their bakery products in certain localities for almost 10 years. The conditions under which this has been done are in dis-

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pute. That which the defendant herein is now doing it apparently has done since 1919.

Final hearing may be had without delay. The injury done to the rights, if any, of the complainant, cannot be materially aggravated or extended in the interim. If, however, a preliminary injunction is issued, the defendant would be required to change its cartons, the inscriptions on its wagons, and its mode of advertising, which would probably be productive of great and irreparable injury to the defendant, should it be ultimately determined that the complainant is without right to the relief it seeks. Under such circumstances, I think the motion for a preliminary injunction should be denied.

It will be so ordered.

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### **RADIO CORPORATION OF AMERICA v. RADIO AUDION CO.**

(District Court, D. Delaware. January 20, 1922.)

No. 439.

**Patents 328—803,684, claim 1, for an audion, held valid and infringed, but claim 37 held not infringed.**

The Fleming Patent, No. 803,684, for a wireless telegraph and telephone device known as an "audion," held, on motion for preliminary injunction, valid and infringed as to claim 1, by defendant's device when used as detector, but not infringed as to claim 37, by defendant's device when used as an amplifier, or as a generator of high-frequency oscillations.

In Equity. Suit for infringement of a patent by the Radio Corporation of America against the Radio Audion Company. On motion for preliminary injunction. Injunction directed, restraining use or sale of defendant's apparatus as a detector only.

Sheffield & Betts and J. Edgar Bull, all of New York City, and William G. Mahaffy, of Wilmington, Del., for plaintiff.

Darby & Darby, of New York City, and Andrew C. Gray, of Wilmington, Del., for defendant.

MORRIS, District Judge. Radio Corporation of America charges Radio Audion Company with infringement of claims 1 and 37 of letters patent No. 803,684, to John Ambrose Fleming, dated November 7, 1905, by making, using, and selling a radio or wireless telegraph and telephone device known as an "audion." A motion for preliminary injunction has been heard upon bill, affidavits, and documentary evidence. I have examined the record, and have studied the briefs of the respective parties with care. Defendant's device may be used as a detector, an amplifier, and as a generator of high-frequency electrical oscillations.

As the record now stands, I think claim 1 of the patent is valid, and that defendant's device, when it is used as a detector, falls within that claim. This makes it unnecessary to determine whether claim 37 is invalid for want of a supplemental oath; but, assuming that claim

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also to be valid, I am not satisfied by the present record, consisting largely of ex parte affidavits, that the defendant's device, when used as an amplifier, or as a generator of high-frequency electrical oscillations, falls within the scope of either of those claims, and consequently the defendant should not now be enjoined from making or selling its devices for the latter uses. I think a more elaborate expression of views at this time would serve no useful purpose.

A decree directing the issuance of a preliminary injunction, enjoining and restraining the defendant from making or selling its device for use as a detector, may be submitted.

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**PAOLICELLI v. SAMUELS.**

(District Court, E. D. New York. November 28, 1921.)

**Removal of causes ¶17—Defendant loses right of removal by appearing and filing answer in state court.**

By appearing in the state court and filing an answer after return day, a defendant held to have lost the right to remove the cause.

At Law. Action by Maria Paolicelli, administratrix, against Harry Samuels. On motion to remand to state court. Motion granted.

Francis G. Hoyt, of New York City, for plaintiff.

Frederick Mellor, of New York City (St. Clair X. Hertel, of New York City, of counsel), for defendant.

GARVIN, District Judge. This is a motion by plaintiff to remand the cause to the state court. The defendant was served with summons within the state of New York on September 28, 1921, and served an answer to the complaint on October 20, 1921, a default of two days being waived. On October 31, 1921, an amended answer was served, with notice that a petition to remove the action to the federal court would be filed on that day. Plaintiff is an alien, residing in the Southern district of New York; defendant is a resident of New Jersey.

The plaintiff contends that the motion must be granted because the petition for removal to the federal court was not filed on or before October 18, 1921, on which day defendant's time to answer the original complaint expired. By appearing in the state court and filing an answer, the defendants lost all right to remove the cause. *Doyle v. Beaupre et al.* (C. C.) 39 Fed. 289; *Woolf v. Chisolm* (C. C.) 30 Fed. 881. The case of *Penniman v. Fuller & Warren Co.*, 133 N. Y. 442, 31 N. E. 318, indicates that the New York Court of Appeals has reached a different conclusion with respect to a state statute phrased in a somewhat similar manner, but that cannot justify a disregard by this court of well-settled authorities.

If the action were removable, it would appear that it should be removed to the federal court of this district. *Matarazzo v. Hustis* (D.

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C.) 256 Fed. 882; Matter of Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061; Matter of Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203.

Motion to remand granted.

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**UNITED STATES v. DOWLING et al. (two cases). SAME v. LINDSAY et al. SAME v. BRYAN et al.**

(District Court, S. D. Florida. February 2, 1922.)

Nos. 1424, 1440-1442.

1. Conspiracy  $\S$  43(6)—Indictments for conspiracy to commit offense not specifically defined held insufficient.

Indictments under Criminal Code,  $\S$  87 (Comp. St.  $\S$  10201), charging conspiracy "to commit an offense against the United States, that is to say, to violate title 2 of the National Prohibition Act in this, to wit, that the said [defendants] would then and there possess certain intoxicating liquors, to wit [stating number of cases of liquor], contrary to the provisions of said act," without stating the kind of liquor, or otherwise alleging which of the many provisions of the Prohibition Act defendants conspired to violate, *held* insufficient, as too general and not sufficiently informing defendants of the charge they were required to meet.

2. Conspiracy  $\S$  43(5)—Allegations of overt acts cannot aid indictment defective in substantive averments.

In an indictment for conspiracy, allegations of overt acts cannot be resorted to in aid of an insufficient averment of the offense which was the object of the alleged conspiracy.

3. Conspiracy  $\S$  43(6)—Indictment held not to charge an offense.

An indictment for conspiracy to violate the National Prohibition Act by possessing "certain intoxicating liquors [stating the number of cases], contrary to the provisions of said act," without alleging any facts to show that such possession was unlawful, either on account of the time, place, or purpose of the possession, or the character of the liquor, *held* not to charge an offense.

4. Intoxicating liquors  $\S$  13, 139—Mere possession of liquor not a crime.

National Prohibition Act Oct. 28, 1919, tit. 2,  $\S$  33, does not make the mere possession of intoxicating liquor a crime, nor would a law making possession a crime be within the power conferred on Congress to legislate for the enforcement of the Eighteenth Amendment, unless for the purpose of rendering effective the prohibition of manufacture, sale, transportation, importation, or exportation contained in the amendment, and appropriate to that end.

5. Conspiracy  $\S$  43(5)—Overt act must be alleged to have been done to effect object of conspiracy.

In an indictment for conspiracy under Criminal Code,  $\S$  87 (Comp. St.  $\S$  10201), an act charged as an overt act must be alleged to have been done "to effect the object of the conspiracy," or words to that effect, and it is not sufficient to allege that it was done "pursuant to said unlawful conspiracy."

6. Customs duties  $\S$  129—Rev. St.  $\S$  3082, as applied to intoxicating liquors, superseded by National Prohibition Act.

Rev. St.  $\S$  3082 (Comp. St.  $\S$  5785), imposing a penalty for smuggling or aiding in concealing or disposing of smuggled goods, as applied to intoxicating liquors, is superseded by National Prohibition Act, tit. 2,  $\S$  3, 29, which prohibit the importation of such liquor, except as therein authorized, and prescribes a less severe penalty for its violation.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. Intoxicating liquors  $\S$  213—Indictment for maintaining common nuisance held insufficient.

An indictment under National Prohibition Act Oct. 28, 1919, tit. 2,  $\S$  21, for maintaining a common nuisance, which alleged in substance that defendants, at some time and at some place within the district, did unlawfully keep — cases of intoxicating liquor on board a certain launch, held insufficient, in that it did not specify the time or place or describe the vessel or the liquor, or set forth any facts showing that the "keeping" was unlawful, or that it was kept for such time as to constitute a "maintaining," within the statute.

Criminal prosecutions by the United States against W. H. Dowling, R. E. Wheeler, and others, and against W. H. Dowling, Bert Lindsay, and others, against Bert Lindsay and others, and against Baker Bryan, P. M. Hopkins, and others. On motions to quash indictments. Motions granted.

Wm. M. Gober, U. S. Atty., of Lakeland, Fla., and Damon G. Yerkes, Asst. U. S. Atty., of Jacksonville, Fla.

Geo. M. Powell, J. T. G. Crawford, Cockrell & Cockrell, John E. Mathews, W. A. Hallowes, Jr., and Edgar W. Waybright, all of Jacksonville, Fla., for defendants.

CLAYTON, District Judge. The defendants are indicted in these four cases for conspiracy to violate the National Prohibition Act (41 Stat. 305). On December 20, 1921, each defendant in each case filed demurrers to the indictments, motions to quash, and motions for bills of particulars. For the purpose of considering such demurrers and motions, the cases are consolidated and heard at the same time.

While there are different defendants in each case, the counts of the indictments are alike in the material aspects, as it will hereinafter appear. Inasmuch as the demurrers and the motions to quash are based upon identical grounds, such motions will not be separately considered, for that is not deemed necessary.

The motion for a bill of particulars need not be passed upon, if the indictments are so fatally defective in the statements of facts alleged to constitute the offense charged that conviction or acquittal upon the indictments would constitute no bar to another prosecution for the same offense. If the indictments are not deemed substantially good, bills of particulars will not be ordered, for a bill of particulars cannot cure a bad pleading. It is because the indictment is good against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If, however, it is bad, the remedy is by demurrer or motion in arrest of judgment. *U. S. v. Tubbs* (D. C.) 94 Fed. 356, 360; *Floren v. U. S.*, 186 Fed. 961, 964, 108 C. C. A. 577.

[1] The first counts in each indictment are legally identical and they charge:

"That on, to wit, the [naming the day] day of [naming the month and year], at Jacksonville, Florida, in the district aforesaid, and within the jurisdiction of this court [naming the defendants] unlawfully, willfully, knowingly, feloniously, and maliciously did combine, conspire, confederate, and agree together, and together with divers other persons, whose names are to the grand jurors unknown, to commit an offense against the United States;

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that is to say, to violate title 2 of the National Prohibition Act in this, to wit, that the said [naming the defendants] would then and there possess certain intoxicating liquors to wit [here stating the number of cases of liquor], contrary to the provisions of said act."

It is not stated in indictment No. 1441 at what place in said district the alleged conspiracy was entered into; and in indictment No. 1424 it is not charged that divers other persons were parties to the conspiracy, as it is done in indictments 1441 and 1442. In other respects, all four of these counts are legally the same in the four indictments.

The first seven grounds of demurrer are:

"(1) That the said count of said indictment does not allege facts sufficient to show the commission by the said defendant of any offense against any law of the United States.

"(2) It is not made to appear, by any issuable allegations of fact in said count contained, what section of title 2 of the National Prohibition Act it will be claimed or sought to be proved the said defendants violated.

"(3) That said count of said indictment is so vague, indefinite, and uncertain that it does not fairly or sufficiently inform the said defendant of the charge he is expected to meet at the trial.

"(4) That it is not made to appear by any issuable allegations of fact in said count of said indictment contained in what county of said district it will be claimed or sought to be proved that the said alleged offense was committed.

"(5) The accusatory part of said count is so vague, indefinite, and uncertain that a judgment upon a trial would not protect the said defendant against a subsequent prosecution.

"(6) The alleged conspiracy is not clearly and definitely charged.

"(7) No plan or scheme whereby an offense against the United States was to be committed is alleged."

Let us now turn to the language of the indictments purporting to impart to the defendants the information as to what particular offense it is charged that the defendants conspired to commit. It is charged:

"That they unlawfully," etc., "did combine, conspire," etc., "to commit an offense against the United States, that is to say, to violate title 2 of the National Prohibition Act, in this, to wit, that the said [naming defendants] would then and there possess certain intoxicating liquors, to wit [here stating the number of cases], contrary to the provisions of said act."

To say that they conspired to commit an offense against the United States is but a conclusion of the pleader. It is not a statement of facts. But it is further alleged that the defendants conspired to violate title 2, etc., in that they "would then and there possess certain intoxicating liquors," the character or kind not stated, "contrary to the provisions of said act."

Examination of the act reveals that it has 39 sections. Section 4 provides that denatured alcohol, rum, certain medicinal antiseptic preparations, patent and proprietary remedies, toilet and antiseptic articles, flavoring extracts, syrups, vinegar, and sweet cider may be manufactured, and of course may be possessed and transported, provided the person doing so acts under the permit and regulations contemplated in the act. All the articles above enumerated come within the definition of intoxicating liquors as contained in section 1 of the act. If the articles mentioned do not conform to descriptions and to prescribed regulations, the manufacturer is not protected, and his possession would

be unlawful, and any one who purchased from him would participate in unlawful possession. Further examination of the act shows that intoxicating liquors may be in other ways unlawfully possessed. It is urged that the vice of the indictment is that the particular manner or way in which the offense was committed is not stated.

The settled rules governing here are that a crime should not be charged by way of inference, but directly; the indictment should set forth accurately every ingredient of which the offense is composed; if the crime is made up of acts and intent, these must be set forth with reasonable particularity as to the time and place; the accused should be informed by the indictment as to the precise nature of the charge against him, to enable the court to say as to whether the facts set forth are sufficient in law to support a conviction; and the test is whether the indictment contains every element of the offense and sufficiently informs the defendant of what he must meet, and also whether it will enable him to sustain a plea of former acquittal or conviction. *Johnston v. U. S.*, 87 Fed. 187, 30 C. C. A. 612; *U. S. v. Cruikshank*, 92 U. S. 543, 23 L. Ed. 588; *Blitz v. U. S.*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; *Brown v. U. S.*, 143 Fed. 60, 74 C. C. A. 214; *Floren v. U. S.*, supra; *Harper v. U. S.*, 170 Fed. 385, 95 C. C. A. 555. Other illustrative cases hold that:

The indictments must set forth the facts and not the law, *U. S. v. Nixon*, 235 U. S. 231, 235, 35 Sup. Ct. 49, 59 L. Ed. 207, that an indictment, even if in the words of the statute, must set forth all the elements of the offense, *Martin v. U. S.*, 168 Fed. 198, 93 C. C. A. 484; that, although the language of the statute is employed in the general description of the offense, it must be accompanied with such statement of facts and circumstances that will inform the accused of the specific offense, coming under the general description of the offense, with which he is charged, and that it must descend to particulars. *U. S. v. Hess*, 124 U. S. 483, 487, 8 Sup. Ct. 571, 31 L. Ed. 516.

In *U. S. v. Beiner*, 275 Fed. 704, 708, District Judge Orr, in considering an indictment very like these here, said:

"Inasmuch as section 37 of the Criminal Code denounces a conspiracy to commit any offense against the United States, and inasmuch as the indictment drawn under that section, and now under consideration, does not set forth which of many offenses denounced by the Volstead Act the accused had conspired to commit, the indictment must be deemed to be insufficient."

And it must be said that the words "to commit an offense against the United States" and "to violate title 2 of the National Prohibition Act," and that the defendants "would then and there possess certain intoxicating liquors, to wit [naming a specified number] cases, contrary to the provisions of said act," cannot render the indictments good. These words amount to no more than to say that the alleged possession was contrary to law. In *Keck v. U. S.*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, it was charged that the defendant did "knowingly, willfully, and unlawfully import and bring into the United States to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law and the provisions of the act of Congress in such cases made and provided." The allegations were held insufficient—that the allegations were too

general, and did not give the defendant the requisite information of the nature of the accusation against him. Chief Justice White, for the court, said that:

"As is apparent, the alleged offense averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *U. S. v. Carl*, 105 U. S. 611, 612, 26 L. Ed. 1135, *U. S. v. Hess*, 124 U. S. 488, 8 Sup. Ct. 571, 31 L. Ed. 516, and *Evans v. U. S.*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 890, the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in Rev. St. § 3082 (Comp. St. § 5785), itself; but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise.' The generic expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not per se contrary to law, and could only become so when done in violation of specific statutory requirements."

[2] During the argument it was insisted that the alleged overt acts show what kind or character of possession is charged. As a matter of fact they do not. But, even if they did, the alleged overt acts cannot be resorted to to aid the counts under consideration.

"Clauses in an indictment charging a conspiracy to commit an offense against the United States, which set forth the overt acts, cannot be resorted to in aid of the averments of the clause setting forth a conspiracy, where the latter clause does not refer to the other clauses for certainty as to its meaning." *Joplin Mer. Co. v. U. S.*, 236 U. S. 531, 85 Sup. Ct. 291, 59 L. Ed. 705; *U. S. v. Belner*, *supra*.

And the words "contrary to the provisions of said act" do not relieve the indictments of the defect, as demonstrated in *Keck v. U. S.*, *supra*. One hundred and nine years ago it was said in *The Hoppet*, 7 Cranch, 389, 3 L. Ed. 380, Chief Justice Marshall speaking for the court:

"It is not contended that all these technical niceties, which are unimportant in themselves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of the statute. It would require a series of clear and unequivocal precedents to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offenses against municipal law. It is, upon these and other reasons, the opinion of the court that the information is not made good by the allegation that the offense was committed against the provisions of certain sections of the act of Congress. Is it cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture? The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced. The reasons for the rule are, first, that the party accused may know against what charge to direct his defense; second, that the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by the law to the specific offense. These reasons apply to prosecutions in courts

of admiralty with as much force as to prosecutions in other courts. It is therefore a maxim of the civil law that a decree must be secundum allegata as well as secundum probata. It would seem to be a maxim essential to the due administration of justice in all courts."

The foregoing language is cited with approval in the case of *U. S. v. Weed*, 72 U. S. (5 Wall.) 62, 68, 18 L. Ed. 531, by Justice Miller, and also in *U. S. v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457, and *U. S. v. Fifteen Barrels Distilled Spirits* (D. C.) 51 Fed. 416, 422, and it does not appear to have ever been departed from by the Supreme Court or any other federal court.

The cases of *Hockett v. U. S.* (C. C. A.) 265 Fed. 588, and *Pierce v. U. S.*, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542, are not in conflict with this holding. They hold that, when an indictment charges that certain acts were committed "wrongfully, unlawfully, and feloniously," the language is sufficient to impart an unlawful motive. In the indictments under consideration the charge of "unlawful," etc., does not apply to the possession, but only to the conspiracy. The possession might be contrary to certain provisions of the act, and in harmony with others, for the reason that in one clause or section possession is permitted on certain conditions, and in other sections it is prohibited.

In the case of *Fontana v. U. S.* (C. C. A.) 262 Fed. 283, the requisites of an indictment are set forth by the Circuit Court of Appeals of the Eighth Circuit, as follows:

"In order to constitute due process of law, an indictment must not only inform the accused that there is a charge against him, but must be sufficiently distinct and specific to advise him what he has to meet and to give him a fair and reasonable opportunity to prepare his defense. A person indicted for a serious offense is presumably innocent, and the sufficiency of an indictment must be tested upon the presumption that he is innocent, and has no knowledge of the facts charged against him. An indictment must set forth the facts so distinctly as to advise accused of the charge, and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction."

In the case of *Anderson v. U. S.*, 260 Fed. 557, 171 C. C. A. 341, the same court applied the same rules to an indictment for conspiracy to steal from a freight car, and held the indictment defective in not sufficiently identifying the offense which was the object of the conspiracy. The count of the indictment held bad is quoted as follows:

"That B. Q. Ayers" and others (naming the others), "on the 8th day of November, in the year 1917, in the said division of said district, and within the jurisdiction of said court, did then and there unlawfully, willfully, and feloniously conspire, confederate, and agree among themselves to commit an offense against the United States; that is to say, to steal from a certain railroad freight car certain goods then and there moving as and containing or constituting a part of an interstate shipment of freight, with the intent then and there to convert said goods to their own use."

As will be seen, it was more certain than the indictment in the instant case; but, after discussion and citation of authority, the court held it insufficient. At the same time the court showed that it might have been possible to charge the defendants with conspiring to steal

generally goods moving in interstate commerce, but that the pleader had narrowed the scope of the conspiracy to a certain railroad freight car, without in any way identifying the car, the railroad on which it was moving, the goods which it contained, or the point of origin or destination. The language of this decision applies with particular force to the present case. For here, too, the pleader in each count has narrowed the conspiracy to a certain lot of liquors, without in any way identifying it, either by telling what kind it was, or when or where it was possessed, or for what purpose. The case above cited also holds that recourse may not be had to the overt acts to supply wanting certainty of allegations. But in the cases here the overt acts are equally as vague as the count itself. The counts above referred to are bad.

[3] The grounds, 8, 9, and 13 to 15, inclusive, of demurrer to the first counts may also be considered together. They are:

"(8) It is not charged that defendants conspired to possess intoxicating liquors for beverage purposes, or any unlawful purpose.

"(9) It does not appear that the alleged possession was not within one of the exceptions contained in the National Prohibition Act.

"(13) It is an essential ingredient of the crime of possessing intoxicating liquors that the person so charged shall not be a manufacturer of any of the articles enumerated in section 4, title 2, of the National Prohibition Act.

"(14) It is an essential ingredient of the crime of possessing intoxicating liquors that the person so charged shall not have procured possession thereof upon the prescription of a physician as authorized and provided for in section 6, title 2, of the National Prohibition Act.

"(15) It is an essential ingredient of the crime of possessing intoxicating liquors that the person so charged shall not possess such intoxicating liquors in his private dwelling house for his personal consumption as authorized and provided for in section 33, title 2, of the National Prohibition Act."

These grounds are urged, not as the basis of a contention that the indictment should negative the exceptions contained in the act, but for the purpose of pointing out and emphasizing the fact that neither the National Prohibition Act nor the Eighteenth Amendment made, or attempted to make, all possession of intoxicating liquors unlawful, and that an indictment, to be sufficient, must state facts showing that the defendant's possession, either actual or intentional, was of a character prohibited by title 2 of the Volstead Act.

As we have now seen by the previously cited authorities, the words "contrary to the provisions of said act" are but the legal conclusion of the pleader, and not the allegations of fact, such as are required by the rule. They cannot be used, then, in determining the sufficiency of the indictment. Without them we have simply the charge that the defendants would "then and there possess certain intoxicating liquors, to wit, \_\_\_\_\_ cases of intoxicating liquor."

[4] The grounds 10, 11, and 12 of the demurrers raise the question as to whether the mere possession of intoxicating liquor is unlawful. The language is:

"(10) That part of the National Prohibition Act which defines the mere possession of intoxicating liquors as a crime is unconstitutional and void.

"(11) The Eighteenth Amendment to the Constitution does not vest in the Congress the power to punish the mere possession of intoxicating liquors.

"(12) Prohibiting the mere possession of intoxicating liquors is not a valid exercise of the police powers vested in the Congress."

From the foregoing discussion of these counts it is apparent that the bare possession of intoxicating liquors is all that is charged. No accompanying facts are alleged to show that such possession was unlawful either on account of the time, place, or purpose of the possession or of the character of the liquor. The Eighteenth Amendment to the Constitution is in these words:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited."

This amendment is at once the law forbidding the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, and at the same time it is a grant of plenary power to the Congress to enact legislation appropriate for its enforcement. The amendment does not proprio vigore provide the means for making it effective; that duty is conferred upon the Congress, and within the scope of the amendment the legislative branch can enact such laws as it may deem proper. Of course the Congress cannot transcend the fundamental law or the delegated power. The amendment does not authorize the Congress to so legislate as to denounce the bare intrastate possession of intoxicating liquors. To do this would be an illegal protrusion. The words, "for beverage purposes," of the amendment, are as plain and important as any other words of the amendment, and they are inseparable from the other words. They qualify "manufacture," "sale," "transportation," "importation," and "exportation."

However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do so for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implication denounces the simple possession of intoxicating liquors. The possession is lawful, unless it be coupled with the illegal "manufacture" or "sale" or "transportation" or "importation" or "exportation."

I am not advised that any court has passed directly upon this question but I think the decision in *U. S. v. Jin Fuey Moy*, 241 U. S. 394, loc. cit. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, is at least persuasive, if not conclusive, of the correctness of the view above advanced. There the court said:

"If opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime."

Of course the Eighteenth Amendment does not apply to opium; but, as it has been said, the amendment does not denounce as unlawful mere possession of intoxicating liquors, nor does the language of the amendment authorize the Congress to make the mere possession of intoxicating liquors a crime, as I have attempted to show.

In the instant case, the liquors may have been in existence before the adoption of the amendment, and for aught that appears from the indictment they may have been in existence at such prior time. The offense which the defendants are charged with conspiring to commit is the possession of liquors disconnected from any facts charging the manufacture, sale, transportation, importation, or exportation in violation of the law, or any intention or purpose to possess or use them in violation of the law. The indictment in that it charges nothing more than the bare possession of intoxicating liquor is defective.

Section 33 of the act provides that:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for the use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

This section does several things. It prescribes a rule of evidence where possession of the liquor is shown on the trial; it requires every person legally permitted to have liquor to report to the commissioner, etc., and then proceeds to say:

"But it shall not be unlawful to possess liquors in one's private dwelling \* \* \* for the personal consumption of the owner thereof and his family \* \* \* and of his bona fide guests when entertained by him therein"

—and puts the burden of proving that such liquors were lawfully acquired, possessed, and used on the possessor. But the act cannot be said to denounce possession, isolated from all other facts or circumstances, as an offense. And if it did it would exceed the power conferred upon the Congress by the Eighteenth Amendment, and to that extent would be void, as I have hereinbefore held.

[5] The demurrers attack the indictment for failure to allege that the overt acts were committed to effect the object of the conspiracy. These grounds will be discussed together and they are:

"(16) It is not made to appear that the alleged overt acts were committed before the consummation of the alleged conspiracy.

"(17) It is not made to appear by any issuable allegations of fact that the alleged overt acts, or either or any of them, were committed with the purpose or intention of putting the alleged unlawful agreement or conspiracy into operation.

"(18) It is not alleged that the overt acts charged were to effect the object of the alleged conspiracy."

The first and second counts of the indictment employ the following language in introducing the overt acts:

"That pursuant to said unlawful conspiracy the said defendants did then and there do and commit the following acts."

In none of the counts is there any language which charges or tends to charge that the acts alleged were committed for the purpose or with intent "to effect the object of a conspiracy," which language quoted is from section 37 of the Criminal Code (Comp. St. § 10201).

In *Collier v. U. S.*, 255 Fed. 328, 166 C. C. A. 498, the Circuit Court of Appeals, Fifth Circuit, went to the limit in sustaining an indictment under section 37, and held that it was not necessary to allege or show that the overt acts, or either of them, "be calculated or have a tendency to accomplish the object of the conspiracy." But the court also held that:

"It is enough if it is done with the purpose or intention of putting the unlawful agreement into operation, whether it is or is not effective towards that end."

This appears to me to be equivalent to holding that to be sufficient the indictment must charge that the act was done with the purpose or intention of effecting the object of the conspiracy; and these counts cannot be said to do that.

There is a distinction between doing something pursuant to the conspiracy and doing something to effect the object of the conspiracy. Manifestly, if alleged conspirators met and entered into a conspiracy to violate a law of the United States, and pursuant to the meeting adjourned finally with intent to abandon the project, such adjournment would be pursuant to the original design of meeting, which was a part of the unlawful conspiracy, the object of their coming together. But I think it could not be said that the adjournment with intent to abandon the project, which is what the law permits one to do (see *Collier Case*, *supra*), was an act done with the purpose or intent of effecting the object of the conspiracy. It might be that, if it was charged that they adjourned to go their several ways to carry out and effect the object of the conspiracy, or with intent of effecting the object, this would be sufficient; but, unless it was charged that the act was committed for the purpose or with the intent of effecting the object of the conspiracy, it would be clearly insufficient, even under the *Collier Case*. This would be so, if for no other reason than because of the presumption of innocence which would be implied in the absence of allegations of purpose or intent that the person acting as alleged in the overt acts did so innocently, and hence on his own account only, and not to effect the object of the conspiracy. All intendments are against the pleader. No inference of intent or purpose will be indulged in to supply the omission of this essential element of an offense under section 37 of the Criminal Code.

From *Read v. Coker*, 13 C. B. 850, 963, it appears that a man might act in pursuance of an act of parliament without acting in exact execution of it. In the cases now under consideration the indictments must allege and the proof show that what was done by way of overt acts was done with intent to execute the conspiracy. Nothing less will satisfy the rule as laid down in the adjudged cases.

In prosecutions under the conspiracy statute, where the purpose or intention of the overt acts is made by the statute an element of offense, such purpose or intention must be both alleged and proved.

"In a criminal case, where the intent is made a part of the offense, the intent should be alleged in the indictment, and must be proved." U. S. v. Wentworth & O'Neil (C. C.) 11 Fed. 52.

"I have held that a particular intent, which made an act a crime by the words of a statute, is a part of the substance." U. S. v. Jackson (C. C.) 2 Fed. 502.

"Now, it is only where the Legislature accompanies its prohibition of particular conduct with a declaration that the inhibited act shall be done with a specific intent, that that intent need be either specifically averred by the indictment or specifically proved on the trial." U. S. v. Jackson (C. C.) 25 Fed. 548, 550.

In the instant case, the statute (section 37, C. C.) accompanies its prohibition of particular conduct with a declaration that the inhibited act shall be done with a specified intent. For instance, it does not provide that a mere conspiracy to commit an offense against the laws of the United States shall be punished; nor does it provide that such a conspiracy accompanied by the doing of any act shall constitute guilt, but only that:

"If two or more persons conspire \* \* \* to commit any offense against the United States \* \* \* and one or more of such parties do any act to effect the object of the conspiracy, each of the parties \* \* \* shall be fined," etc.

In the Collier Case, our own Circuit Court of Appeals has construed this language to mean "with the purpose or intent of putting the unlawful agreement into operation." We have here then an intent, which is made by statute an essential element of the offense, and hence one which must be both alleged and proved.

It was argued that, by reference to the overt acts alleged, it will appear that they were calculated to effect the alleged object of a conspiracy; but in the Joplin Mer. Co. Case, *supra*, the court held that this could not be done. So it may be said here that the charging part of an indictment for conspiracy must stand on its own bottom, and that no reference to other portions of the instrument, not expressly made in the indictment itself, may be permitted to supply deficient allegations.

In the case of Michael Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, the Supreme Court sustained an indictment using the language, "according to and in pursuance of"; but this is as far as any court has gone, or, it is believed, ever will go. The indictments in these cases use only the language "pursuant to," which, literally translated, means nothing more than "following." The demurrers on these grounds are sustained.

There is nothing in the allegations setting forth the overt acts themselves to indicate that they were committed to effect the object of the alleged conspiracy. No time is alleged, and, from all that appears, it might have been that the acts alleged were committed long after the object of the conspiracy, and after the "partnership of conspiracy" was at an end.

Counts No. 2 in indictments Nos. 1424, 1441, and 1442, and count No. 3 of indictment 1441, count No. 4 of indictment 1424, and count No. 4 of indictment No. 1442, are alike; the difference being that in one set it is charged that the proposed violation was to be the possession while in another it was to have been by transporting and in the second set it is alleged to have been with the intention to sell. In other respects these counts are legally identical, and the reasoning applied to the counts heretofore discussed is applicable to these.

[8] The fifth and sixth grounds of demurrer to count No. 4 of indictment 1424 show an additional reason why it is insufficient. These grounds are:

"(5) Section 3082 of the Revised Statutes of the United States, as applied to intoxicating liquors for beverage purposes, has been repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.

"(6) Section 8082, of the Revised Statutes of the United States, as applied to intoxicating liquor for beverage purposes, has been superseded by the National Prohibition Act."

Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than section 3082, and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *U. S. v. Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 66 L. Ed. —, the holding was as follows:

"Existing penal statutes are repealed by later ones covering practically the same acts, but fixing lesser penalties."

Also see *U. S. v. Windham* (D. C.) 264 Fed. 376.

Section 3082 is the smuggling statute, and it imposes a penalty of \$5,000 and two years' imprisonment upon any one found guilty of knowingly assisting in smuggling. Section 3 of the Volstead Act prohibits importation of intoxicating liquors, and section 29 provides that, for violations where a special penalty is not provided, the punishment shall be a fine of not more than \$500. So the ground is fully covered by the Volstead Act, as it is a later statute, and as the penalty prescribed by it is less than that prescribed by section 3082, R. S. section 3082 would also appear to come within the provisions of section 35 of the Volstead Act, which provides for the repeal of conflicting acts to the extent of the conflict.

[7] Counts No. 3 of indictments 1424 and 1442 are alike, except that in 1442 the count includes the word "time" and the quantity of intoxicating liquor is alleged to be 100 cases, instead of 400 cases, and the names of the defendants are different. The substance of these counts are that:

"At some time and at some place within the district the defendants did unlawfully, willfully, knowingly, feloniously, and maliciously maintain a common nuisance; that is, did keep — cases of intoxicating liquors on board a certain launch."

The demurrers to these counts are:

"(1) That the said count of the said indictment does not allege facts sufficient to show the commission by the said defendants of any offense against any law of the United States.

"(2) That said count of said indictment is so vague, indefinite, and uncertain that it does not fairly or sufficiently inform the said defendant of the charge he is expected to meet at the trial.

"(3) It does not appear that the alleged nuisance was maintained within the jurisdiction of this court.

"(4) This count is improperly joined with the other counts of said indictment.

"(5) It is not alleged that the intoxicating liquors were kept for sale.

"(6) It is not alleged that the intoxicating liquors were kept for any purpose prohibited by the National Prohibition Act.

"(7) No sufficient facts are alleged to make out the offense of maintaining a common nuisance, as defined by the National Prohibition Act."

These counts are framed under section 21 of the Volstead Act, the applicable part of the section being:

"Any boat \* \* \* where intoxicating liquor is \* \* \* kept \* \* \* in violation of this title \* \* \* is hereby declared to be a common nuisance, and any person who maintains such common nuisance shall be guilty," etc.

The pleader assumed that any one who kept intoxicating liquors on a boat was guilty of maintaining a common nuisance; but the law, fairly interpreted, means that the keeping of liquor, to constitute a nuisance, must be in violation of title 2 of the Volstead Act. There are no allegations in either of the counts that indicate that the alleged "keeping" was not in all respects lawful. Of course, they do allege that it was all "contrary to the form of the statute," etc.; but, as we have seen by the authorities cited, such language cannot be made to fill the place of allegations of fact showing a violation of the act.

Each of these counts is supposed to be complete in itself; but in neither do we find any time or place alleged where it will be sought to be shown the alleged nuisance was maintained. In one count it is said, "that at the place within the jurisdiction aforesaid"; and the other says, "that at the time and place aforesaid." In neither case is there any "aforesaid" time and place. Not only is the allegation of time and place wanting, but there is not any attempt at a description of the boat on which it is claimed the nuisance was maintained. The case of *Anderson v. U. S.*, 260 Fed. 557, 171 C. C. A. 341, cited above, is peculiarly applicable, for the reason that it charges conspiracy, and the description was of the object of the conspiracy merely, while here the charge is a substantive one.

In the *Anderson Case*, the court held that, where the charge was conspiracy to steal from a freight car in interstate commerce, the indictment was insufficient, because it did not sufficiently identify the freight car in question. As the court said:

"To illustrate: The words 'certain railroad freight car' might apply to any of the vast number of freight cars in existence in the United States, or in the world, for that matter; and for the same reason the words 'certain goods' might apply to any kind of the thousand varieties of property."

Here the words "a certain boat" might apply to any boat; and the words "intoxicating liquors" might apply to any of the many kinds and brands in existence, coming within the definition in section 1 of the Volstead Act.

But, in addition to all the foregoing, there is no showing of the "maintenance" of a "nuisance." It may be said that, not only is there no showing that the intoxicating liquors were kept in a manner violative of the act, or in such manner as to come within the definition of a nuisance as contained in section 21, but the allegations which should be present to show "maintenance" were also wanting. The word "maintenance" implies continuance, and the act implies it from the use of the word "keep." The meaning of these words was passed upon in the case of *Commonwealth v. Patterson*, 138 Mass. 498, 500, where the following language was used in reference to a liquor nuisance:

"The proprietor of a building cannot be said to 'keep or maintain' a common nuisance, within the meaning of Pub. St. c. 101, § 6, making a building used for the sale of intoxicating liquors a nuisance, on the strength of a single casual sale, made without premeditation in the course of a lawful business. The words 'keep or maintain' import a certain degree of permanence."

No facts are alleged in these counts of the indictment showing, or tending to show, a keeping or maintaining, or any other status from which permanence could be inferred.

In my opinion, all the indictments are insufficient, and demurrers to each of them are sustained; and it is ordered and adjudged that they each separately and severally be quashed.

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FALSTAFF CORPORATION v. ALLEN et al.

(District Court, E. D. Missouri, E. D. February 7, 1922.)

No. 5872.

Intoxicating Liquors  13—Amendment of Prohibition Act, prohibiting prescription of beer by physicians, held constitutional; "appropriate legislation."

National Prohibition Act as amended by Act Nov. 23, 1921, providing that "only spirituous and vinous liquors may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void," held within the power conferred on Congress by Eighteenth Amendment, § 2, to enact "appropriate legislation" for its enforcement.

In Equity. Suit by the Falstaff Corporation against William H. Allen and others. On motion by defendants to dismiss bill. Granted.

FARIS, District Judge. This is an action for an injunction to prevent the enforcement by defendants of so much of the amendment of November 23, 1921, to the Volstead Act as provides:

"That only spirituous and vinous liquors may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void"

—for that the inhibition above quoted is unconstitutional and void.

Defendants, who are officers of the government charged by law with

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the duty of enforcing the statute quoted, have separately filed motions to dismiss complainant's bill, on the general ground that it states no sufficient facts to warrant the granting of the relief prayed for. These motions constitute the matters herein up for judgment.

It is, of course, fundamental that before the adoption of the Eighteenth Amendment the Congress had no power to pass any law which either forbade, narrowed, or restricted the privilege of physicians to prescribe liquors for medicinal purposes; so it necessarily follows that the power in Congress to pass the law attacked by complainant must be found, if it exists, in the Eighteenth Amendment, and largely in so much of it as reads thus:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors \* \* \* for beverage purposes is hereby prohibited."

However difficult, therefore, the question presented may be in its solution, it is an extremely simple one in its statement: Did the language of the Eighteenth Amendment confer on the Congress authority to forbid the physicians, who are citizens of the several states, from prescribing intoxicating malt liquor as a medicine? There is no allegation in the bill, and, of course, no proof in the record, touching the question whether beer possesses, or does not possess, therapeutic value in the treatment or cure of diseases; in fact, learned counsel for complainant, both in their briefs and in their oral arguments, disclaim the assertion in behalf of beer of any medicinal value or property whatever.

Counsel bottom their contentions upon the grounds: (a) That the act under discussion invades the inviolable rights of natural liberty inalienable in free men; (b) that the Eighteenth Amendment therefore cannot, and as a matter of law and fact does not, confer on the Congress the authority to say what particular thing or agent may or may not be prescribed as a medicine, by physicians residing in the several states of the Union.

Holding in mind, therefore, the allegations of complainant's bill, and the candid disclaimer of complainant's counsel, it is obvious that it cuts no figure in the case, upon the question now presented, whether beer is or is not valuable as a medicine, for, regardless of such value, counsel contend that Congress has no right, even by virtue of the Eighteenth Amendment, to invade a natural, inviolable, and indestructible right of mankind, which right, it is strenuously contended, connotes the privilege to use, and to have prescribed for use, in the treatment and cure of those ills which flesh is heir to, any thing or agent which any physician may desire to use, or deem of therapeutic value, regardless, I repeat, of whether such thing or agent actually has such value or not, as a matter of fact.

Courts take judicial notice that beer, of the sort here involved, is an intoxicating liquor; but they do not judicially notice whether beer is or is not valuable as a therapeutic agent. It follows, then, that for the present purposes of this case, beer which complainant desires to make and sell without any interference from the defendants, must be regarded as an intoxicating liquor which possesses no recognized medicinal value whatever. If it could be proven to be, or if it were judi-

cially noticed as being, of value in the cure or treatment of diseases, a far more serious question might be presented, for in such latter case the question would arise whether Congress, having had conferred on it by the Eighteenth Amendment the power only to forbid the manufacture, sale, or transportation of intoxicating liquors as beverages, could by any law it might pass forbid the use of any kind or sort of such liquors for medicinal purposes, if any of the liquor so forbidden possessed medicinal value.

Confessedly, the latter question is a most troublesome and far-reaching one, whose ultimate solution must inevitably bring about the very sharpest conflict between notions touching the very nature of the federal Constitution, which notions have long been regarded as well settled, if not fundamental, and necessary and practical legislation for the enforcement of the Eighteenth Amendment, which legislation goes to the very life of the matter of enforcement; for, if the Eighteenth Amendment shall allow questions of fact to be raised touching whether a given beverage is or is not intoxicating, or is or is not of therapeutical value, so that courts and juries may decide these questions upon the weight of the evidence, then the legal views upon these questions will depend upon state lines, or even boundaries of federal court districts. But I need not go farther into this.

It is fundamental that the word "beverage," as used in the Eighteenth Amendment, has no technical meaning, but that it is used in its ordinary meaning as defined in the dictionaries. It means, then, simply *liquid for drinking*, and connotes that the act of drinking is not accompanied by any ulterior purpose, or followed by any beneficial result, present, potential, or even hoped for. Many beverages—for example, milk, coffee, and tea—are drunk either as beverages or foods, or both. In the final analysis, it might well be insisted that the Eighteenth Amendment does not, *in terms*, forbid the use of beer as a food; but it will hardly be contended that its use for such purpose can be permitted in the face of this amendment, and the statutes passed by virtue thereof, even though chemical analysis discloses that it possesses some food value, and even though in other times it may have constituted, as to many, both food and drink. In other words since the adoption of the Eighteenth Amendment, the privilege of drinking beer is no longer allowed to be governed by the state of mind of him who drinks it; for, since it is an intoxicating liquor, its use is forbidden by the Eighteenth Amendment, and such use may be forbidden by a law passed by Congress, under the power conferred by that amendment; certainly, unless its use be permissible because it possesses such medicinal value as to remove it from the ban of the constitutional amendment, and the statutes passed thereunder.

The Eighteenth Amendment and the Volstead Act (41 Stat. 305) both forbid the use of beer as a beverage. The amendment to the Volstead Act, now before me, forbids its use as a medicine. When used as a drink, it necessarily follows that it is so used either as a beverage, or as a medicine. If it has no value as a medicine, then when it is used as a drink it is used as a beverage, and this the Eighteenth Amendment, and the laws passed thereunder, forbid. It is, of course,

true, as already forecast, that the federal Constitution is a grant of power, and not, as is the Constitution of Missouri, for example, a mere limitation upon power, whereby the General Assembly may pass for the public weal any law not forbidden by the state Constitution. But it is no longer true to say that Congress has no police powers which, through legislation, it may exercise within the body of the state.

Touching the subject-matter of prohibiting the sale, manufacture, or transportation of intoxicating liquors for beverage purposes, Congress, perforce the Eighteenth Amendment, now has within the several states the same police powers which these states themselves enjoyed before the adoption of that amendment. Of course, I put stress in making this statement upon the expression "intoxicating liquor for beverage purposes." *U. S. v. Cohen* (D. C.) 268 Fed. loc. cit. 426. Some notion even that a thorough-going, full, and complete power in this behalf, not at all modified and restricted by the term "for beverage purposes," may, among other things, be contemplated by the concurrent power of enforcement conferred by the second section of the Eighteenth Amendment. *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; *Commonwealth v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568. But on this latter most serious question the case does not require me to pass.

It will also be noted that section 2 of the Eighteenth Amendment confers on Congress (agreeably to a like power theretofore enjoyed by the several states) the power to enforce this article by appropriate legislation. The word "appropriate," as used in other parts of the federal Constitution, has been defined by the Supreme Court of the United States in the case of *Ex parte Virginia*, 100 U. S. loc. cit. 345, 25 L. Ed. 1667, where it was substantially said that "appropriate legislation," as used in the Thirteenth and Fourteenth Amendments to the Constitution of the United States, means legislation contemplated to make the amendments fully effective; that is, legislation adapted to carry out the objects the legislators had in view, and whatever tends to enforce submission to the prohibitions thus contained, and to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against state denial or evasion, if not prohibited, is brought within the domain of congressional power.

This brings me to the query as to what is the object which the legislators had in view in passing the Volstead Act. This question is at least partially answered by a provision in the Volstead Act itself. This act, to which the statute here attacked is an amendment, provides, among other things, that it shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented. The Volstead Act, against a general and a few specific attacks, has been held constitutional. See *Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946; *Hamilton v. Kentucky Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194; *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260.

Since the end sought, as Congress has thus solemnly determined, is the prohibition of intoxicating liquors as a beverage, no one, I apprehend, can well contend that the amendment of November 23, 1921, is

not appropriate legislation to the end sought. Color is lent to the appropriateness of the restriction here complained of by the fact that a large number of the states of the Union have deemed it absolutely necessary to pass laws which prohibit the prescribing for medicinal purposes of any intoxicating liquors whatever, save alcohol alone. See *Ruppert v. Caffey*, 251 U. S. loc. cit. 283, 40 Sup. Ct. 141, 64 L. Ed. 260, et seq. Those statutes thus restricting the privileges of physicians have been upheld in every case, so far as my examination of the holdings extends; indeed, on principle, no legal reason exists why any such statute of a state could or should be held invalid, for it is settled by a long and uninterrupted line of cases, that the states may regulate the mode and manner, and the circumstances, under which the liquor traffic may be conducted, and may hedge about the right to pursue it with such restrictions, conditions, and limitations as the Legislature may deem proper, or they may even prohibit it entirely. 15 R. C. L. 455, and cases cited.

While I am of opinion that it cannot be successfully contended that Section 1 of the Eighteenth Amendment conferred on the Congress the same thorough-going, full, and complete power to legislate touching the sale, manufacture, and transportation of intoxicating liquors as the states themselves had theretofore enjoyed before the adoption of the Eighteenth Amendment (for such contention is, in my humble opinion, in the very teeth of the terms of that amendment itself), yet, what the states have found it necessary to do in order to curb illegal traffic in intoxicating liquors, and what it has been held they could lawfully do in this behalf, throws some light upon the question of what is appropriate legislation, and also some light on the contention of plaintiff that the statute here attacked violates the inherent rights of mankind. Surely the several states have no more power to violate such rights than has Congress! Before the effective date of the Eighteenth Amendment, when power so to do was to be found, if at all, in the "appropriate legislation" provisions of the federal Constitution, or through interpretation of the constitutional provisions relative to the waging of a successful war, the Supreme Court of the United States upheld the war-time prohibition definition of an intoxicating liquor as being any liquid which contained more than one-half of 1 per cent. of alcohol. *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260. In this case it was held, in effect, that Congress, in the light of what experience had demonstrated to the several states to be necessary in enforcing prohibition, could arbitrarily declare a fact to exist, and, so declaring, could preclude the courts themselves from any judicial examination and finding upon such fact thus legislatively determined.

While in the case of *Ruppert v. Caffey*, supra, the question which was legislatively determined by Congress was that a malt liquor which contained more than one-half of 1 per cent. of alcohol is per se intoxicating (so that the courts are absolutely concluded by this legislative determination), yet the principle is precisely the same on that point in that case as in the point up for judgment in the case at bar; for it seems clear if Congress already had the power under the federal Constitution, absent the aid of the Eighteenth Amendment, to legislatively

determine whether a given per cent. of alcohol in a beverage renders such beverage intoxicating, then, present the aiding provisions of the Eighteenth Amendment, as in the case at bar, it can, by the same token, legislatively determine whether an intoxicating beverage is or is not a therapeutic agent. Therefore (and holding this view as to what was ruled in the Ruppert Case) I am bound by the principle declared therein, even though I might personally lean to the view that ordinarily Congress has no power to legislatively determine a controverted question of fact, so as to preclude the courts from judicially examining and determining such a fact for themselves. But in any view, even if the Ruppert Case does not go so far in legal principle as I am constrained to construe it as going, it throws much light on this case.

While the confusion, and I might say legal chaos, obviated by the rule I deem to be present in the Ruppert Case, is apparent, it is a little difficult to reconcile it with the notion heretofore extant that the federal Constitution is a grant of power by the several states to the United States. But, be this as may be, I am in duty bound to follow the principle of the case, *supra*. So, if what the several states have done, and can do, in the enforcement of prohibition, furnishes a thorough-going rule of action to Congress in legislating about the subject-matter, it is obvious there is nothing left of the contention of complainant; even if what the states can do *serves only to indicate what is appropriate legislation*, there is little left, in my opinion, of complainant's case.

It is true that in the case at bar the fact legislatively determined by Congress—that is, that beer has no medicinal value—is not controverted; so in a way the point is but indirectly involved in the discussion. But, if it were involved, I am constrained to believe that the principle so clearly set forth in the case of *Ruppert v. Caffey*, *supra*, absolutely settles it so long as that case shall stand as a rule of action. So far, of course, as I am concerned, or any court of inferior jurisdiction is concerned, it must stand as a rule of action until it has been changed by the Supreme Court of the United States, which ruled it. The rule is that a statute ought not to be held unconstitutional unless the court so holding is convinced beyond a doubt, based on reason, of such invalidity. *State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477, I am not, to the extent noted, so convinced; but, on the contrary, I feel no doubt, the authorities considered, that the statute here involved is constitutional and one which Congress, by virtue of the Eighteenth Amendment had the right to pass.

If so it be, that the power so conferred upon Congress by the Eighteenth Amendment had the effect to narrow, or impinge upon, or wholly wipe out, constitutional rights and guaranties heretofore deemed vested and inviolable, the situation may be regrettable, but it cannot be helped. The Constitution when amended must be construed as a whole. If later amendments destroy, impinge upon, modify, or wipe out old provisions, the newer provisions must stand, because they are the last utterance of the people, who reserve to themselves the right to change the organic law, in the way provided by the organic law itself. Of course, the Constitution, when amended, should, if possible, be so construed as to give effect to both the old and the new parts thereof; but if this be impossible, if the new inevitably and unquestionably changes old pro-

visions and destroys antecedent guaranties, the only help for the situation is an amendment which will restore these rights and guaranties.

Article 5 of the federal Constitution (barring a prohibition as to equal representation in the United States Senate, not here in question) conferred on the people the power of amending the Constitution; they have seen fit to amend it by the adoption of the Eighteenth Amendment. It is obvious that the power to amend connotes, not only the power to add to, but also the power to change whatever was contained in it, which the sovereign people desire to change. So it is, to my mind, utterly futile to urge that the Eighteenth Amendment cannot stand for what it fairly and obviously means, if such construction shall be in effect to change, modify, or impinge, or in fact destroy, old provisions and guaranties. In such case, and in the face of such obvious conflict, I repeat, the old provisions must yield, and the newer provisions must stand. Any other view would, in effect, be tantamount to saying that the Constitution cannot be amended at all. The people may be mistaken; their course may be tending toward restrictions of human liberty in comparison with which absolute monarchy would be hailed and acclaimed as freedom; but under our form of government they are sovereign, and the majority rules, and when they change the organic law in the solemn manner provided therein this change must stand, and be fairly construed and honestly enforced until it, in turn, shall be again changed in due and legal form.

When this matter was first presented, and this bill filed, complainant, as it was averred, had on hand a large quantity of beer, which it had made pursuant to permit regularly issued to it. This permit had been issued under the opinion of the Attorney General of the United States, who construed the then existing law as allowing the making and sale of beer for medicinal purposes. Certain of the defendants, upon the passage of the Act of November 23, 1921 (which outlawed a large quantity of beer thus made and held by complainant), were threatening to destroy the same unless complainant dealcoholized it at once. In either contingency complainant (which had done nothing except to honestly and fairly follow the law as interpreted by the highest non-judicial legal authority in the United States) would have been subjected to loss of its property. To prevent such loss, which, in my view, would have been tantamount to taking the property of complainant without due process of law, a temporary restraining order pending further hearing was granted to afford opportunity to complainant to avoid, if possible, and if so advised, the contingent loss. It is scarcely conceivable that Congress would have passed the amendment of November 23, 1921, without providing certain days of grace before the act went into effect, if it had been advised of the situation existing. Be this as may be, it seemed only fair to temporarily stay the action threatened until the case could be presented on its merits, and this was done.

It follows, from what has been said, that the several separate motions to dismiss should be sustained, and the bill dismissed, as being without equity. The temporary restraining order will, it necessarily follows, be set aside.

Let it be so ordered.

## UNITED STATES v. SNYDER.

(District Court, N. D. West Virginia. January 28, 1922.)

**1. Searches and seizures ¶7—No constitutional prohibition of search without warrant.**

The Fourth Amendment, providing that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," contains no prohibition of arrest, search, or seizure without a warrant, but only against "unreasonable" searches and seizures.

**2. Arrest ¶63 (3)—Criminal law ¶395—Intoxicating liquors ¶249, 255—Person found with liquor on his person may be arrested without warrant and searched, and the liquor seized and used as evidence, and defendant is not entitled its return.**

Under National Prohibition Act Oct. 28, 1919, tit. 2, § 25, providing that "it shall be unlawful to have or possess any liquor \* \* \* intended for use in violation of this title, \* \* \* and no property rights shall exist in any such liquor," a prohibition agent *held* to have authority to arrest without warrant a person found on the street with whisky on his person, and to search him and seize such liquor; and such person *held* to have no right to the return of such liquor which may be retained and used as evidence against him.

**3. Words and phrases —"Probable cause."**

"Probable cause," which will justify a criminal accusation, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

Criminal prosecution by the United States against George Snyder. On petition of defendant. Denied.

T. A. Brown, U. S. Atty., of Parkersburg, W. Va., and Charles J. Schuck, Sp. Asst. U. S. Atty., of Wheeling, W. Va.

John B. Wilson and Fred L. Maury, both of Wheeling, W. Va., for defendant.

BAKER, District Judge. On the 10th day of January, 1922, T. A. Brown, United States district attorney for the Northern district of West Virginia, filed information against George Snyder, of Wheeling, Ohio county, W. Va., charging that he did unlawfully and knowingly possess, for beverage purposes, a large quantity, to wit, four pints, of intoxicating liquor, commonly called whisky, the same containing more than one-half of 1 per cent. of alcohol by volume, and being then and there fit for beverage purposes, and a further description of the kind and quantity whereof is to the United States attorney unknown, contrary to the act passed on the 28th day of October, 1919, commonly known as "National Prohibition Act," and against the peace and dignity of the United States of America.

On the 12th day of January, 1922, Fred L. Maury and John B. Wil-

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

son, attorneys for George Snyder, filed in this court their petition, alleging that on the 5th day of November, 1921, two certain state policemen and Thomas Arrington, a federal prohibition officer, went to a certain place of business, located on the northwest corner of Market and Eleventh streets in the city of Wheeling, Ohio county, W. Va., the two persons represented to be state officers being possessed with a state warrant for the searching of said premises and one John Doe; that the defendant, George Snyder, was standing on the sidewalk outside of said building to be searched, and was not an owner of, nor had any interest in, said building, or any business conducted therein; that said two state policemen entered said building with their alleged search warrant. There is no search warrant or copy thereof filed with said petition. Petition prays that United States be not allowed to use any of the evidence whatever obtained under the alleged illegal search warrant against the defendant George Snyder.

On the 12th day of January, 1922, T. A. Brown, United States attorney, filed answer to said petition, and denies every material allegation therein contained. On the 21st day of January, 1922, evidence was taken in open court, before the court, upon said petition and answer. The facts as developed show:

That on or about the 5th day of November, 1921, State Policemen Harry Burr and Corporal Kemper had sworn out a state search warrant for a certain place of business located on the northwest corner of Market and Eleventh streets, in Wheeling, Ohio county, W. Va., but show nothing as to a warrant for one "John Doe." That shortly before 2 o'clock of that day, state police telephoned Federal Officer Arrington to meet them at Seventh and Market streets at 2 o'clock, not saying what they wanted. At 2 o'clock Arrington met said state policemen and got on the rear of the motorcycle behind one of the police. After they had started, one of the state police told Arrington they were going to search 1061 Market street. Thereupon Federal Prohibition Officer Arrington responded, "Help yourselves; I am not going to take any part in the raid," in which determination the state police acquiesced. When the state police stopped near the property to be searched, Arrington left them, walking on up street. Turning the corner commonly known as "Market Square," Federal Prohibition Officer Arrington observed defendant, George Snyder, standing on the pavement just a few feet above the corner, with his overcoat on and his hands in his pants pockets. As Arrington approached the defendant Snyder, he observed his pockets very much bulged out and the neck of a bottle protruding from one of his pockets. Walking up to the defendant, he lifted the bottle half way out of his pocket, observing it to be whisky, placed the bottle back in defendant's pocket, placed him under arrest, took him in an adjoining building, removed the bottle previously observed, and upon further search found three other pints of whisky on his person. Thereupon Federal Prohibition Officer Arrington took defendant before United States Commissioner John Conrad and swore out the warrant upon which the information in question is based.

Testimony shows clearly that Federal Prohibition Officer Arrington had nothing to do with the swearing out of the alleged state warrant by state policemen or making the alleged raid thereunder. Neither did he assent to the state policemen making the raid or participate in any manner therein. It further shows that Arrington, leaving the state officers and walking on up street and around the corner, was not directed or requested by or under any instructions from either of the state policemen. Neither were the state policemen acting under any instructions from Arrington in any of their actions in connection with the proceeding.

[1] The state search warrant in question, or any proceedings thereunder, is in no wise before the court in this proceeding, as the warrant is not presented and no claim made that Arrington made his arrest and seizure thereunder. It is insisted that the arrest of the defendant, Snyder, by Federal Prohibition Officer Arrington, after seeing the bottle of liquor protruding from his pocket, and the search made pursuant thereto, is unconstitutional, and in conflict with the Fourth Amendment to the Constitution. This amendment reads as follows:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision of the Constitution should be construed in the light of, and in conformity with, principles of the common law, with which the framers of the Constitution were familiar. The amendment contains two separate and distinct prohibitions, to wit: First, it prohibits *unreasonable* searches and seizures; and second, it prohibits the issuance of warrants, except upon probable cause shown, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

There is, in the amendment, *no prohibition against search or seizure without a warrant*. Such a prohibition would have been subversive of the common law and fatal to the safety of human life and the repression of crime. The second prohibition in the amendment was aimed against *general search warrants* as had then been in vogue for many years prior to the noted Wilkes Case in 1776, when the validity of such warrants was questioned and brought to issue in the Court of King's Bench. That court held such warrants to be illegal and contrary to the principles of the English Constitution. Pomeroy, in his introduction to Constitutional Law, clearly states the case in the following language:

"This clause of the Constitution was particularly aimed at what were known in the English law as general warrants. These general warrants were used more especially in the case of political offenses, and were issued by the government, directing the officers to search all suspected places and seize all suspected persons, without describing any place or person. The execution of the warrant was left to the caprice of the individual who had it in charge. Although these warrants were so plainly contrary to the spirit of the English common law, and destructive of individual rights, and liable to become instruments of tyranny in the hands of an unscrupulous official, they continued in

use down to a time immediately prior to the American Revolution. The practice was finally declared illegal by the Court of King's Bench during the presidency of Lord Mansfield, in the case of *Mooney v. Leach*. The case arose on a warrant issued by one of the Secretaries of State, requiring the officers to make diligent search for the authors and publishers of a certain seditious libel, and they, or any of them, being found, to apprehend and seize, together with their papers." Pomeroy's Constitutional Law, p. 158, § 241.

*The Fourth Amendment to the Constitution contains no prohibition against arrest, search, or seizure without a warrant.* That was left under the rules of common law. The amendment provides *not* that no arrest, search, or seizure should be made without a warrant, but prescribes that there shall be no *unreasonable* search and seizure; in other words, that the people shall be secure in their persons, houses, papers, and effects against *unreasonable* searches and seizures; *not against all searches and seizures, but simply against unreasonable searches and seizures.* And this brings us to the question: In what cases may arrests, searches, and seizures be made without a warrant, under the principles of the common law and statutory law prevailing in this country?

[2] It was the rule of the common law, at the time of the adoption of the Constitution, and it has been the rule of the common law of this country, and of most of the statutory law, that a peace officer—an officer charged with the enforcement of the law—may arrest a criminal when caught in the act of committing a crime, and when thus arrested he may search him for evidence pertaining to the crime, and, as a general rule, retain such evidence for the use of the court in the prosecution or trial of the case; and this applies to all criminal cases, misdemeanors, as well as felonies.

In support of this statement I quote, among other cases, the following authorities, which are directly in point. I quote the following from 1 Hale's Pleas of the Crown, p. 587, a work prepared and compiled in the early part of the eighteenth century:

"I come in the next place to arrests, *ex officio*, without any warrant. If any affray be made in the presence of a justice of peace, or if a felon be in his presence, he may arrest him and detain him, *ex officio*, till he can make an arrest to send him to gaol, but then the warrant must be in writing to the gaoler (page 23, Car. B. R., Sanford's Case); and so he may by word command any person present to arrest (Dalt. cap. p. 328)."

He further states:

"A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house or in the stocks till he can bring him before a justice of peace. So if A. be dangerously hurt, and the common voice is that B. hurt him, or if C. thereupon comes to the constable and tells him that B. hurt him, the constable may imprison him till he knows whether A. dies or lives (T., 43 Eliz., B. R., Dumbleton's Case), or can bring him before a justice. So if a felony be committed, and A. acquaint him that B. did it, the constable may take him and imprison him, at least until he can bring him before some justice of peace."

Blackstone, in his Commentaries (book 4, p. 292), states the common-law doctrine as follows:

"2. Arrests by officers without warrant may be executed, first, by a justice of the peace, who may himself apprehend or cause to be apprehended, by

word only, any person committing a felony or breach of the peace in his presence; second, the sheriff; and, third, the coroner may apprehend any felon within the county without warrant; fourth, the constable, of whose office we formerly spoke, hath great original and inherent authority with regard to arrests. *He may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace; and in view of felony actually committed, or a dangerous wounding, where felony is likely to ensue, he may, upon probable suspicion, arrest the felon if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrest, it is murder in all concerned.*"

Russell on Crimes, vol. 1, p. 725, states the doctrine as follows:

"A constable may arrest any person who, in his presence, commits a misdemeanor or breach of the peace, if the arrest is effected at the time, when, or immediately after, the offense is committed."

In volume 9, Laws of England, Lord Halsbury, pp. 309, 310, is this statement:

"A constable and also, it seems, a private person, may upon lawful arrest of a suspected offender take and detain property found in the offender's possession if such property is likely to afford material evidence for the prosecution in respect of the offense for which the offender has been arrested."

The Supreme Court of Massachusetts, in the case of Commonwealth v. Phelps, 209 Mass. 410, 95 N. E. 873, Ann. Cas. 1912B, 566, asserts:

"The further objection made by the defendant that an arrest without a warrant is in conflict with the Fourteenth Article of the Declaration of Rights of the Constitution of the commonwealth was disposed of in *Rohan v. Sawin*, 5 Cush. 281. It was there stated that these provisions were in restraint of *general warrants to make searches* and that they do not conflict with the authorities of officers or private persons under proper limitations to arrest without a warrant when authorized by the common law or by statute. To the same effect, see *Wakely v. Hart*, 6 Binn. 316. The same is true of the Fourth Amendment to the Constitution of the United States."

The court discussed the question directly in reference to the Constitution of Massachusetts, and then concluded by saying:

"The same is true of the Fourth Amendment to the Constitution of the United States."

Chief Justice Redfield, of Vermont, delivered the opinion of the court in the case of *In re Powers*, 25 Vt. 265, a *liquor case*. Under the law of Vermont the officers of the law were allowed to arrest a man for drunkenness, and if they found any bottles of whisky in his possession they had a right to take them. In that case the court said:

"It seems to us, that the eleventh article of our state Constitution, and the corresponding provisions in the United States Constitution, have no reference to the subject now before the court. It is in these words: 'That the people have a right to hold themselves, their houses, papers and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search suspected places, or seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted.' This seems to be directed against *general warrants*, and *general search warrants in particular*, not specifically describing the persons, places, or property, to be searched, or arrested. This class of warrants, which in troublous and un-

settled periods in English history, were issued to a very alarming extent, by their Secretaries of State, and other magistrates perhaps, was prohibited, at the final settlement of the realm upon the Prince of Orange, and the Hanover family, I think, if not earlier; and similar provisions have been transferred to the United States and to most of the state Constitutions. It is very obvious this proceeding is not of that character. And it has never been supposed to prohibit arrests by private persons, or without warrant, in that class of cases where delay would be perilous. *Necessity is the first law of government as well as of nature, and is not to be abrogated by implication.*"

In the case of *Getchell v. Page*, 103 Me. 390, 69 Atl. 626, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307, the court states the law as follows:

"It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court. *Thatcher v. Weeks*, 79 Me. 547; *Spaulding v. Preston*, 21 Vt. 10; *Bishop*, Crim. Proc. 211.

For other cases showing the holdings of various states of the Union see *Wakely v. Hart et al.*, 6 Bin. (Pa.) 317; *Rohan v. Sawin*, 5 Cush. (Mass.) 284, 285; *Holker v. Hennessey*, 141 Mo. 539, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524. As to the holdings in the state of West Virginia, I find as follows:

In the case of *State v. Baker*, 33 W. Va. 319, 10 S. E. 639, decided in 1889, a pair of pantaloons, obtained by the jailor from the prisoner, without protest, and showing blood stains, was admitted in evidence over the objection of the prisoner. The point raised was whether this was compelling the prisoner to be a witness against himself, contrary to the Constitutional provisions. The court held that it was not. On page 333 of the opinion (10 S. E. 644) Judge Brannon quotes the old rule as follows:

"At a criminal trial, courts cannot take notice of the manner of obtaining evidence out of court. If it is competent and pertinent to the issue, it will be received."

In the case of *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, a notable case decided in 1902, and reported with copious annotations in 59 L. R. A. 465, and frequently cited in subsequent cases on the question, as supporting the old rule, the court held that instruments, devices, or tokens used in the commission of a crime are competent and legitimate evidence upon the trial of the accused. To the contention that the articles so seized should not be used in evidence, because the seizure was illegal, Judge Poffenbarger, on page 229 of the opinion (41 S. E. 432), answers:

"One complete answer to this is that, if it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects, for the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would it form a collateral issue to determine that question."

Further on in his opinion he distinguishes that case from *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, saying in the *Boyd* Case the seizure was of private papers belonging to the defendant. The two cases are entirely unlike.

In the case of *State v. Booker*, 68 W. Va. 8, 69 S. E. 295, decided in 1910, a letter written by the prisoner to his mother, and intercepted by the jail keeper, was held not to be inadmissible in evidence, as contrary to the Constitutional provision in regard to compelling a person to be a witness against himself; and in the case of *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399, decided in 1912, cocaine, forcibly and without a warrant taken from the person of the defendant, was held to have been properly admitted in evidence.

In 4 *Wigmore on Evidence*, § 2183, the same rule is thus stated:

"For these reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means by which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored."

In the case of *Weeks v. U. S.*, 232 U. S. 392, 34 Sup. Ct. 344, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, in discussing that case, the court makes the following statement:

"What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 *Bishop on Criminal Procedure*, § 211; *Wharton, Crim. Plead. and Practice* (8th Ed.) § 60; *Dillon v. O'Brien and Davis*, 16 Cox, C. C. 245. \* \* \* The federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the purposes of evidence against the accused his letters and correspondence seized in his house during his absence and without his authority by the United States marshal holding no warrant for his arrest or for the search of his premises. \* \* \* While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence, may be justified, and a collateral issue will not be raised to ascertain the source of competent evidence, *Adams v. New York*, 192 U. S. 585, that rule does not justify the retention of letters seized in violation of the protection given by the Fourth Amendment where an application in the cause for their return has been made by the accused before trial. The court has power to deal with papers and documents in the possession of the district attorney and other officers of the court and to direct their return to the accused *if wrongfully seized*."

Neither the *Weeks* Case nor any of the cases cited by counsel for defendant go as far as this court, in this case, is asked to go. None of the property involved in them was contraband, or property in which Congress has said, as in section 25 of the Volstead Act (41 Stat. 315), as follows:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and *no property rights shall exist in any such liquor or property*."

The defendant in this case had not at the time and has not now any property right in the liquor. It is the same as if counterfeit coin,

lottery tickets, implements of gambling, and many other things of this character that might be enumerated, were found in his possession.

I find, in looking over the matter, that there are 33 states in the Union which allow, by statute, an arrest to be made without a warrant. In 33 states arrest of persons can be made without warrant if he commits an offence in the presence of the officer. These states are Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. Thirty-three states have adopted laws of this kind, so that it can be said to be the common law of the states, or the common law of the great majority of the states, in the Union, that a peace officer, a prohibition officer, has the right to arrest a criminal offender caught in the act of committing the crime; and when he arrests him, if he captures him with counterfeit coin, if he catches him with smuggled goods, if he catches him with stolen articles, if he catches him with liquor under the Prohibition Law, *he has the right, not only to arrest him without a warrant, but to search him and to retain the wet goods as evidence against him.*

Judge Deady, of the United States District Court, in the case of *Ex parte Morrill* (C. C.) 35 Fed. 267, in discussing the question as to when a person could be arrested without a warrant, after quoting the Fourth Amendment, states:

"It has never been understood that this provision was intended to or does prevent an arrest by a peace officer—a sheriff or constable—for a crime committed in his presence. Whart. Crim. Pl. § 8; 1 Bish. Crim. Proc. § 181. The knowledge derived by the officer from his observation, acting under the sanction of his official oath, is considered equivalent to information supported by the oath or affirmation of another. Now, a warrant of arrest may issue on 'probable cause' supported by oath; and by analogy a peace officer may arrest on probable cause derived from his own observation. At common law a peace officer might arrest without a warrant 'on reasonable grounds of suspicion'; and the facts and circumstances which furnish such grounds of suspicion amount to 'probable cause,' under the Constitution, which is such cause as will constitute a defense to an action for false imprisonment or malicious prosecution. Whart. Crim. Pl. § 9; 1 Bish. Crim. Proc. 182; Rap. and L. Law Dict. 'False Imprisonment,' 'Malicious Prosecution.' Probable cause is a probability that the crime has been committed by the person charged. The facts stated upon oath 'must induce a reasonable probability that all the acts have been done which constitute the offense charged.' Cranch, C. J., in *United States v. Bollman*, 1 Cranch, C. C. 379; *Wheeler v. Nesbitt*, 24 Howard. 551."

United States District Judge Paul, in the case of *Carico v. Wilmore* (D. C.) 51 Fed. 198, states:

"Officers who, by virtue of their offices, are conservators of the peace, have, at common law, the right to arrest without warrant all persons who are guilty of a breach of the peace, or other violations of the criminal law, in their presence." 1 Amer. & Eng. Enc. Law, 734."

The Revised Statutes of the United States provide as follows:

"Sec. 3452. Every person who shall have in his custody or possession any goods, wares, merchandise, articles, or objects on which taxes are imposed by

law, for the purpose of selling the same in fraud of the internal revenue laws, or with design to avoid the payment of the taxes imposed thereon, shall be liable to a penalty of \$500, or not less than double the amount of tax fraudulently attempted to be evaded." Comp. St. § 6354.

A violation of this statute, under the federal law, is a misdemeanor. If committed in the present of an officer, the offender can be arrested without a warrant. I do not think that any one, after a careful study of the decisions of our state and federal courts, can well question the authority of an officer to arrest without a warrant a person in the act of committing a crime. When such an arrest has been made, a search by the arresting officer may be made for the evidence of the crime. *Brroks v. Commonwealth*, 61 Pa. 352, 100 Am. Dec. 645; *Davis v. Russell*, 5 Bingham's Reports (Eng.) 354; *Beckworth v. Philby*, 6 Barn. & Cress. (Eng.) 635; *U. S. v. Hart*, Fed. Cas. No. 15,316, 1 Pet. C. C. 390.

The Fourth Amendment does not prohibit searches and seizures without a warrant. *It only prohibits unreasonable searches or seizures*, and an unreasonable search or seizure is one for which there is in law a want of probable cause. In other words, it recognizes the rule of the common law then prevailing, and described in the decisions hereinbefore quoted. To hold that no criminal can, in any case, be arrested and searched for the evidence and tokens of his crime without a warrant, would be to leave society, to a large extent, at the mercy of the shrewdest, the most expert, and the most depraved of criminals, facilitating their escape in many instances.

In conclusion, I hold the framers of the Constitution were familiar with the common law on the subject; hence they were content to adopt the common-law rule, that no *unreasonable searches or seizures should be made in any case*, and that, if an attempt to search or seize should be made under a warrant, such warrant could only issue on the showing under oath of probable cause therefor. In either case, whether with or without warrants, the existence of *probable cause* is essential, if a warrant is resorted to, it cannot be of the general character of that in the *Wilkes Case*, but must "particularly describe the place to be searched, the person or thing to be seized, and the judge or commissioner issuing such warrant must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night."

[3] Probable cause, which will justify a criminal accusation, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. There can be no doubt in the mind of any reasonable man that Prohibition Officer Arrington, in this case, had probable cause, supported by circumstances sufficiently strong in themselves, to warrant him in arresting the defendant, when he found him on the public streets of the city of Wheeling with four of his pockets bulged out and the neck of a whisky bottle protruding from one of his pockets, to such an

extent that the officer could detect what it was. There can be no further doubt that, after Prohibition Officer Arrington took hold of the neck of this bottle and raised it partially out of defendant's pocket, while yet on the street, that he had the right to arrest defendant and search him for further evidence.

Therefore it naturally follows that defendant's petition will be and is hereby dismissed.

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**UNITED STATES V. EILERT BREWING & BEVERAGE CO.**

(District Court, N. D. Ohio, E. D. December 26, 1921.)

No. 643.

**1. Intoxicating liquors §275—Evidence held to establish maintenance of common nuisance.**

Evidence held to establish the allegation that defendant maintained a common nuisance on premises by the manufacture and sale of intoxicating liquor thereon, which rendered them subject to injunction and abatement, under National Prohibition Act, tit. 2, § 22.

**2. Intoxicating liquors §260—Common nuisance same for purposes of criminal prosecution and injunction suit.**

What constitutes a common nuisance for the purpose of a criminal prosecution, under National Prohibition Act, tit. 2, § 21, also constitutes a common nuisance for the purpose of an injunction suit, under section 22.

**3. Intoxicating liquors §261—Single sale of liquor, with possession of other liquor on the premises, constitutes maintenance of common nuisance.**

A single sale of intoxicating liquor on premises, accompanied by the unlawful possession of other liquor thereon, is sufficient to warrant the granting of an injunction under National Prohibition Act, tit. 2, § 22, for maintenance of a common nuisance.

In Equity. Suit by the United States against the Eilert Brewing & Beverage Company. Decree for complainant.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio.

Reed, Meals, Orgill & Maschke, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This bill of complaint is filed under favor of sections 21 and 22, title 2, Act of Congress approved October 28, 1919, known as the National Prohibition Act (41 Stat. 314). The relief sought is the abatement as a common nuisance of certain premises therein described, and enjoining the further use thereof for the illegal manufacture and sale of intoxicating liquors. The defendant, called herein the Eilert Company, has answered, denying generally all the allegations of illegal manufacture and sale. In the hearing before me, and on argument, no question has been raised or discussed, except these issues of fact.

[1] The premises in question, including the buildings, machinery, and equipment, were formerly owned and used by the Excelsior Brewing Company for the manufacture and sale of beer. After prohibition became legally effective, the Eilert Company acquired the same, and have since been, and were at the time the transactions under investigation took place, used ostensibly for the manufacture and sale of

cereal and other nonalcoholic beverages. The government's evidence shows that on May 14, 1921, two prohibition enforcement agents bought from the defendant's sales manager and its cashier and head bookkeeper four cases of beer, found by analysis, made the first week in June following, to have an alcoholic content of 1.25 per cent. by volume. Three cases were taken from the defendant's bottling room from a large stack of similar cases. The purchase and sale was transacted at defendant's office and place of business with its sales manager, the money was paid to and received by its cashier and head bookkeeper, and sales memos made out by him and placed in a special wallet in the office safe. The price paid therefor was the sum of \$5 a case, whereas the customary price for nonalcoholic or near-beer, it is admitted, was only \$1.50 a case.

This evidence further shows that on May 19 these same agents bought another case of beer, found upon analysis to contain an alcoholic content of 2.86 per cent. by volume. This sale was transacted at the same place, in the same manner, with the same persons, and at the same price. The witnesses, however, say that, when they went to defendant's bottling room and inquiry was made for beer, it was found that there was on hand less than a case, and therefore, at the direction of defendant's sales manager, its cashier went elsewhere in an automobile, returning in about five minutes with a full case of beer. Again, on May 25, these same agents bought two cases of beer, one found upon analysis to contain 2.86 per cent. of alcohol by volume, and the other 3.21 per cent. These purchases were likewise made at the same place, in the same manner, of the same persons, and at the same price, and an employee of defendant was sent by its sales manager in an automobile therefor, and returned with the cases within a period of six or seven minutes. Again, on June 11, the same witnesses bought another case of beer, found upon analysis to contain an alcoholic content of 2.58 per cent. by volume. This sale was also transacted at the same place, in the same manner, with the same persons, and at the same price, and again an employee of defendant was sent by its sales manager after the same in an automobile, returning within a short time with the beer. On June 14 defendant's premises were seized by federal prohibition officers, and several samples of its product were taken at random from a large number of bottles in its bottling room, and three of them were at once analyzed. Of these, one showed an alcoholic content by volume of 51 per cent., and two an alcoholic content by volume of 71 per cent.

The witnesses making these purchases testify to numerous conversations characterizing the transactions then in progress. They say that they asked for real beer; that defendant's sales manager, its cashier and head bookkeeper, and its president were present on some, if not all, of the occasions, and knew and understood what the witnesses desired; and that defendant was selling alcoholic and not near-beer, and also that the beer thus sold was manufactured by defendant at its place of business, and was being thus manufactured and sold along with the nonalcoholic or near-beer. It appears that in the process of manufacturing near-beer, alcoholic beer is first produced, and later the alcohol is extracted therefrom, until the remaining alcoholic con-

tent is reduced to the limit permitted by law. The chemists say that a variation of 10 points is a sufficient allowance for errors in an ordinary chemical analysis; that is to say, that an alcoholic content ranging from 45 to 55 would not evidence an intention to produce and sell beer containing more than 50 per cent. of alcohol by volume.

It is the government's contention that defendant illegally and surreptitiously, under cover of its permit to manufacture and sell cereal beverages, near-beer, and other nonalcoholic drinks, was manufacturing and selling some part of its product of a higher alcoholic content, charging therefor a price of \$3.50 a case higher than the customary price for the lawful beverages. Defendant admits that the four cases sold on May 14 were manufactured and sold at its plant, and were selected and delivered from an assortment of similar cases in its bottling plant. All other testimony incriminating defendant's president and sales manager is denied by them, but Fred J. Haller, its cashier and bookkeeper, admits that the sales made May 19, 25, and June 11 were of alcoholic beer. In explanation, it is urged that the high alcoholic content of the first four cases is due to the fact that they had not been pasteurized before the sale, and that between the sale and the first week in June, when they were analyzed, the alcoholic content might have been increased by fermentation. As to the sales made May 19, June 15, and June 11, the explanation urged is that this beer had been bought by Jacob Haller, defendant's brewmaster and vice president, from the Excelsior Brewing Company before the country had gone dry, and had been stored by him in the cellar of his house, a few hundred yards distant from defendant's plant, for his personal use, and that, he having left for Europe in April and remaining absent until August following, his son Fred J. Haller, its cashier and bookkeeper, wrongfully and illegally assumed to sell these cases from that stock.

Upon a study of the evidence, I am firmly convinced that the government's case is fully made out, and that these denials and explanations are not true. On all four occasions defendant's sales manager was in active charge of the transaction. Two sales slips were found at the time of the search and seizure in defendant's office, in the receptacle where the government's witnesses testify they had seen them placed. These show sales at \$5 a case. The persons who were sent after the cases sold on May 25 and June 11 were not called as witnesses, and do not testify, and their absence is unexplained. One was present while the testimony was being taken. Even more convincing are the markings on the bottles and the cases, all of which I have examined. The four cases sold May 14 are mostly in plain bottles without labels, and one in a case labeled "Excelsior Brewing Co.," and the other three are labeled "Eilert Co." The case sold May 19 contains mostly plain bottles, some with the label "Pilsener" and "Home Brewing Co." blown in the bottles, and with the label "Excelsior Brewing Co." on the case. The two cases sold May 25 are mostly plain bottles, but contain thereon the Golden Seal label of defendant and are in a case marked "Eilert Co." The case sold June 11 contains bottles with the defendant's name blown in the glass, and are in a case labeled with defendant's name. These physical facts conclusively disprove the truth of the ex-

planations offered by defendant's witnesses, are consistent only with the statements of the government's witnesses, and fully sustain their testimony.

[2, 3] My finding on the issues of fact is that the defendant during the period in question was using the premises described in the bill for the illegal manufacture and sale of intoxicating liquors in violation of the National Prohibition Act. In criminal prosecutions for maintaining a common nuisance, under section 21 of the act, a single sale of intoxicating liquor, accompanied by the unlawful possession of other liquor, has been held sufficient by three Circuit Courts of Appeals to sustain a conviction. See *Young v. U. S.* (9 C. C. A.) 272 Fed. 967; *Wiggins v. U. S.* (2 C. C. A.) 272 Fed. 41; *Gray v. U. S.* (6 C. C. A., decided November 8, 1921) 276 Fed. 395. The definition of a common nuisance for which one may be prosecuted criminally, and a common nuisance which may be made the basis of an action in equity by injunction, is precisely the same. If the language of the act is to be given its ordinary meaning, that which constitutes a common nuisance for the purpose of a criminal prosecution will also constitute a common nuisance sufficient to support any action in equity. The language of the act suggests no reason why the public authorities may not resort to either or both remedies.

I have not overlooked *U. S. v. Cohen* (D. C.) 268 Fed. 420. In that case District Judge Faris expresses the opinion that a common nuisance, such as will support an action in equity, requires a more or less continuous violation of law, and that, if a single violation only is proved, the action at law by criminal prosecution may be adequate, and that equity may not take jurisdiction. This view it does not seem to me is sustainable, in the light of the three Circuit Court of Appeals decisions above cited and of the explicit language of sections 22 and 23, defining a common nuisance and giving the remedy both by indictment and by bill in equity. However, if such were the law, the evidence in this case shows a continuous violation sufficient under Judge Faris' view to sustain a bill in equity. Furthermore, the view that the remedy by bill in equity may not be resorted to for a first violation because the remedy at law by criminal prosecution is adequate is, it seems to me, plainly in conflict both with the holding and the reasoning in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. The reasons why a criminal prosecution is not adequate, and why the equitable remedy by injunction may be resorted to, are set forth with convincing clearness at 123 U. S. 672, 673, 8 Sup. Ct. 273, 31 L. Ed. 205, in that opinion.

Plaintiff is entitled to the relief prayed for. A decree will be entered enjoining the defendant, its officers and employees, from manufacturing or selling intoxicating liquor as defined in the National Prohibition Act on or from the premises described in the bill, and that the common nuisance heretofore maintained on said premises shall be abated. The decree will further order that neither the defendant nor any other person shall, for a period of one year from the date hereof, occupy or use said premises or any part thereof for the manufacture or sale, not only of intoxicating liquors, but of near-beer, cereal or other beverages, or liquid compounds or preparations requiring or

developing at any time in the course of their manufacture or preparation for sale any alcoholic content. Under section 23, the use of the premises for any purpose might be forbidden, but an injunction limited as above provided seems to me to be broad enough to answer fully all the requirements of the law and of the situation.

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In re ROUDEN MFG. CO., Inc.

(District Court, E. D. New York. December 22, 1921.)

1. **Bankruptcy**  $\S$  318(2)—**Claim for damages for breach of executory contract provable.**

A claim for damages for breach of an executory contract for services to be rendered to the bankrupt, further performance of which was prevented by the bankruptcy, is provable.

2. **Bankruptcy**  $\S$  92, 328—**Court may fix time less than one year for filing of claims; in proceedings looking to dismissal all creditors may be required to prove claims.**

The provision of Bankruptcy Act,  $\S$  57n (Comp. St.  $\S$  9641), that claims shall not be proved subsequent to one year after adjudication, is a limitation, and does not preclude the court from fixing a shorter time within which claims must be proved, as in proceedings looking to a dismissal of the petition, as provided in section 56g (Comp. St.  $\S$  9643), in which case the court may require all creditors scheduled and notified to prove their claims before the hearing.

In Bankruptcy. In the matter of the Rouden Manufacturing Company, Inc., bankrupt. On review of order of referee allowing claim of Fred Gibson. Reversed.

Francis J. Sullivan, of New York City, for claimant.

Arthur Leonard Ross, of New York City, for appellant.

David Haar, of New York City, for purchaser.

GARVIN, District Judge. Frederick Schwartz, hereinafter described as the purchaser, has brought before the court for review an order of the referee allowing the claim of Fred Gibson in the sum of \$1,310, as a general claim. It is contended that the order was erroneous, in that:

First. The claim of the said Fred Gibson is not a provable claim in bankruptcy, because founded upon damages for personal services to be rendered after the adjudication in bankruptcy herein.

Second. The said claim cannot be allowed because the same is barred by an order of a judge of this court, made and entered herein on March 25, 1921, requiring all creditors to prove their claims and file same on or before February 24, 1921.

I assume that these dates appearing in the record are erroneous, and should be February 7, 1921, and February 21, 1921, respectively. On February 7, 1921, the court made an order, based upon the petition of the receiver, directing that a hearing be had before the referee to consider a bid of the purchaser above named for all the assets of the estate, at which hearing any and all other bids therefor were to be considered,

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and at which time the referee was directed to make such orders for the acceptance or rejection or other disposition of the bid of said purchaser or any other bid as might seem proper. This order further provided that, on or at any time after the conclusion of the hearing and without further notice to creditors, the court would entertain an application by the petitioning creditors or by the bankrupt for a dismissal of the proceedings in bankruptcy, and directed the bankrupt, all of its creditors and stockholders, the receiver herein, and other parties in interest to show cause why at said hearing or thereafter said bid of said purchaser or such other bid as might seem proper should not be accepted, or why such other order in respect to the assets of the estate, or any part thereof, should not be made as might be just and proper.

The said order of February 7 further provided for publication in a daily newspaper, in this district, of a notice of said hearing before the referee and the object thereof, and for the service by mail, under the direction of the referee, of a copy of said order and of the petition upon which it was granted to all creditors and stockholders of the bankrupt, as the same appeared on the schedules of the bankrupt on or before February 11, 1921, and that no persons claiming to be creditors of the bankrupt, excepting those whose claims appeared on the schedules of the bankrupt as creditors, and whose claims were deemed by the receiver and by the bidder as valid claims, should be entitled, in the event of the acceptance of the said bid, to be paid a percentage of their claims as creditors unless their claims be filed with the referee before the 21st day of February, 1921, and that all persons claiming to be such creditors and failing so to file such claims with said referee should be barred from sharing in the distribution to be made in the event of the acceptance of any such percentage bid by this court.

On or about March 3, 1921, the referee filed a comprehensive report, reciting, inter alia, that a hearing was held pursuant to said order of February 7, and that the bid of the said purchaser was the highest bid offered, that all creditors then present at said hearing voted to accept said bid, and that it appeared to the satisfaction of the referee that said bid should be accepted as in the best interest of the creditors herein. The report recommended that an order be entered for the immediate sale of all assets of the bankrupt to said purchaser, and that each unsecured creditor of the bankrupt, as his claim might thereafter be proved and allowed, should receive from the purchaser 20 per cent. of the amount of his claim. Other recitals and recommendations in said report are not material, except the final recommendation that the adjudication be vacated and the petition dismissed.

On March 5, 1921, the court made an order in effect approving the report of the referee, to which order the attorney for the petitioning creditors, the receiver, the attorneys for the bankrupt, and the attorney for the purchaser consented in writing. The decision of the referee, upon which his order allowing the Gibson claim was made, states that the claim is based upon breach of a contract between Gibson and the bankrupt by which the former was employed as superintendent of the bankrupt's plant for one year beginning June 8, 1920, at a salary of \$60 per week. He continued until his employment ceased with the in-

stitution of the bankruptcy proceedings. He was out of employment nine weeks and two days, during which his salary would have amounted to \$525. He then, on February 17, 1921, obtained employment at \$40 per week, until March 17, 1921. During the latter period he was paid \$80 less than he would have received, had he remained in the bankrupt's employ.

The decision states that it does not appear whether Gibson obtained other employment after March 17, and the referee finds that he is entitled to the sum he would have earned, had he been in the bankrupt's employ, from that date until June 8—i. e., for 11 weeks and 5 days, \$710. The foregoing various items of damage the referee allows upon the claim for breach of contract. They aggregate \$1,315, although for some reason, which is not apparent, the referee has allowed only \$1,310. Other errors of computation appear, but, as no objections thereto are raised, it may be assumed that they are considered of no consequence.

[1] So far as the nature of the claim is concerned, it is a provable debt. *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. In that case it is stated:

"Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm v. Horst*, 178 U. S. 1, 19. The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of section 63a(4), and the damages may be liquidated under section 63b."

[2] With regard to the contention that the claim is barred, because it was not filed within the time fixed by order of this court, the claim having been originally filed March 19, 1921, section 57n of the Bankruptcy Act (Comp. St. § 9641) provides:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer"

—and it was urged and the referee decided that the court had no power to fix a time within which claims against the estate must be proved less than one year after adjudication. By this section claims may not be proved after the expiration of one year, under ordinary circumstances. Had Congress intended to allow creditors in all cases a full year to prove claims, it would seem that the statute would have so provided, for section 59g (Comp. St. § 9643) regulates the proceedings upon the dismissal of a petition, and in no way indicates that such dismissal may not be had until one year after adjudication. Section 57n applies only to an estate that is in process of administration, and is

intended to prevent creditors from attempting to file claims after one year has elapsed, rather than to deny to the court the power to fix a less time, where it becomes necessary so to do in connection with the dismissal of a pending proceeding and the payment of creditors as a result thereof.

Section 59g of the Bankruptcy Law reads as follows:

"A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

Before the proceeding in the case at bar was dismissed, the court caused the requirements of this section to be followed, and the creditor whose claim is now in question to be notified, as were all the others. The schedules of the bankrupt, which had been filed February 4, 1921, included the list of all the bankrupt's creditors, required by the statute to be filed.

It is well settled that creditors may be barred from participation in an estate even though their claims are filed within a year. *In re Bell Piano Co.* (D. C.) 155 Fed. 272, 18 Am. Bankr. Rep. 183; *Matter of Eldred* (D. C.) 155 Fed. 686, 19 Am. Bankr. Rep. 52; *Matter of Coulter* (D. C.) 206 Fed. 906, 30 Am. Bankr. Rep. 76. The reasoning of those opinions is applicable, and the court is of the opinion that, as the Gibson claim was not proved within the time set by the court, the learned referee was in error in allowing proof thereof after the petition in bankruptcy had been dismissed.

If these conclusions are correct, it follows that the claim should have been disallowed; and it will be ordered accordingly.

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#### WESTINGHOUSE ELECTRIC & MFG. CO. v. METROPOLITAN ELECTRIC MFG. CO.

(District Court, E. D. New York. October 6, 1921.)

**Patents** ~~328~~—1,224,880, for electric switch and fuse box, held valid and infringed.

The Kries patent, No. 1,224,880, for an electric switch and fuse box for use where electric wires enter a building in which the switchboard and fuses are in separate compartments, the former of which may be locked and made inaccessible to consumers, held not anticipated, valid, and infringed.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Metropolitan Electric Manufacturing Company. Decree for complainant.

Kerr, Page, Cooper & Hayward, of New York City, for plaintiff.  
C. P. Goepel, of New York City, for defendant.

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GARVIN, District Judge. This is an action in equity, brought to restrain defendant from infringing claims 5, 6, 7, 10 and 12 of the Kries patent No. 1,224,880, issued May 1, 1917, covering an electric switch and fuse box. These claims read as follows:

"5. The combination with a casing having a door hinged thereto, of fuse terminals in one part of the casing accessible when the door is open and inaccessible when the door is closed, supply terminals and live switch contacts in another part of the casing, a barrier within the casing preventing access to said supply terminals and switch contacts when the door is open, pivotally mounted switch arms within the casing for connecting said switch contacts with the fuse terminals, and means operable from without the casing for rocking the switch arms and controlling the door, said means acting to lock the door when said arms are moved toward closed position and to release the door when said arms are moved from closed position.

"6. The combination, with a casing of fuse terminals in one part of said casing, supply wire terminals and a switch in another part of the casing, said switch adapted to connect the latter terminals with the fuse terminals, a door, hinged to the casing, for permitting access to the fuse terminals, said door having a projecting part adjacent its pivotal axis, a barrier within said casing for preventing access to said supply wire terminals and switch, and mechanism for actuating the switch and simultaneously controlling the door, said mechanism being operable from without the casing and comprising means acting to engage said projecting part on the door and lock the door when the switch is closed.

"7. The combination, with a casing, having an opening, and a door, hinged to the casing, for closing said opening, fuse terminals within said casing accessible through said opening when the door is open, supply wire terminals and live switch contacts in another part of the casing, inaccessible through said opening, movable switch members within the casing, for connecting said fuse terminals with said switch contacts, and actuating mechanism for the switch operable from without the casing, said mechanism and door having interlocking parts acting to automatically lock the door in closed position when said mechanism is moved to close the switch, the interlocking part on the door being located adjacent its pivotal axis."

"10. The combination with a casing having an opening and a door on the casing for closing said opening, of fuse terminals in one part of the casing accessible when the door is open and inaccessible when the door is closed, supply wire terminals and live switch contacts in another part of the casing, a barrier within the casing preventing access to said supply terminals and switch contacts through said opening, movable switch members within the casing adapted to connect said fuse terminals and switch contacts, mechanism for operating said switch members and for simultaneously controlling the door, said mechanism projecting outside the casing and comprising means for locking the door when the switch members are in closed position and releasing the door when the switch members have been moved to open position, and means for locking the said operating mechanism so as to hold said switch members in open position."

"12. The combination with a casing having an opening, and a door hinged to the casing for closing said opening, of fuse terminals in one part of the casing, accessible when the door is open and inaccessible when the door is closed, supply wire terminals and live switch contacts in another part of the casing, inaccessible through said opening, pivoted switch members within the casing adapted to connect said fuse terminals and switch contacts, mechanism for operating said switch members and simultaneously controlling the door, said mechanism projecting outside the casing and comprising means for locking the door when the switch members are in closed position and releasing the door when the switch members have been moved to open position, and means for locking the said operating mechanism so as to hold said switch members in open position."

Thus the purpose of the inventor was to inclose the apparatus making up such a switchboard as is placed where electric wires enter a building and before they enter the meter therein, in such a manner that the consumer might have access to the fuses, but not to the parts that carry the current, with such access possible only when the current is turned off.

Since electric lighting has been employed, all parts of the switchboard were exposed. Until the Kries patent this frequently involved danger to persons touching the exposed parts through which the current is carried, and under certain conditions made easy theft of the current by attaching wires to the switchboard between the point of entry of the wires into the building and the meter, and connecting such wires around the meter, so that the consumer is not charged with the current thus used.

To overcome these two objections to an exposed switchboard, the inventor inclosed it in a box, which could be locked, and the key held by the Electric Company. This box was made up of two compartments, with separate doors; one containing the switch, the other the fuses; the former being accessible to the company, the latter to the consumer. In order to make access by the consumer to the fuses unaccompanied by danger, and to prevent theft of current, Kries, the inventor of plaintiff's box, by an arrangement of bars and arms, made it impossible to open the fuse compartment of the box until the switch was "off," or, with the door of the fuse compartment open, to close the switch until that door was closed.

Plaintiff's device thus is merely a means of effecting an interlock between the door of the fuse compartment and the switch. To accomplish this, the door is hinged at its side nearest the pivot of the switch, and is provided with an appropriate projection near its hinge, while to the switch arm is attached a member which is movable, and which may engage and disengage with the door projection.

Defendant's claims of noninfringement will be considered. It was at first urged that defendant's box has a knob on the door of the fuse compartment and an additional catch or sliding latch on the door. These features are nothing more than convenient additions, and have nothing to do with the safety features of plaintiff's device. Indeed, they were abandoned upon the argument.

Defendant contends that plaintiff's barrier between the two compartments of the box does not go all the way across the casing. This appears to be true, but it is of no consequence, for the opening is so slight that it is well-nigh impossible to get the hand through (thus practically eliminating danger) while the connection that could be made by slipping through a hook, with wire attached, to steal current, would be so imperfect that but little loss would be possible by that means. It is finally claimed that there is no infringement because in plaintiff's patent the door is closed by the closing of the switch, whereas, in defendant's the switch *may* be closed by the closing of the door. An inspection reveals, however, that the closing of the switch in defendant's device *will* close the door. The conclusion is reached that defendant's box differs from that of plaintiff's only in slight and non-

essential particulars, and that the claims of the patent in suit are infringed.

It now becomes necessary to consider whether the prior art covers the invention which is involved. The prior patents offered by defendant, so far as the record discloses, either are not in point, in that all of the parts are accessible (thus failing to avoid the danger from contact, which plaintiff's device eliminates) or have no satisfactory interlock.

Defendant relies chiefly upon the German patent to Oerlikon, No. 191,485, and the German patent to Schuckert, No. 107,437, claiming that these patents show a construction and arrangement similar to that of the patent in suit as disclosed at page 1, line 9, of the patent:

"My invention pertains to boxes or holders for electrical apparatus, and is designed to permit the opening thereof whenever necessary for inspection or renewal of the apparatus, but to preclude the passage of the current to the apparatus while the box or holder is open, and to prevent the possible taking of current at such time from within the chamber. Though susceptible of use in various other relations or with other apparatus, the invention is primarily intended for, and is illustrated in connection with, a switch and fuse box for the introduction of current from a service main into a room or building where the current is to be used."

At page 1, line 24:

"Briefly stated, the invention consists in a novel construction and arrangement of parts, prominent among which is a closure for the fuse box or apparatus containing chamber, which closure is so connected with or related to a line switch inaccessibly mounted in a separate compartment that the switch must be opened before, and remain open during, the opening of the containing chamber."

At page 1, line 59:

"By my invention I avoid these several difficulties, give free and prompt access to the interior of the box or containing chamber, preclude all chance of accidental contact with live wires or conductors, and render impossible the taking of current from within the box or chamber while said box is open."

And at page 3, line 78:

"It is obvious that other forms of electrical apparatus, in addition to or in place of the fuses shown, might be inclosed in chamber 4, the essential idea of the invention being the combination of an apparatus containing chamber and a switch in such a manner that the opening of the apparatus containing chamber becomes possible only when the switch is open."

The Oerlikon patent, according to defendant's own witness, does not contain all the elements of claim 6 of the patent in suit, although it was apparently endeavoring to solve the problem to which the Kries patent was directed. It was unsuccessful, however, for in it the switch may be closed, either by accident or intentionally, with the door unfastened, or the switch may be readily closed, with the door open, by employing a screw driver or even a pencil.

The other German patent, No. 107,437, taken out by Schuckert, has one lid for both compartments, to which there seems to be no locking apparatus. There are certain essentials of plaintiff's device that are wholly lacking—to wit, fuse chamber, door to same, interlock between

door and switch and access through the slide opening to the lower compartment. The inventor of this patent did not have before him the problem solved by the inventor of plaintiff's patent.

Plaintiff may have a decree.

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**AMERICAN METAL CAP CO. v. ANCHOR CAP & CLOSURE CORPORATION.**

(District Court, E. D. New York. October 6, 1921.)

**1. Patents ~~328~~—1,079,238, for bottle cap, held valid and infringed.**

The Hammer patent, No. 1,079,238, for a sheet metal bottle cap, *held* not anticipated, valid, and infringed.

**2. Estoppel ~~68~~(2)—Patentee bound by his own construction of patent.**

Where a patentee has secured a decree from one court sustaining his patent on a particular theory advanced by him, he cannot, in another suit in which the evidence discloses anticipation, on that theory, abandon it and successfully contend for an inconsistent theory.

**3. Patents ~~54~~—Abandoned experiment not part of prior art.**

A prior invention, abandoned, is merely an experiment, and does not affect the rights of an inventor, who takes up the subject and perfects the invention for actual use.

In Equity. Suit by the American Metal Cap Company against the Anchor Cap & Closure Corporation. Decree for complainant.

C. A. Weed, of New York City, for plaintiff.

George Ramsey, of New York City, for defendant.

GARVIN, District Judge. [1] This is an action in equity brought by plaintiff, assignee of Hammer patent, No. 1,079,238, to restrain the infringement of claims 2, 4, and 9 thereof. These claims read:

"2. A sheet metal bottle cap provided with a collared bead at the lower edge of the flange thereof, said bead being collapsed at intervals to provide instructed locking projections."

"4. A sheet metal cap having a vertically corrugated flange formed with a coil enveloping its free edge, and having said coil collapsed at intervals to provide instructed locking projections reinforced by the adjacent corrugations."

"9. A sheet metal bottle cap provided with a rounded bead at the lower edge of the flange thereof, said bead being flattened at intervals to provide locking projections."

The device covered by plaintiff's patent is a metal cap intended to be screwed on glass bottles or jars, locking lugs or projections at the lower edge of depending skirt, engaging the thread of the jar; the said lower edge having a protecting bead or rounded edge. This last-named feature is intended to eliminate the raw edge of the cap at the lower edge of the skirt, thus protecting that part of the cap from any injurious effects of acids, rust, or salts, preventing any danger of the user's hands being cut by the raw edge, and furnishing locking lugs that do not bend out of shape upon the application of force.

Lug caps being old in the art, as both parties agree, there was nothing novel in the feature of the lug. The defendant claims that there

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are certain essentials in plaintiff's patent that are lacking in that of defendant, to wit, coiled-bead, multi-walled projection, out-struck corrugations, and indentations at lugs. The above-mentioned feature of nonbending lugs is secured by turning in the raw edges of the cap, thus making a bead or coil, and utilizing the same metal which made up the bead to form the lugs or projections, at intervals. There seems to be no doubt that never before had the bead and the lug been combined and located at the same spot. The advantages of thus utilizing the same metal for both are that by this method the lug can be forced in further, and thus accommodate itself to variations in jars, and, because several thicknesses of metal are used, the lugs are strengthened.

That plaintiff is entitled to a decree, if defendant's cap is the equivalent of that of plaintiff, requires no discussion. An examination of the prior art offered by defendant discloses that practically all caps mentioned either have lower raw edges, have no lugs, or are not similar (Painter patent, No. 582,762, has no lugs whatever, and is a cap for beer bottle). The Hammer patent, No. 894,633, July 28, 1908, must be critically examined, however, for it is strongly urged by defendant, and if it fails to show a lug combined with a bead at the lower edge of the flange, the defense of prior art must fall. Does this patent show a lug made of or projecting from a coil, bead, or rounded edge? The patentee states that the bead is immediately below the locking projection, and so the question must be answered in the negative. Indeed, the patentee himself stated that he had tried, unsuccessfully, to make the lug in the bead of that patent. There really seems to be no doubt of this, for defendant's attorney stated, during the prosecution of defendant's Wieland patents:

"In the Hammer device, in which the projections simply project inwardly from the skirt and have no connection with the bead, this transmission of forces is not secured and consequently the projections are weak, as is admitted in the patent."

[2] Where a patentee had secured a decree from one court sustaining his patent on a particular theory advanced by him, he cannot in another suit, in which the evidence disclosed anticipation on that theory, abandon it, and successfully contend for an inconsistent theory. *Kintner et al. v. Atlantic Communication Co. et al.*, 240 Fed. 716, 153 C. C. A. 514. We have, too, the opinion of an official of the Patent Office (which cannot be impeached because of interest, and which is entitled to great consideration, *Ideal Stopper Co. v. Crown Cork & Seal Co.*, 131 Fed. 244, 65 C. C. A. 436):

"Claim 9 is rejected on the patent to Hammer, 894,633, of record. To provide indentations in the bead, instead of as shown, would not involve invention."

During the pendency of plaintiff's patent and in reply to this announcement by the Patent Office, plaintiff's attorney said:

"A careful review of the entire art shows that the applicant is the first to combine any kind of a bead, whether partly or wholly coiled, with locking projections forming part of the bead, and it is submitted that the applicant is clearly entitled to the allowance of claim 9."

Thereafter the Patent Office acquiesced, and allowed the claim.

In addition, defendant's claim of prior art cannot prevail, because it appears from the testimony that the Hammer patent, 894,633, was never actually used; indeed, that the cap of that patent was never more than an experiment, and was at no time used commercially.

[3] A prior invention, abandoned, is merely an experiment, and does not affect the rights of another inventor, who takes up the subject and perfects the invention for actual use. *Whiteley v. Swayne*, 7 Wall. 685, 19 L. Ed. 199. The case of *Hall Signal Co. et al. v. General Ry. Co.*, 169 Fed. 290, 94 C. C. A. 580, is almost identical with the case under consideration. It was there said:

"A patent which was respected by competitors for thirteen years, and which covers a system which has been in successful operation during its entire life, cannot be invalidated by the ambiguous language of a patent which has added nothing of value to the art."

Defendant's cap shows a lug combined with a bead and a comparison of claims 3, 5, 7, 11, and 14 of defendant's patent indicates that they read upon plaintiff's cap. The claims just mentioned read as follows:

"3. As an article of manufacture a closure cap comprising a cover portion, a skirt depending from such cover portion, and a locking projection comprising metal folded upon itself at the lower edge of the skirt portion and extending inwardly at substantially right angles to said skirt portion, the upper fold being integral with the skirt portion and the lower fold extending across the lower limit of the skirt portion."

"5. As an article of manufacture a closure cap comprising a cover portion, a skirt depending from said cover portion, and a plurality of lugs arranged at the lower edge of the said skirt portion comprising metal extending across the margin of the skirt and folded upon itself and rolled outwardly into a wire edge on the lower edge of the said skirt."

"7. As an article of manufacture a closure cap comprising a cover portion, a skirt depending from said cover portion, and a plurality of closed tubular lugs at the lower edge of said skirt."

"11. A closure cap of the character specified comprising a cover portion, an annular skirt depending from said cover portion, a plurality of lugs adjacent the edge of said skirt and comprising segments of metal folded upon itself and integral with the skirt throughout their length."

"14. A closure cap of the character specified comprising a cover portion, an annular skirt depending from said cover portion, a continuous annular bead formed at the lower margin of the skirt portion, a plurality of elongated thread engaging lugs extending substantially perpendicular to the skirt portion, each of said lugs comprising an upper fold connecting with the skirt portion and a lower fold connecting with the annular bead."

The defendant's witness, whose experience and ability cannot be denied gave the following differences between plaintiff's and defendant's caps:

**Plaintiff's Hammer Patent, 1,079,238.**

**Defendant's Wieland Cap.**

(1) Has coiled bead of  $1\frac{1}{2}$  turns completely protecting edge of metal.

(1) Has ordinary "wire edge," which does not protect raw edge of the metal.

(2) Coiled bead must be made before locking lugs can be made.

(2) Locking lugs must be made before wire edge can be made.

(3) Bead collapsed—i. e., horizontally flattened—to make locking lugs, from metal of the bead.

(3) Locking lug made independently of wire edge from extra metal provided for the purpose.

(4) Metal in locking lugs multifolded and flattened, with successive layers in contact throughout.

(5) Coiled bead destroyed. Walls smashed and tightly flattened at locking lugs.

(6) Lugs triangular in form with sharp inner edges.

(7) Skirt indented vertically, and shorter at each locking lug, due to vertical smashing of coiled bead.

(8) Skirt indented inwardly to give greater elasticity at the locking projections.

(9) Corrugations all struck outwardly to reinforce locking projections.

(10) Blank circular or round.

(11) Finishing operation is a punching operation.

(12) Lugs inclined like screw threads.

(13) Location of lugs visible when on package.

(14) Flattened lugs, formed by flattening metal and sharply creasing it, tending to weaken metal.

(4) Metal in lugs looped with loops hollow and wire edge tubular. No metal folds in contact.

(5) Wire edge complete, not destroyed. Locking lugs constituted, in effect, by making wire edge of larger horizontal diameter, due to excess metal.

(6) Lugs straight chords of cap circle, with thick inner edges.

(7) Skirt unbroken smooth and slightly longer at each lug, due to vertical enlargement of wire edge.

(8) Skirt not indented, but stiffened by chordal lugs.

(9) Corrugations all struck inwardly. Do not reinforce locking projections.

(10) Blank four-pointed.

(11) Finishing operation is a spinning operation.

(12) Lugs always straight.

(13) Location of lugs invisible when on package.

(14) Tubular lugs, formed by compressing metal edgewise without sharply creasing, tending to strengthen it.

Conceding these differences, many of which are obviously of no consequence, the fact remains that defendant's cap has the features that have been pointed out to be original with the inventor of plaintiff's cap, and it is clear that an article has been produced which accomplished the same result, in the same manner, and has the same effect as plaintiff's cap.

The court cannot escape the conclusion that there is no essential difference between the two caps, and will direct a decree for plaintiff.

## HUBERT et al. v. APOSTOLOFF.

(District Court, E. D. New York. September 24, 1921.)

### 1. Contracts ⇐267—Right to rescind contract for fraud not barred by non-performance.

Failure to perform a contract by a party induced to enter into it by fraudulent representations is not a bar to a suit for its rescission.

### 2. Evidence ⇐434(8)—Party not bound by recitals of contract procured by fraud.

Where a contract was procured by the fraud of one party, the other party cannot be estopped by recitals therein that it contains the only representations made and relied on.

### 3. Contracts ⇐97(2)—Fraudulent contract; failure to make inquiry, when induced by other party, not bar to relief.

That a party induced to enter into an executory contract by fraud

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proceeded with the contract after knowledge of facts which might have put him on inquiry *held* not to bar his right to relief, where such facts were plausibly explained by the other party.

In Equity. Suit by Conrad Hubert and two corporations against Sergius Apostoloff and another; also two suits by defendant, each against one of the corporate complainants. Decree for complainants, and suits by defendant dismissed.

C. Bertram Plante, of New York City (Herman Aaron, of New York City, of counsel), for plaintiffs.

Borris M. Komar, of New York City (Robert P. Levis and L. E. Schlechter, both of New York City, of counsel), for defendant.

GARVIN, District Judge. Three actions have been tried together by consent—a suit in equity to rescind two contracts made by one of the plaintiffs, Conrad Hubert (hereinafter referred to as the plaintiff) with defendant, dated June 23, 1919, and September 8, 1919, and to compel defendant to deliver to plaintiffs certain stocks and securities received by him pursuant to said contracts; plaintiffs claiming that the contracts were made as a result of fraudulent misrepresentations by defendant. When the action was brought, defendant's wife was made a codefendant, but at the close of plaintiff's case, she was eliminated by consent.

The other two actions are brought by the defendant in the foregoing action against each of the plaintiff companies, respectively, to compel the issuance to him of certain specified shares of stock in each of said companies, which were organized pursuant to said contracts to finance, develop, and market defendant's alleged invention.

This matter first came before the court on a motion by plaintiffs for an injunction pendente lite restraining the defendants from transferring any of the stocks and securities received pursuant to the contracts above mentioned. When that application came on for hearing, both sides filed voluminous affidavits. The court decided that plaintiffs should have the relief sought, and set forth its conclusions somewhat at length, after a review of the facts. After hearing the testimony the court is satisfied that the plaintiffs have established the material allegations of the bill of complaint, not merely by a fair preponderance of evidence, but by clear and convincing proof.

In the fall of 1918 defendant made a contract with the Interstate Electric Novelty Company, granting the latter a license which he had obtained from the United States government to manufacture samples of battery cells, after representations to that company by defendant that he had invented a cell that would last for all time. The negotiations leading up to the execution of this contract were conducted, to a great extent, by Block, the vice president of the Novelty Company, who, in May, 1919, introduced the plaintiff Hubert to the defendant. Then followed a series of representations by defendant to plaintiff—that defendant had invented a new method of construction of a battery for flash lights, applicable to small as well as large cells, by which the elements necessary to generate electricity were kept apart until the battery was to be used, when they would be pushed together; that the life of the battery would be unlimited; that the electrolyte, a necessary part

of the battery, would not dry up, but would remain soft; that this condition of the electrolyte would be brought about by adding thereto agar-agar, by which, not only would the electrolyte be kept moist and pliable, but the zinc cup in which it was contained would be unaffected (ordinarily zinc is injured by electrolyte); that he had been making these batteries for several years, having some perfect specimens more than two years old, and that he had manufactured more than 5,000 of them for the Interstate Novelty Company.

In view of the fact that the life of a flash light battery is at most but a few months, it is manifest that such an invention would revolutionize the industry. Plaintiff's interest was at once aroused, and he finally made the contracts with defendant which he seeks to have set aside, claiming that they were procured by the misrepresentations aforesaid. The defendant denied that he made these statements, but they have been clearly proved in whole or in part:

(1) By the testimony of plaintiff and other witnesses, some of whom are disinterested.

(2) By the application for latter's patent, which defendant admitted he gave to plaintiff, and which he admitted that plaintiff read, which application contained these claims:

"A further object of my invention is to provide a new electrolytic mix of a semi-solid nature that will retain its form when moulded, pressed or otherwise formed into a desired shape or mass until forcibly disturbed therefrom; that will retain its semi-solid nature for an indefinite period of time until required for use, and that at the same time will possess a sufficient degree of fluidity to yield and flow freely upon force or pressure being applied to it."

"My electrolytic mix 18 is placed in the bottom of the outer container 12. I form this mix in a semi-liquid state of materials, which include elements which are by nature non-drying, so that the mix will remain in whatever shape it is molded, pressed, or otherwise formed into, and at the same time possess a sufficient degree of fluidity to yield and flow freely upon sufficient force or pressure being applied to or upon it."

"I prepare this mix from the usual salts at present in general use, which I dissolve in water and then add an equal volume of powdered cellite or kisselguhr and from 7½ to 11 per cent. of its volume according to its strength, of agar-agar, mixed or emulsified with one-tenth part by weight of either glycerine or still bottoms produced by the distillation of mineral or petroleum oils; if desired, the agar-agar can be substituted by a starchy powder, or wheat, or other flour, but in this case the compound must be heated up to about 82 degrees Centigrade, when the right consistency and properties are obtained. The above-described mix is poured while still in a fluid state into the bottom of the outer container 12, which has been previously treated to render it sufficiently waterproof and rigid by usual and well known methods. Within a short time this mix will stiffen or become semi-liquid and become sufficiently solid to preserve its form, softness, and elasticity for an indefinite period of time, and yet be sufficiently liquid to easily give and flow when mechanical pressure is applied to it."

(3) By the draft contract dictated by defendant in plaintiff's presence, which referred to "a new ageless and imperishable battery cell." These representations were false, and known to the defendant to be false, were made to the plaintiff with intent to deceive him, and he acted thereon, investing more than \$650,000.

[1] It is not necessary to set forth in detail all the relations between the parties nor any further particulars of defendant's device, but the arguments of importance upon questions of law which are advanced

in behalf of defendant should be considered. It is asserted that the right to rescind a contract on the ground of failure of performance by the other party, delay in performance, want or failure of title, insufficient or incomplete performance, breach of conditions or of warranties, or for other such causes, cannot be claimed by a party who is in default in the performance of any of the obligations imposed upon him by the contract, citing *Hull v. Pitrat* (C. C.) 45 Fed. 94, and *Gardner v. The Roycrofters*, 197 N. Y. 511, 90 N. E. 1158, and that the failure to permit defendant to have the supreme direction of the works of the manufacturing corporation (the Portable Electric Current Company, Inc., one of the plaintiffs) and to have issued a part of the stock of both plaintiff companies to defendant was a breach of the contracts.

The action, however, having been brought for a rescission of a contract on the ground of fraud, any failure of performance by plaintiffs is immaterial. Even if this were not the law, it does not appear that plaintiffs violated their agreements with defendant, as is asserted. There was no agreement by plaintiffs to place defendant in supreme control of the manufacturing works. The agreement provides:

"The inventor covenants \* \* \* that he will enter into an agreement with the manufacturing company when organized, by which he will undertake the complete and supreme direction of the manufacturing company's works, acting as the fully authorized executive of the same, under the direction of the board of directors," etc.

Nor was there a breach by plaintiffs of their agreement to issue to defendant stock of either of plaintiff companies.

[2] Defendant claims that, when a contract states that it is made under representations therein expressed, other representations cannot be alleged, in the absence of proof that a party to it was deceived as to the contents of the contract, or otherwise prevented from ascertaining the same. It has been decided that the contract is void because it was procured by defendant's fraud; it follows that plaintiff cannot be estopped from setting forth the truth by anything contained in the contract itself. *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444, and cases therein cited.

Defendant claims that the evidence shows that in June, 1919, he honestly believed and had a right to believe that his invention was practical, notwithstanding the fault developed by the samples made. An examination of the record discloses that the defendant represented that he had ascertained, after a long experience with the invention, that the electrolite would remain soft and pliable, and would have no injurious effect on zinc, whereas he had ascertained nothing of the kind.

It is also asserted that plaintiff used a mix meter and monocell which defendant claims to have invented, and for which he (defendant) made application for letters patent. As the applications for letters patent to both of these stand in defendant's name, he is fully protected with respect to any rights he may have therein.

Defendant further contends that, since plaintiffs attempted to rescind the contracts, the firm of Williams & Pritchard, patent solicitors, have taken various legal proceedings in connection with the foregoing and other applications for patents. Whatever this firm did was

rather to attempt to keep the applications in statu quo, and as the plaintiff gave instructions to take no action, except to keep the applications unchanged, he discharged his duty in full.

It is urged that plaintiff knew or could have known that the representations were untrue, either before or after June 23, 1919, but that nevertheless he continued his relations with defendant. This is in reality an attempt to invoke the doctrine of caveat emptor. A discussion of the principles here applicable is found in the case of *Strand v. Griffith*, supra.

In the case at bar the representations were of facts of which plaintiff had no knowledge, and concerning which the ordinary individual would have no information. If plaintiff had undertaken to make a full investigation, before accepting defendant's representations as true, the element of reliance by plaintiff upon defendant's statements would be lacking. If the contract is executory, and the defrauded party thereto, after ascertaining the facts, proceeds with the contract, he cannot rescind. But here there is no evidence that plaintiff discovered that the representations were fraudulent until after defendant had withdrawn from his association with plaintiff.

[3] Defendant contends that plaintiff had facts brought to his notice which would put upon inquiry the man of ordinary prudence. The difficulty with this claim is that, when plaintiff spoke to defendant about these very facts, defendant offered a plausible explanation, so that plaintiff's failure to terminate their relations is excusable.

The other points relied upon by defendant are either without merit or have been hereinbefore determined adversely to him.

There will, therefore, be a judgment according to the prayer of the complaint in the action against Apostoloff. The two actions brought by him are dismissed.

## UNITED STATES v. BUTLER et al.

(District Court, E. D. New York. January 4, 1922.)

### 1. Intoxicating liquors ⇨274—Requisites of bill to enjoin nuisance.

In a suit under National Prohibition Act, tit. 2, § 22, to enjoin a nuisance the bill must set forth the facts which constitute the nuisance, and if the sale of liquor in the premises is alleged it must appear that it was sold, kept, or bartered habitually, continually, or recurrently, and a general allegation that liquor has been and is being sold and kept for sale therein is insufficient.

### 2. Intoxicating liquors ⇨261—To constitute place a nuisance, its unlawful use must have been with owner's knowledge, actual or implied.

To constitute a place a common nuisance, which may be closed to use by injunction, under National Prohibition Act, tit. 2, § 22, its unlawful use must have been with the consent of the owner, or he must have had knowledge or reason to believe it was so used.

### 3. Intoxicating liquors ⇨274—Bill to enjoin nuisance must allege specific violation of statute.

Under National Prohibition Act, tit. 2, § 21, providing that any building or place where liquor is "manufactured, sold, kept or bartered in violation of this title is hereby declared to be a common nuisance," a bill

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

for an injunction to close a place as a nuisance under the following section 22 must allege specifically what violation of the statute was committed therein, and it is not sufficient to allege in the disjunctive that liquor was manufactured, sold, kept, or bartered on the premises.

**4. Intoxicating liquors § 274—Allegations on information and belief insufficient to warrant injunction.**

A bill to enjoin a nuisance, under National Prohibition Act, tit. 2, § 22, is insufficient to authorize the granting of a temporary injunction, where the allegations are made on information and belief.

In Equity. Suit by the United States against Elias H. Butler and the S. Liebmann's Sons Brewing Company. On motion to dismiss bill. Granted.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y.

Alexander S. Drescher, of Brooklyn, N. Y. (Isidore Oshlag of Brooklyn, N. Y., on the brief), for defendant Butler.

Liebman, Blumenthal & Levy, of New York City (Walter H. Liebman and David Levy, both of New York City, of counsel), for defendant S. Liebmann's Sons Brewing Co.

**GARVIN, District Judge.** Each of the defendants moves to dismiss the bill of complaint upon the ground that no cause of action and that no facts sufficient to entitle plaintiff to the relief demanded appear in the bill. The action is brought pursuant to the provisions of section 22, title 2, of the National Prohibition Act (41 Stat. 314), which reads as follows:

"An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any state or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than \$500 nor more than \$1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property."

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The plaintiff prays that the court abate the public and common nuisance on the premises referred to in the bill of complaint, close same, take possession of all liquor, fixtures, and other property now used on said premises in connection with the violation of law constituting said nuisance, direct the destruction of all intoxicating liquor on the premises, or its delivery to a department or agency of the United States government, direct that the premises shall not be occupied or used for one year after the date of the decree, or, if the court permits it to be used, only upon giving security that intoxicating liquor shall not thereafter be manufactured sold, bartered, kept, or otherwise disposed of therein or thereon, and that the defendants pay all costs, fines, and damages that may be assessed for any violation of title 2 of the National Prohibition Act upon said property. Plaintiff also asks for a temporary injunction, pending final determination of the issues, restraining all persons occupying the premises from conducting or continuing a nuisance thereupon.

[1] 1. The defendants claim that the allegation in the bill of complaint, "that the defendants are maintaining and conducting a common nuisance on the premises, described herein, in that intoxicating liquor containing more than one-half of 1 per cent. of alcohol by volume has been and is being sold and kept for sale in the premises," is a conclusion of law only, and is not sufficient, in the absence of any specific allegation of fact. They refer particularly to the decision in the case of *United States v. Cohen* (D. C.) 268 Fed. 420, in which it was held that the facts constituting a nuisance at common law must be set forth. With this conclusion this court is in accord. A pleading which does not fairly apprise an opposing party of what is expected to be proved thereunder fails to accomplish one of the controlling reasons for the requirement of written pleadings, and the mere employment of the words of the statute, as here used, does not sufficiently inform defendants of what the plaintiff claims has been done which constitutes a crime. *United States v. Cohen*, supra; *Mugler v. Kansas*, 123 U. S. 623, at page 672, 8 Sup. Ct. 273, 31 L. Ed. 205.

2. Furthermore, as urged by defendants, it must clearly appear that the liquor prohibited was sold, kept, or bartered habitually, continually, or recurrently. *City of Salina v. Langhlin*, 106 Kan. 275, 187 Pac. 676; *United States v. Cohen*, supra; *Tuttle v. Church* (C. C.) 53 Fed. 422; *State v. Stanley*, 84 Me. 555, 24 Atl. 983. This requirement has not been met by the plaintiff in its bill of complaint.

[2] 3. The defendant Brewing Company contends that the failure of the bill to allege that the company has knowledge or reason to believe that the premises are occupied or used for any purpose contrary to the provisions of the National Prohibition Act and suffers such use is a fatal defect so far as this action is concerned. It is provided by section 21, title 2, of the National Prohibition Act, that:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not

more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction."

From this it is apparent that mere occupancy, without knowledge or reason to believe that the premises are being used in violation of law on the part of the owner, is insufficient.

[3] 4. The bill of complaint alleges:

"The intoxicating liquor manufactured, sold, kept, or bartered upon the said premises of the said defendant is sold and kept for sale for beverage purposes."

This was obviously for the purpose of pleading the facts constituting the nuisance in question, for section 21, *supra*, defines a common nuisance under the act as:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title," etc.

Consequently it is apparent that a nuisance may result either from manufacturing, selling, possessing, or trading in intoxicating liquor, except as permitted by the act, and that the bill of complaint must allege at least one of these as a fact. The defendants insist that the allegation may not be in the disjunctive, citing *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Simpson v. United States*, 229 Fed. 940, 144 C. C. A. 222, and *People ex rel. Schuler v. Schatz*, 50 App. Div. 544, 64 N. Y. Supp. 127. These cases (and certainly the last named) are authorities for a general prohibition against setting forth several acts disjunctively in an indictment, but no reason is suggested why they should not apply to a bill in equity. Indeed, there is direct authority for holding that such a bill must be specific. *Brooks v. O'Hara* (C. C.) 8 Fed. 529.

[4] Of course, no temporary stay could be granted, under the bill of complaint, which alleges upon information and belief that the acts were committed. Positive averments are required. *Brooks v. O'Hara*, *supra*.

The motion will be granted, each of the four objections to the bill being sufficient to justify such action by the court. Plaintiff may serve an amended bill within 20 days.

IN RE BOWERS.

(District Court, N. D. Georgia, E. D. March 7, 1922.)

1. Bankruptcy  $\S$  399(1)—Act does not prevent return of property conditionally set apart as exempt.

The provisions of Bankruptcy Act,  $\S\S$  6, 7a, 47, and 70a (Comp. St.  $\S\S$  9590, 9591, 9631, 9634), relating to exempt property, but containing no reference to a waiver or renunciation of the right, do not prejudice a right of the bankrupt to return to the court for administration property previously set apart to him as exempt under the state statutes, if he might do so without prejudice to the rights of others.

2. Bankruptcy  $\S$  399(1)—Amended schedule, waiving right to exemption, held sufficient under state law.

Under Civ. Code Ga. 1910,  $\S$  3413, allowing a debtor to waive his right to exemption by a writing, either general or specific, which has been construed to limit the right of the beneficiaries to claim the exemption under section 3393 to the case of verbal waiver or nonaction, the amendment of the schedule in bankruptcy, so as to waive or renounce the bankrupt's claim to exemption, during the time allowed creditors to object to the exemption, is a sufficient waiver and renouncement in writing.

3. Bankruptcy  $\S$  399(1)—Holders of notes renouncing homestead exemption cannot prevent waiver of exemption by bankrupt.

Creditors of the bankrupt, who held notes in which he waived his homestead exemption by a general declaration of renouncement, cannot object to the waiver by the bankrupt of his right in bankruptcy proceedings to renounce his exemption, after property was set apart to him.

4. Bankruptcy  $\S$  399(1)—Original claim of homestead held not to prevent renouncing after note holders had receiver appointed.

The fact that the holders of notes in which the bankrupt waived his homestead exemption had had receivers appointed by the state courts of such homestead property after the bankrupt claimed his exemption, but within the 20 days for objections by creditors, does not prevent the bankrupt from thereafter amending his schedule, so as to renounce his homestead claim and return the property for administration by the court of bankruptcy.

In Bankruptcy. In the matter of the estate of J. L. Bowers, bankrupt. On a review of a judgment allowing an amendment of schedule, so as to waive and renounce claim of homestead. Judgment affirmed.

S. C. Upson, of Athens, Ga., for creditors.

H. W. Whitnell, of Athens, Ga., for bankrupt.

SIBLEY, District Judge. The bankrupt in his schedule claimed a \$1,600 exemption to be set apart out of specific property. The trustee set the property aside, and, during the 20 days within which creditors might object, certain creditors, holding notes against the bankrupt in which he had waived and renounced all rights of homestead and exemption, obtained the appointment of a receiver in the state court, under the practice authorized in *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 48 S. E. 150, and the receiver applied to have the exempted property turned over to him. The bankrupt, on the twentieth day, came into court and in writing amended his schedule, so as to waive and renounce all right or claim to the homestead, which amendment was allowed by the referee, and thereupon the trustee in bankruptcy was ordered to

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

take charge of the property set apart and administer it in bankruptcy. Of this judgment of the referee a review is now sought.

[1] The Bankruptcy Act provides, by section 6 (Comp. St. § 9590), that allowance to bankrupts of exemptions which are prescribed by the state laws shall not be affected, by section 7(a), being Comp. St. § 9591, the bankrupt is required to make a claim to such exemptions as he may be entitled to, and by section 47 (Comp. St. § 9631) the trustee is required to set the same apart; section 70(a), being Comp. St. § 9654, providing that the title to the property so set apart shall not vest in the trustee. The result of setting apart by the bankrupt court of an exemption is, of course, to hold off all creditors who are parties to the bankruptcy proceeding, just as though the exemption had been made in the state court; but the title to the property set apart remains in the bankrupt and subject to his disposition, unless it is thereafter or at the same time set apart under the state court procedure. This has been long settled in the state of Georgia. *Farmer v. Taylor*, 56 Ga. 560, and many cases collected in *Pincus v. Meinhard*, 139 Ga. at page 373, 77 S. E. 82. The Bankruptcy Act contains no reference to a waiver or renunciation of the right of exemption, but from the duty laid upon the bankrupt to state and claim his exemption it is evident that, if none is claimed, the bankrupt court will administer the property, as the sheriff of the state court under like circumstances would sell it. Nothing in the Bankruptcy Act suggests that it would be a violation of its policy for the bankrupt, at any time that he might do so without prejudice to the rights of others, to return to the bankruptcy court for administration the property set apart to him, that it might be paid out upon his debts. The utmost that the bankrupt act provides is that the exemptions allowed by the state law shall not be affected.

[2] We turn, therefore, to the law of Georgia, to see what light it throws upon the right of the bankrupt to surrender property set apart, for administration in the bankrupt court. The scheme of homestead provided by the Georgia law is that the person entitled may claim to the value of \$1,600 any sort of property selected by him; an elaborate method of ascertaining and setting it apart by the ordinary being provided. Code, § 3377 and following. Section 3393 provides that, should the head of the family refuse to apply, the beneficiaries might do so. The refusal contemplated, however, is evidently a verbal one, or perhaps mere nonaction, because section 3413 expressly provides that, except as to wearing apparel and \$300 worth of household and kitchen furniture and provisions, any debtor may waive or renounce his right to the benefit of the exemption by a writing, either general or specific, stating that he does so waive and renounce the right, and that it may be done in the contract of indebtedness or contemporaneously therewith or subsequently thereto in a separate paper. It has been held that this right of the debtor may be asserted against the will of his family, even after application has been made by them for the setting apart of the homestead in the state court. *Jackson v. Parrott*, 67 Ga. 210.

[3, 4] The amendment of the schedule here is such a waiver and renouncement in writing as is contemplated by this section, made subsequently, of course, to the contracting of the debts involved. So far

as the rights of the family are concerned, evidently no wrong has been done by the bankrupt. The creditors who are complaining must rest their rights upon the waiver made in their notes. This waiver was not a covenant that the debtor would seek and claim a homestead against all other creditors, and renounce it in favor of those to whom he was giving the waiver. On the contrary, it was a general declaration of renouncement of homestead against the debts made, and that only. If the debtor claims no homestead, he has done these creditors no wrong. He has faithfully adhered to the agreement to waive and renounce his right to a homestead. I do not see that his act in first claiming it and then renouncing it can operate to enlarge the rights of these creditors. It is true that they went to the expense of having a receiver appointed in the meanwhile, but that was in the protection of a situation which might be changed without doing them a legal injury. The referee's conclusion was right. No reason appears, either in the bankrupt law or in the state law, why a debtor may not, at any time prior to the actual setting apart of his homestead by the state courts, or the actual turning of it over to the state court receiver, waive and renounce his right to the same, and invest the bankruptcy court with power to administer it for the benefit of his creditors.

The judgment is therefore affirmed.

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CORDLEY v. RICHARDSON CORPORATION.\*

(District Court, W. D. New York. July 18, 1921.)

1. Patents  $\Leftrightarrow$  20—Making a thing in one piece that was before in two pieces does not give patentability.

Any new function or effect, where making a thing in one piece that was before made in two, does not give it patentability, unless there is evidence of "unexpected properties or uses capable of producing a novel result."

2. Patents  $\Leftrightarrow$  112(5)—Changes requiring only skilled mechanic not patentable.

When the court is satisfied that changes in old devices require only the exercise of the skilled mechanic, the presumption of patentability running with the allowance of the patent is overcome.

3. Patents  $\Leftrightarrow$  328—1,054,677, for improvements in coolers for liquids, held invalid.

Cordley patent, No. 1,054,677, for improvements in coolers for water and other potable liquids, held invalid.

In Equity. Bill by Henry G. Cordley against the Richardson Corporation. Bill dismissed.

Fish, Richardson & Neave, of Boston, Mass. (Harrison F. Lyman and Hector M. Holmes, both of Boston, Mass., of counsel), for plaintiff.

Duell, Warfield & Duell, of New York City (F. P. Warfield and L. A. Watson, both of New York City, of counsel), for defendant.

HAZEL, District Judge. The Cordley patent in suit, No. 1,054,677, was issued to the inventor March 4, 1913, and describes improvements in coolers for water and other potable liquids. The receptacle con-

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$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Decree affirmed 290 Fed. —.

taining the liquid is arranged so that the lower part only is exposed to the direct cooling action of the cooling chamber; the larger part, or display part, being on the outside thereof. The single claim is for a combination and reads as follows:

"In a cooler for liquids, the combination of an outer receptacle adapted to contain a cooling medium, an inner receptacle adapted to contain liquid and having its upper portion above the top of the outer receptacle and of relatively large cross-sectional area and its lower portion of relatively small cross-sectional area, and formed integrally with the upper portion, closed at its lower end and extending downward through the top of the outer receptacle and having its lower closed end resting on the bottom of the outer receptacle, a draw-off faucet exterior of the outer receptacle, and a connection leading from the lower end of the lower portion of the liquid receptacle to the faucet."

The defense is noninvention. Various kinds of water-cooling apparatus are shown in the prior art wherein the water is held in glass bottles or earthen jars separated from the cooling box; the container being inverted, with the neck projecting into the cooling part. The prior devices were all provided with means for draining or faucets at the lower end of the cooling medium, and the patentee claims that he improved such devices as shown in patents to Hart, Conover, and to himself, with the result that liquid may be supplied to the container before the original contents are wholly exhausted, and also that the reserved supply receives a better cooling. The essential difference between the prior structures and the structure in suit is that in the latter the upper portion of the reservoir is exposed and the liquid is in sight, while the lower part extends into the ice container and rests on the bottom; both parts being integral. In thus joining the parts, and supporting the lower part on the bottom of the cooling chamber, tight and firm positioning was secured.

The claim was at first rejected by the Patent Office on the ground that it distinguished from the earlier patent to Conover only in "the limitation having liquid tight connection with the upper portion," and it was said by the Examiner that to provide Conover's structure with water-tight connections between the water storage receptacle and the cooling receptacle did not involve invention, but later on, upon filing a new oath by the inventor that his improvement was unknown before his discovery, the claim was allowed.

[1] The only perceivable difference of any materiality between the Conover structure and the structure in suit is that in Conover's the reservoir is not connected to the bottom of the cooling receptacle does not rest on the bottom, and the liquid is drawn directly from the cooling receptacle. It is of the inverted type, but I think the presumption of patentability and invention of the present patent is strongly shaken by it, and indeed is overcome upon consideration of the entire prior state of the art. In Cordley's prior patent there is a cooler with an open-mouth jar that contained ice. The neck of the bottle at the top rests on a ring. The main difference between that device and the device in suit is that in the latter the upper reservoir and the lower part which is the cooling portion are made integral, and extend farther down into the cooling receptacle. The Conover and earlier Cordley apparatus,

true enough, function a little differently; but I nevertheless think the changes made lacked invention. The mere making of the two parts of the reservoir integral, instead of keeping them separate, did not in my opinion constitute a patentable invention. Any different results obtained seem to me to be simply the ordinary consequence of extending the lower portion of the container down to the bottom of the cooling chamber.

Rigidity of the parts was no doubt secured by such adaptation, but, as said by Judge Townsend for the Circuit Court of Appeals of this Circuit, in *General Electric Co. v. Yost Electric Mfg. Co.*, 139 Fed. 568, 71 C. C. A. 552, any new function or effect, where making a thing in one piece that was before made in two, does not give it patentability, unless there is evidence of "unexpected properties or uses capable of producing a novel result." The modification of the prior Conover and Cordley structures to produce the structure in suit does not attain any such distinction. To extend the lower part of the reservoir and close the end thereof at the bottom of the cooling device constituted a change of form only, wherein old elements were altered to produce a more desirable result, or a result amounting to a difference of degree only, and not a patentable result. The elements of the claim in controversy are fairly readable upon the Conover structure; the only difference being, as heretofore stated, in the integral formation of the reservoir and positioning it.

It was argued that plaintiff's reservoir has at its upper end an opening for pouring in the liquid, but an opening or removable cover is not embodied in the claim, and indeed was an old adaptation. See Hart and Wisloh patents. The prior Wisloh patent, No. 296,095 (not cited in the Patent Office), though perhaps not an anticipation, nevertheless shows a one-piece reservoir extending close to the bottom of the ice chamber, the lower funnel-shaped end connected to a drain or faucet connection.

[2, 3] Although plaintiff's device has come into popular favor, there must be both utility and invention to sustain a patent. Great utility not infrequently results from mechanical changes and alterations which do not embrace invention. That rule is not inapplicable in this case, inasmuch as I think there was no patentable novelty in either forming the two parts of the reservoir integrally, or making it of one piece of glass, or making it tight and rigid; for such alterations and modifications, by which better cooling, and display were obtained, are thought to fall within the realm of mechanical skill, and not invention. Old devices frequently require alteration or modification to apply them to uses for which they were not originally designed or adapted, and when the court is satisfied that the changes require only the exercise of the skilled mechanic, the presumption of patentability running with the allowance of the patent is overcome.

For these reasons, the claim of the Cordley patent in suit is invalid, and the bill may be dismissed, with costs.

**HOUCK et al. v. SEABOARD FUEL CORPORATION.**

(District Court, E. D. Pennsylvania. February 23, 1922.)

No. 8578.

1. Appeal and error  $\S$  883—Party estopped by consent to submission of issue to jury.

A defendant, whose counsel withdrew objection to evidence tending to show that by its conduct it had waived its right to recover damages pleaded as a counterclaim, and expressed his willingness that the question be submitted to the jury, *held* estopped to complain of such submission.

2. Pleading  $\S$  427—Failure to plead waiver immaterial, where evidence is admitted without objection.

Where evidence tending to show that defendant by its conduct had waived the right to claim damages pleaded as a counterclaim, such evidence may properly be considered in determining whether defendant has established its counterclaim, and the fact that waiver was not pleaded as a defense is immaterial.

At Law. Action by one Houck and others against the Seaboard Fuel Corporation. On motion by defendant for new trial on counterclaim. Denied.

John G. Kaufman, of Philadelphia, Pa., for plaintiffs.

Conlen, Brinton & Acker, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. At the close of the plaintiff's testimony, his counsel suffered a voluntary nonsuit. Counsel for the defendant then proceeded with proof of its counterclaim, relying largely upon the testimony already adduced in the case and relevant to that claim. The plaintiff moved for a nonsuit, upon the ground that the testimony did not show the proper measure of damages. What then occurred appears on the record as follows:

"The Court: I think the defendant is entitled to have the case go to the jury on that point. I will overrule the motion for a nonsuit on that ground. The question, to my mind, is whether the defendant did not by his conduct waive any right to claim damages in this case.

"Mr. Conlen: I think your honor is right on that, and I think that is a question which should be passed on by the jury. I am perfectly willing to have the jury pass on that question.

"The Court: I think that is a question for the jury.

"Mr. Conlen: I am perfectly willing to let that question be passed on by the jury. I think your honor is quite right as to that. I might add that the question of waiver depends, too, on the question of pleading. There is no waiver pleaded in this reply."

Moreover, during the early part of the trial, objection was made to the plaintiff's offer in evidence of a letter concerning the defendant's orders upon the plaintiff for coal to be shipped. The record shows that at that stage of the case the defendant's counsel withdrew objection to that letter; the conversation being as follows:

"Mr. Kaufman: No; they alleged that we were shipping under; that we undershipped. They are going to ask damages on that ground. So that we are showing that our performance was as requested.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

"Mr. Conlen: If that is the purpose for which the letter is offered, I have no objection.

"The Court: The correspondence will be admitted.

"Mr. Conlen: I take it, it might be a waiver, if the court please."

The jury having returned a verdict for the plaintiff upon the defendant's counterclaim, the defendant now moves for a new trial, upon the ground that the trial judge submitted the question of waiver to the jury; that waiver was not pleaded in the plaintiff's reply to the counterclaim, and, if there was evidence of waiver, waiver was a question of law for the court, and not of fact for the jury.

[1, 2] In view of the circumstances at the trial from which it appears that objection to evidence showing waiver was specifically withdrawn upon that ground, and that defendant's counsel at the close of the case expressly stated his willingness that the question should be passed on by the jury, it is too late for him to shift his ground at this time. Under the circumstances of this case, waiver was a question of fact. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420. And the defendant cannot complain if the jury found against it upon an issue to which its counsel expressly agreed. Where not pleaded, evidence offered for the purpose of showing waiver is not admissible. But after such testimony is admitted, as here, without objection, and all relevant testimony relating to defendant's counterclaim is relied upon in support thereof, waiver becomes material, not as a defense, but in determining whether the defendant has made out its case upon the counterclaim. Even if the defendant had not expressly agreed to what it is now seeking to avoid, the fact that the waiver was not pleaded is immaterial.

Motion denied.

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NEKRITZ v. KLEIN.

(District Court, E. D. New York. January 23, 1922.)

Trade-marks and trade-names and unfair competition §—95(2)—Temporary injunction issued against imitation of plaintiff's label.

Defendants, who were marketing a stove polish called "stove lacquer" in a package of the same color as had been used by plaintiff for his packages of "stove lustre," and bearing a label which was strikingly similar to plaintiff's, can be temporarily enjoined from pursuing such practice, regardless of whether plaintiff's label was legally registered as a trade-mark.

In Equity. Suit by Louis Nekritz, doing business under the name of Perfect Polish Company, against Charles A. Klein, doing business under the name of Standard Polish Company. Temporary injunction issued.

Moses J. Dalinsky, of New York City, for plaintiff.

Moses S. Hirsch, of New York City, for defendant.

CHATFIELD, District Judge. The plaintiff manufactures stove polish, varnish, and paint. It puts on the market a stove polish in

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

pint and half-pint cans, bearing a bluish paper label, with the name "Stove Lustre" and various inscriptions as to qualities and use, as well as a representation of a coal stove, oil stove, water heater, housemaid, etc.

The defendant sells on the market a polish of similar nature, with a label of like design, presenting substantially the same information, and in many instances using the same or synonymous terms. The product of the defendant is contained in a can of the same size. The printed label bears the words "Stove Lacquer" as a part of the design, which also has the representation of a coal stove, but omits the gas stove and water heater of the plaintiff. A woman of almost identical appearance with the figure upon the plaintiff's can is shown, using the polish upon the stove, and the design is palpably an imitation of the plaintiff's. The motive of this competition is shown by the price printed on the defendant's product, viz. "thirty cents," while that of the plaintiff's product is printed as "thirty-five cents."

Upon the argument it was urged that the general bluish gray color of the label used by both the plaintiff and defendant was a well-known requisite of stove polish for sale in grocery stores; but this is not substantiated, either by the allegations of the defendant's answer nor by his affidavits.

It appears that the defendant has also placed upon the market a stove polish of similar qualities with a red label, but bearing the same directions and statement of qualifications, but that the cans with the red label are sold to hardware stores, who thus distinguish from the product carried by groceries. But this does not show that the general use of a blue label is open to the public, or that the grocery store trade and custom has established the right in all individuals who may wish to use a blue label for stove polish.

The defendant shows other products on the market, which may or may not be the subject of action by the plaintiff; but neither his answer nor his affidavits present any defense which would give him the right to use the blue label design "Stove Lacquer" in the form complained of.

The plaintiff alleges a registration of his label under the law relating to copyright. Whether it is a legally registered trade-mark may appear upon the trial, and, if so, the defendant's label plainly infringes. But it is unnecessary to consider this, as in the other branch of the case temporary injunction should issue.

NORSK HYDRO-ELEKTRISK KVAELSTOF ACTIESELSKAB et al. v. CALIFORNIA & O. S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922. Rehearing Denied February 20, 1922.)

No. 3758.

**Receivers** — 38—Appointment of receiver for steamship held within discretion of court, on facts shown.

The appointment of a receiver for a steamship in a suit involving the question of her ownership, to keep her employed and to prevent her removal out of the jurisdiction, *held* within the discretion of the court on the facts shown.

Appeal from the District Court of the United States for the First Division of the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by the California & Oriental Steamship Company against the Norsk Hydro-Elektrisk Kvaelstof Actieselskab and Bjarne Eriksen. From an order appointing a receiver, defendants appeal. Affirmed.

The bill in this case was filed July 16, 1921, and service thereof with summons was made upon the defendants, who are the appellants here, two days thereafter, to wit, July 18, 1921. The subject of the suit is the Norwegian ship Pacifico, and, the court below having appointed a receiver thereof pendente lite, the present appeal is from that order, and is here submitted upon an agreed statement of the case, which shows, among other things, that the ship is registered under the Norwegian flag, her registered owner being the appellant Eriksen, who, the statement shows, holds the title to the vessel as trustee for the other appellant, which is a Norwegian corporation, and they were in possession of her at the time the suit was brought.

The complaint alleges, in substance, that on or about October 27, 1920, the plaintiff purchased the Pacifico (then called Taiga Maru) from her then Japanese owners, causing the bill of sale thereof to be executed to one Mathiesen, a citizen of the kingdom of Norway, who took and held the ship in trust for the plaintiff, who thereafter held and operated the same for and at its expense; that during the month of January, 1921, Mathiesen transferred the ship to the defendant Norwegian corporation through Eriksen, who thereupon caused her to be registered in his name in the kingdom of Norway; that at the time of such transfer Eriksen knew, or had sufficient information to put a prudent man upon inquiry, that Mathiesen held the ship solely in trust for the plaintiff, and the plaintiff alleged upon information and belief that the defendants paid no valuable consideration therefor, and took the ship with notice of the plaintiff's right thereto.

The defendants in their answer put in issue the averments respecting the holding by Mathiesen of the title to the ship in trust for the plaintiff, and alleged that at the time the defendant corporation took the bill of sale in Eriksen's name neither of the defendants had any notice that Mathiesen held the legal title to the vessel in trust for any one other than one C. Henry Smith, or had any information sufficient to put a prudent man upon inquiry regarding that matter, and alleged in effect that, at the time the vessel was purchased from her then owners by Smith, he caused her registry to be changed and to be registered under the laws of the kingdom of Norway under the name Pacifico, with Mathiesen, a citizen of that kingdom, as the registered owner thereof; that Mathiesen accepted and held the registered ownership of the vessel in trust for Smith as the sole beneficial owner thereof, and that he remained such owner and in possession of the vessel

until he turned it over to the defendants to the action; that the plaintiff permitted Smith to purchase the vessel for himself, to cause her to be transferred to a Norwegian register in the name of Mathiesen, and permitted the latter to accept and hold such registered ownership in trust for Smith; that until about April 20, 1921, the plaintiff made no claim that it was the beneficial owner of the vessel, or any interest therein, and took no steps to inform Mathiesen that it was or claimed to be such beneficial owner, and took no steps to require him to hold the title in trust for it instead of for Smith, and took no steps to secure possession of the said vessel; that long prior to April 20, 1921, and while Mathiesen and Smith were clothed with the indicia of ownership of the vessel, and on or about January 17, 1921, the defendant corporation purchased the ship for the consideration and under the circumstances next stated; that the defendant corporation was and is a manufacturer of nitrates, and for a considerable period prior to January 17, 1921, was engaged in business with Smith whereby it sold him nitrates, and by which it also delivered nitrates to him to be sold by him for it upon a *del credere* commission; that in pursuing the latter course of business it was the custom between the defendant corporation and Smith for the former to deliver nitrates to him without requiring payment therefor in advance, the amount of the purchase price being charged by it against Smith upon an open account between them; that on January 17, 1921, and for some time prior thereto, Smith was indebted to the defendant corporation upon that account in approximately \$150,000; that the defendant corporation refused to deliver to him further nitrates without payment upon delivery, unless he would pay or adequately secure the account, whereupon he offered to cause the ship in question to be transferred to the defendant corporation or its nominee as security for the account, provided the defendant would thereafter continue to deliver nitrates to him without requiring as a condition thereof the payment of the purchase price, but allow such price to be charged against him upon open account; that immediately prior to January 17, 1921, a consignment of nitrates shipped by the defendant corporation to Smith was expected to arrive in California, and did so arrive, which consignment the defendant refused to deliver to Smith, but had stored and held for its account, the approximate value of which was \$90,000; that thereafter, and prior to January 17, 1921, the defendant corporation accepted the offer of Smith, in performance of which Smith, on said January 17, 1921, caused Mathiesen to transfer the vessel to the defendant corporation, in consideration of which transfer it delivered the nitrates last mentioned to Smith, charging the price thereof against him upon the said open account, thereby increasing the indebtedness from him to the defendant corporation to the approximate sum of \$240,000, no part of which has been paid, and all of which remains due; that the defendant corporation accepted the transfer of the ship from Mathiesen as the registered owner of the vessel, in full belief that he held the legal title thereto in trust for Smith, and that the latter was the sole beneficial owner thereof; that after the receipt of the bill of sale of the ship the defendant corporation caused the registered ownership of the vessel to be transferred from Mathiesen to Eriksen, who thereupon took and held the registered ownership and possession thereof as the agent of the defendant corporation, and as security to the latter for the payment of the \$240,000 due it from Smith.

The answer further set up in defense of the action, upon information and belief, that on or about October 19, 1920, Smith and certain other individuals entered into an agreement to purchase from her then Japanese owners the vessel in question, and that for purposes of convenience it was agreed between those parties to use the plaintiff as a temporary organization representing their association in that enterprise, but upon condition that the plaintiff was to have no interest in the vessel; that the purchase price of the vessel was \$350,000, and that the said mentioned individuals agreed to contribute \$60,000 of such purchase price, and that the actual purchasing of the ship and its operation thereafter should be done by Smith, and that a portion of the purchase price should or might be obtained by mortgaging the vessel; that Smith did purchase her from her then Japanese owners as be-

fore stated, but, instead of mortgaging the ship to obtain a portion of the purchase price, he actually paid the full purchase price with his own funds; that thereafter the said mentioned individuals, through the instrumentality of the plaintiff corporation, paid Smith the \$60,000 which they had agreed to contribute toward the purchase price of the vessel, with the exception of which Smith has not been reimbursed to any extent, and that the amount of \$290,000 paid by him on the purchase price still remains due; that upon making the said purchase Smith took possession of the vessel, and caused her to be registered under the laws of the kingdom of Norway in the name of Mathiesen as before stated, and that Smith remained in possession of the vessel until she was transferred to the defendants, as has been stated; that Smith caused Mathiesen to accept the registered ownership of the ship upon the trust that he would hold the same for the account and subject to the order of Smith; that by reason of the facts so alleged Smith had, in case the purchase was in reality for the account of the plaintiff, as alleged in the complaint, an equitable lien upon the vessel for the reimbursement to him of the amount of the purchase price which he had paid and for which he has not been reimbursed; that Smith caused Mathiesen to indorse and deliver to the defendant corporation the bill of sale of the vessel as security for the sum of \$240,000 so due by Smith to the defendant corporation, under and by virtue of which all the rights and equities of Smith in and to the vessel passed to that defendant, under and by virtue of which bill of sale it caused the registered ownership of the ship to be transferred to its co-defendant, Eriksen.

The answer also alleged that the plaintiff has never paid or offered to pay to either Smith or the defendant corporation any part of the purchase money of the vessel advanced by Smith, and it also set up as a separate defense that ever since July 21, 1916, the laws of Norway have made unlawful and prohibit the legal or beneficial ownership of any vessel registered under its laws to be held by one not a citizen of that country, or by a corporation not organized and existing under its laws, any violation of which is made punishable by fine and imprisonment, and a forfeiture of the vessel, by reason of which it is alleged the defendants should not be compelled to transfer either the registry or beneficial ownership of the vessel to the plaintiff.

In its petition for the appointment of a receiver pendente lite the plaintiff alleged in substance that at all times since the petitioner purchased the ship on October 27, 1920, she had been operated by and at the expense of and for the sole account of the petitioner, under the command of one H. J. Hammer as master, who, until on or about July 15, 1921, operated the vessel under and in pursuance of the orders and instructions of the petitioner; that on or about the said 15th day of July, 1921, and since the ship reached the waters of San Francisco Bay, the said master ceased to obey the orders and instructions of the petitioner respecting the management and operation of the ship, but from that time obeyed the orders and instructions given him by the defendant Norwegian corporation, which corporation, according to the allegations of the petition, claims to be entitled to the immediate possession and control of the ship, and intends to and will, unless restrained by order of the court, endeavor to operate, and, incident to such operation, remove the ship from the jurisdiction of the court, rendering it impossible for the petitioner to procure charters and contracts of affreightment for the ship, and the necessary material, supplies, and labor required for her operation; that the vessel is of a value in excess of \$350,000, and that "said steamship and her apparel and equipment are subject to serious depreciation in value by virtue of nonusage, and those legally and equitably entitled to the use, earnings, and benefit of said steamship will suffer great and irreparable injury, if said steamship is not operated for the length of time necessary to permit of a full and final adjudication" by the court as to the right of the respective parties in and to the ship and her equipment.

McCutchen, Olney, Willard, Mannon & Greene and McClanahan & Derby, all of San Francisco, Cal. (Warren Olney, Jr., of San Francisco, Cal., of counsel), for appellants.

Louis Ferrari and Bell, Simmons & Creech, all of San Francisco, Cal. (Golden W. Bell, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). It is needless to cite the almost innumerable decisions that might readily be cited to the effect that the discretion possessed and exercised by a judge in appointing a receiver is not an arbitrary discretion, and where shown to be such will not be sustained by an appellate court. In the present case, however, we are unable to hold that there was any violation of the sound discretion with which the court below was invested, in making the appointment complained of. The showing made on the hearing of the application disclosed, among other things, that, at and prior to the time of the purchase of the vessel from her then Japanese owners, Smith was president of the plaintiff corporation, and was personally present at a meeting of its stockholders held at the office of the company in the city of San Francisco, October 9, 1920, at which meeting "it was decided to purchase the 'Taigi Maru,'" at a certain stated price, and at which meeting "it was also decided to place the steamer under Norwegian flag, and," according to the record, "the ownership of the steamer will be in the name of the California & Oriental Steamship Company, with a corresponding owner in Norway, according to law."

The record further shows that at a meeting of the board of directors of the plaintiff corporation held April 18, 1921, Smith tendered his resignation as a member of the board, "to take effect immediately," which resignation was thereupon accepted; that on the next day—April 19, 1921—at a meeting of the board of directors of the plaintiff at which Smith was present, this resolution was adopted:

"With the unanimous consent of all the directors of this corporation, O. Henry Smith, manager, was directed to send the following telegram to Arthur Mathlesen, corresponding owner, in Kristiania, Norway, to wit:

"Inasmuch as steamer Pacifico is owned by California & Oriental Steamship Company, please cable declaration that such is the fact that you are the representative of this company. [Signed] Smith"

—and that Smith sent the telegram. The record further shows that two days thereafter, to wit, April 21, 1921, Smith exhibited to the company a reply to his telegram, in these words:

"Referring to your telegram just received, Pacifico is actually owned by the California & Oriental Steamship Company. I am registered owner of the steamer and representative of this company. Accordance with your instructions bill of sale has been deposited with the Norsk-Hydro Kristiania as security for your debts to them. They are entitled to have clean bill of sale at any time transferred to them."

The record further shows that among the records of the plaintiff corporation are what purport to be copies of two letters signed by Smith, one dated October 23, 1920, and the other October 25, 1920. They are as follows:

"Oct. 23, 1920.

"Chr. Barth, Esq., Attorney at Law, Christiania, Norway—Dear Mr. Barth: Referring to my letter of September 25th, I have had, in the meantime, occasion to transfer a steamer to Norwegian flag which was purchased for

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friends here from Japanese owners, named the 'Taigi Maru' or now named 'Pacifico.' Inasmuch as all negotiations were carried on by cable, I had to appoint a corresponding owner in Norway in order to avoid any delay to the boat, and shipowner. Mr. Arthur H. Mathiesen, Kristiania, has agreed to act as correspondent for the steamer, and I have so advised the broker, Messrs. Pinkney & Co., Cardiff, and they are therefore sending the necessary papers to Mr. Mathiesen. If you will be willing to attend to the matter of incorporating the steamer in a Norwegian company for the owners here, please send me a cable. I do not know whether your specialty is admiralty law, but if you, for any reason, could not handle this matter, probably you could recommend some one to us, by cable. In the meantime, I beg to mention the necessary particulars to follow in this case:

"The owners here of the S. S. Pacifico bought the steamer on a cash basis of £18-0-0 per deadweight ton, or £98,154-0-0, and the capital stock of the company should be one-half of this amount, or £49,077-0-0, or the equivalent amount in Norwegian currency. I presume it will be necessary, according to Norwegian law, to have at least three Norwegian directors besides myself, as I am an American citizen, and if you in that case should be willing to stand as one of the directors, I would name my brother, Privisor Arthur Smith, Sarpsborg, besides Mr. Arthur H. Mathiesen, and I will write him in the matter in the same mail. The name of the company should be A/S Pacifico. As to your remuneration, we shall, no doubt, be able to agree on this.

"On account of having been obliged to make the necessary arrangements by cable with Mr. Mathiesen, who will act as corresponding owner for the steamer, we have had no opportunity for drawing up any contract. As the steamer is owned by a company here, it would be necessary for me to have some sort of an agreement with Mr. Mathiesen, and I have offered him a remuneration of Kr. 12,000 per year during the time he is standing as corresponding owner, and the duties will be principally to engage officers whenever any vacancies occur; to make up returns for taxes from statements that we will furnish him from here covering the earnings and expenses; also to attend to the insurance at rates which are no higher than can be obtained from here. The stock is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this company is the actual owner of the boat, and the shares to be in denominations of Kr. 6,000 or Kr. 12,000.

"If there are any other points that have not been fully explained, we can easily do so by cable. In the meantime, remain with kind regards,

"Yours very truly,

C. Henry Smith."

"Oct. 25, 1920.

"Mr. Arthur H. Mathiesen, Kristiania, Norway—Dear Sir: Referring to your cable to-day, as per copy inclosed, in which you suggested a limited company be formed according to Norwegian laws, I telegraphed in reply thereto that I had already sent full particulars by mail. You will appreciate that, on account of the limited time I had to take over this boat, I had not made any such arrangement, and I am very much obliged to you for accepting the proposition I made, to act as correspondent for the boat, and I have now written my friend, Advokat Barth, at Kristiania, with regard to this company. I asked Mr. Barth to get in touch with your good self, and as I also thought it would be necessary to have a third director under Norwegian law, I suggested my brother, Arthur Smith, Sarpsborg, who also will call on you in this connection. I am thankful for the information in your cable that six-tenths of the capital must be owned by Norwegian subjects, and I am writing Advokat Barth with regard to this stipulation.

"Insurance: I beg to confirm cable in which I asked you to cover Kr. 2,000,000 hull 6 per cent. and interest and disbursements Kr. 700,000 2½ per cent. The valuation of the steamer is Kr. 2,600,000, which kindly keep private. I have cabled London for rates, but so far have not had any reply, as they are very particular about which trade the steamer was to operate,

so under the circumstances, not having anything definite from London, I accepted your rates on the basis as just mentioned.

"I also appreciate very much that you have engaged three engineers, 750, 575, and 480, respectively, and three mates, 560, 460, and 350 monthly, which is satisfactory, and may say that I had already engaged a captain through Messrs. Pinkney & Co. on the basis of Kr. 12,000 per year.

"Loan with Mortgage in Steamer: I have been in communication with a bank in Norway and also an attorney with regard to a loan, and thought possibly you could arrange such a loan with the Skibs-Hypothek Bank for one-half of the valuation, basis Kr. 2,600,000, and I shall be glad to hear on what terms such a loan can be obtained and particularly at what rate of interest. Messrs. Pinkney & Co. will be sending you the papers after they have made transfer, and may say that the transfer will be delayed a couple of days on account of the London bills for the balance of the payment being mailed by our bank from New York, instead of being telegraphed, but presume that these bills will arrive there not later than Thursday of this week.

"Yours very truly,

C. Henry Smith."

The records above referred to, if genuine, very clearly show that Mathiesen held the title to the ship in trust for the plaintiff corporation; and as the defendants, according to their own pleading, knew that he held it in trust for somebody, it cannot be supposed that they would not have ascertained the truth by making inquiry of the trustee, which it does not appear that they did or tried to do. See our own decision in *Sternfels v. Watson* (C. C.) 139 Fed. 505; *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Jones v. Williams*, 24 Beav. 62.

The order is affirmed.

### KANEDA v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1922.)

No. 3692.

1. Aliens  $\S$  40—Constitutional law  $\S$  318—Alien not entitled, under Constitution, to judicial hearing on right to enter.

Congress can prescribe the conditions on which aliens will be admitted to the country, so that Act Feb. 5, 1917,  $\S$  17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919,  $\S$  4289 $\frac{1}{4}$ ii), making the adverse decision of the Immigration Board final, unless reversed by the Secretary of Labor, when construed with sections 15 and 16 (sections 4289 $\frac{1}{4}$ hh, 4289 $\frac{1}{4}$ i), relating to examination before the board, and providing that removal of the applicant from the vessel pending such examination shall not be considered a landing, does not violate Const. Amends. 5 and 6, by depriving an alien while within the territorial jurisdiction of the United States, of his liberty without due process of law.

2. Aliens  $\S$  54—Constitutional law  $\S$  72—Courts may not prescribe limitations of examinations by immigration officials and decide false oath was to immaterial matter.

Under Act Feb. 5, 1917,  $\S$  16 (Comp. St. 1918, Comp. St. Ann. Supp. 1919,  $\S$  4289 $\frac{1}{4}$ i), requiring aliens to state under oath certain facts and such other information regarding themselves as will aid the immigration officials in determining their right to enter, the courts cannot prescribe what information the immigration officials can seek, and cannot hold that a false statement as to relatives of the alien within the country, which was one of the facts regularly inquired about, was immaterial, so as not to be perjury.

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**3. Aliens  $\Leftrightarrow$  53—False testimony at hearing is crime involving moral turpitude.**

Under Act Feb. 5, 1917, § 16 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼(1), making a false statement under oath relating to the right of alien to admission perjury, a statement by the alien that he had no relatives within the country was a crime involving moral turpitude, which justified his exclusion under section 3 of the act.

Appeal from the District Court of the United States for the Territory of Hawaii; J. B. Poindexter, Judge.

Habeas corpus by Buntaro Kaneda against the United States to procure applicant's discharge from custody of the immigration service. From a judgment discharging the writ, and remanding applicant to custody, applicant appeals. Affirmed.

Thompson, Cathcart & Lewis, Frank Andrade, George S. Curry, and Barry S. Ulrich, all of Honolulu, T. H., and Annette Abbott Adams, of San Francisco, Cal., for appellant.

S. C. Huber, U. S. Atty., of Honolulu, T. H., and John T. Williams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. Buntaro Kaneda, the appellant, a citizen and subject of the empire of Japan, aged 22 years, arrived at the port of Honolulu, Hawaii, on the 5th day of October, 1919, as a first-class passenger on the steamship Korea Maru. He had been provided with a passport by the Japanese authorities, with which he applied for admission to the United States, stating to the board of special inquiry in the Immigration Service that he intended to investigate the conditions of Hawaii's Japanese and then report to certain newspapers in Japan; that he expected to remain in Hawaii for 8 months; that he had attended the Waseda University, Tokyo, for 2½ years, but had no papers showing that he had attended such school. He also claimed to have worked as a reporter and writer on the daily paper, Niigata Asahi, in Niigata City, Japan, for one year before his departure. The applicant carried no family record, but stated that his father was dead, that his father had been a farmer, that his mother was living, that he had two brothers and one sister in Japan, and that he had no relatives in Hawaii. Later, when confronted with the records of the immigration office in Honolulu, showing the arrival in Honolulu from Japan of two Japanese persons, one in 1906 and the other in 1908, coming from the same place in Japan as appellant, and bearing the name of Kaneta, the appellant admitted that he had two brothers residing in Hawaii, and that he had lied to the board of special inquiry, because he thought it would be of no benefit to him to say that he had relatives in Hawaii, and that he was afraid he would not be admitted if he had; that he told this lie while testifying under oath to tell the truth, for the purpose of gaining admission into the United States.

Appellant was denied admission to the United States by the board of special inquiry, for the reason that he had admitted committing a crime or misdemeanor involving moral turpitude, to wit, perjury. An

$\Leftrightarrow$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

appeal from this decision was taken to the Secretary of Labor. The decision was affirmed by the Assistant Secretary of Labor. The appellant thereafter petitioned the District Court of Hawaii for a writ of habeas corpus, alleging unlawful restraint, and that the hearing before the board of special inquiry was unfair and was merely the semblance of a hearing. The writ was issued, a hearing was had, and on February 16, 1920, the writ was discharged, and the appellant remanded to the custody of the United States immigration inspector. From the order and judgment of the District Court this appeal is taken.

The authority of the court to review the proceedings before the board of special inquiry and the Secretary of Labor is invoked by the appellant on the ground that the order of exclusion was not the result of a fair and impartial hearing. Alleging that appellant was within the territorial jurisdiction of the United States, he claims the protection of the Fifth and Sixth Amendments of the Constitution of the United States against being deprived of his liberty without due process of law and against being deported on the charge of perjury. Alleging that his false statement to the board of special inquiry was not material to the investigation, he claims it was not perjury, and did not involve moral turpitude.

[1] It is provided in section 3 of the Act of February 5, 1917 (39 Stat. 874, 875 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b]):

"That the following classes of aliens shall be excluded from admission into the United States: \* \* \* Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."

In section 16 of the act (section 4289¼i) it is provided:

"Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

And in section 15 (section 4289¼hh) it is provided that, pending such examination of an alien, he may be removed from the vessel to a designated place, "but such temporary removal shall not be considered a landing." In section 17 of the act (page 887 [section 4289¼ii]) it is provided:

"In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor."

In the Japanese Immigrant Case, 189 U. S. 86, 97, 23 Sup. Ct. 611, 613 (47 L. Ed. 721), the Supreme Court, reviewing its previous decision relating to questions arising under acts of Congress excluding certain classes of alien immigrants, said:

"That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court."

In *Turner v. Williams*, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979, the proceedings were upon a warrant of deportation issued by the Secretary of Commerce and Labor. The warrant was resisted upon the ground that it was in violation of the Fifth and Sixth Amendments to the Constitution of the United States. The court, answering this contention, said (194 U. S. 289, 24 Sup. Ct. 722, 48 L. Ed. 979):

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States, to prescribe the terms and conditions on which they may come in, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers, that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application."

In the case of *U. S. v. Ju Toy*, 198 U. S. 253, 262, 25 Sup. Ct. 644, 646 (49 L. Ed. 1040), application for admission into the United States was made by one who claimed to be a citizen of the United States. The Supreme Court, referring to that feature of the case, said:

"The act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to a class excepted from the Exclusion Acts."

But the applicant, claiming to be a citizen of the United States returning to the United States after a temporary absence, claimed the protection of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of his liberty without due process of law. The court answered this claim by the declaration that:

"If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial."

With respect to the claim that the applicant was within the boundary of the United States, the court said:

"The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."

In *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, the applicant for admission into the United States claimed to be a citizen of the United States. His application having been denied by the immigration authorities, he appealed to the United States District Court upon habeas corpus, alleging that he had been excluded by the arbitrary action of, and abuse of the powers and discretion reposed in, immigration officers. The Supreme Court held that the decision of the immigration officers was final, but that "is on the presupposition that the decision was after a hearing in good faith, however summary in form."

This last declaration of the Supreme Court has become the authority relied upon in numerous cases for petitions to the United States District Court for writs of habeas corpus to review the proceedings before the immigration officers. It is accordingly alleged in this case

that the appellant did not have a fair and impartial hearing before the immigration authorities. The proceedings in formal procedure were clearly fair and impartial. Did they exceed the legal limit authorized by statute for such an inquiry?

In *Zakonaite v. Wolf*, 226 U. S. 273, 274, 275, 33 Sup. Ct. 31, 32 (57 L. Ed. 218), it was contended on behalf of the petitioner in the District Court that there was no evidence before the Secretary of Commerce and Labor sufficient to warrant a finding upon which the order of deportation was based. The Supreme Court was of the opinion that the evidence was adequate to support the Secretary's conclusion of fact, and, that being so, the appellant having had a fair hearing, the findings were not subject to review by the courts. The court said further:

"It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend, that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments, that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair, though summary, hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question."

[2] It is contended by the appellant that the false oath made by him, that he had no relatives in Hawaii, was not material to the inquiry that was being prosecuted by the immigration commissioner. It is provided in section 16 that:

"All aliens coming to the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section 3 hereof."

The facts that would aid the immigration official in determining whether an alien belonged to any of the excluded classes would be material to such an inquiry, and the scope of that inquiry must be a matter within their sound administrative discretion. It is not for the courts to prescribe rules of evidence for such an investigation. If the questions asked appear to be fair and reasonable for the purpose of enabling the officials to perform their duty, they cannot be held in violation of the statute. As a matter of fact, the question asked in this case was the usual one in such cases.

In *Jeung Bock Hong v. White*, 258 Fed. 23, 169 C. C. A. 161, this court said:

"The discrepancies in the testimony appear to be unimportant; but if, taking them altogether, the executive officers of the department found that the evidence in support of the petitioners' right to land and enter the United States was so impaired as to render it unsatisfactory, the court is not authorized to reverse that conclusion."

[3] It is next contended that the admission of the appellant that he had made a false statement when he told the board of special inquiry

upon oath that he had no relatives in Hawaii was not an admission that he had committed a crime involving moral turpitude. Section 16 of the act, referring to the oaths required of witnesses before the inspector, provides:

"That any person to whom such an oath has been administered, under the provisions of this act, who shall knowingly or willfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission, or readmission to, or to pass through, or to reside in the United States, shall be deemed guilty of perjury."

We are of the opinion that the false statement made by the appellant to the board of special inquiry clearly and distinctly involved moral turpitude of the most serious and objectionable character.

The judgment of the District Court is affirmed.

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ROSS-HIGGINS CO. v. PROTZMAN et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 3876.

1. Corporations  $\S$ 672(1)—Failure to plead incapacity of foreign corporation to contract by reason of not complying with statute waives that defense.

Under the provision of Comp. Laws Alaska, 1913,  $\S$  657, that contracts made by a foreign corporation which has not complied with the statute shall be voidable at the election of the other party, failure of a party sued to plead the incapacity of the corporation or the invalidity of the contract waives such defense.

2. Corporations  $\S$ 661(2)—Right to maintain action not affected by previous doing of business without complying with law.

That a foreign corporation may have done business in Alaska without having complied with the statutory requirements therefor does not affect its right to maintain an action in the courts of the territory after it has ceased doing such business.

3. Corporations  $\S$ 641—Statute making void contracts by corporations not authorized to do business strictly construed.

Under Comp. Laws Alaska, 1913,  $\S$  660, providing that, if a foreign corporation shall fail to comply with the requirements of the statute to authorize it to do business in Alaska, "all its contracts with citizens of the district shall be void as to the corporation," to authorize a court to adjudge a contract void, it must clearly appear that it was made with a citizen of the district.

4. Attachment  $\S$ 345—Surety on forthcoming bond estopped to deny that attachment was properly levied.

Sureties on a forthcoming bond conditioned for redelivery of attached property or payment of the judgment recovered against the attachment defendants are estopped to set up in defense to an action thereon that the attachment was not properly levied, or was irregular, or that the contract sued on was voidable.

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action at law by the Ross-Higgins Company against L. F. Protzman and F. S. Gordon. Judgment for defendants, and plaintiff brings error. Reversed.

Louis K. Pratt, of Fairbanks, Alaska, for plaintiff in error.  
A. R. Heilig, of Portland, Or., and Kerr, McCord & Ivey and James A. Kerr, all of Seattle, Wash., for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This action was based upon a forthcoming bond executed in 1908 by Protzman and Gordon, defendants in error, payable to the United States marshal and conditioned that, if the Ross-Higgins Company should recover a judgment against Ohlsen in an action by Ross-Higgins Company against Ohlsen, then pending in the courts of Alaska, they would redeliver certain goods attached or pay the value thereof to the marshal. In December, 1910, the marshal assigned the bond to the present plaintiffs, who brought this action in 1911.

Plaintiff pleaded that, when it transacted mercantile business during 1906 and 1907, it complied with the local law (chapter 23, pt. 5, Carter's Alaska Code), requiring filing of a certificate of incorporation. Defendants answered that on July 18, 1906, and continuously thereafter, the Ross-Higgins corporation had not complied with the laws concerning the filing of articles of incorporation in Alaska, and for that reason the forthcoming bond involved was void; also that the stock of merchandise attached did not belong to Ohlsen at the date of levy, and that one Vachon had a chattel mortgage lien on the goods. Demurrers to the answers were overruled, and plaintiff replied by denials and pleas of fraudulent conduct and estoppel. The court found as follows:

Ross-Higgins Company, an Oregon corporation, in 1906 and part of 1907 did business in Alaska, with its principal place at Fairbanks, in the then Third judicial district of Alaska, and sold merchandise to one Ohlsen, for which, in August, 1907, Ohlsen owed the company \$1,689. Before April 7, 1908, Vachon, a merchant in Fairbanks, Alaska, sold merchandise to Ohlsen, for which Ohlsen owed Vachon about \$1,400. Ohlsen, wishing further credit, mortgaged all his goods, including those to be sold, to Vachon, thus securing several promissory notes by Ohlsen to Vachon. The mortgage was recorded and Ohlsen continued in business; but on August 20, 1908, the Ross-Higgins Company sued Ohlsen, and in 1911 recovered judgment for \$1,404, and sued out writ of attachment against the property of Ohlsen. Execution was had by the marshal. When Vachon learned of the attachment, with the permission of Ohlsen, who was then in possession of the goods, he took possession of the mortgaged goods and sold them, but for a sum insufficient to pay Ohlsen's secured debt. Ross-Higgins Company never filed in the office of the clerk of the District Court for the Third Division of Alaska any copy of its charter or articles of incorporation, or other statements required by law, except an annual report for the year 1906.

The court concluded that the Ross-Higgins Company, while carrying on business in Fairbanks, Alaska, failed to comply with the provisions of the Alaska law relating to foreign corporations, and that the court was "prohibited from enforcing" its claim against Protzman and Gordon; that the claim of the plaintiffs against defendants upon the

bond sued upon "is invalid and unenforceable," and the bond without valid consideration; that "no valid attachment" was ever made, and the bond executed for the "supposed release" from the attachment was without consideration and null and void. To review judgment for defendants, writ of error was brought.

The statutes of Alaska provide (Comp. Laws 1913, §§ 657, 660):

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the District to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the treasury of the United States."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

In the consideration of the cited provisions of the Code, we cannot ignore an allegation of the complaint to the effect that the Ross-Higgins Company transacted a mercantile business at Skagway and Fairbanks, in Alaska, with principal place of business at Skagway after 1900, but that in July, 1907, it sold out its stock in trade and closed out its business in Alaska, and thereafter transacted no corporate business in the territory, other than such as was necessary in winding up its affairs, in paying its debts, and collecting outstanding accounts. This averment is not answered, except by denials that the principal place of business of plaintiff corporation was ever at Skagway, and that at any time other than August 14, 1906, the corporation filed at Fairbanks, Alaska, the annual statement required by the Alaska statutes. As a result the following situation is presented:

The Ross-Higgins Company was not a party to the bond or contract now before us, made in 1908, in the course of litigation between Ross-Higgins Company and Ohlsen. Nor did the corporation become assignee of the bond until December 9, 1910, when the marshal assigned the bond to it. However, before 1910 the corporation went out of business in Alaska, and after that was only doing what was necessary to wind up its corporate affairs and collect debts due it.

[1] No taint of fraud attached to the obligation here sued upon, or to the assignment thereof by the marshal to the Ross-Higgins corporation. In the action wherein the Ross-Higgins Corporation recovered judgment against Ohlsen, by failure to plead the incapacity of the corporation to sue, or the invalidity of the contract, Ohlsen waived the defense that the contract was voidable at his election (*Bernheim D. Co. v. Elmore*, 12 Cal. App. 85, 106 Pac. 720), and judgment went against him. In our opinion, the bond, when given, was a valid contract between the marshal and the obligors, Protzman and Gordon, and, in the event of certain contingencies, became subject to enforcement by the marshal.

[2] This being so, the assignee, which was not engaged in business in Alaska at the time of the assignment, or at the time of the institution of the present action, may enforce the obligation, and the court will not in this action permit the signers of the bond to inquire whether at the date of the notes involved in the action against Ohlsen the contract between him and the corporation was voidable for failure to comply with the statute cited, or whether, if Ohlsen had so elected in the action against him, the contract could have been held void as to the corporation. Whatever violation of the law the corporation had been guilty of ceased before it became the assignee of the bond, and thereafter its attitude was that of a litigant foreign corporation not attempting to carry on business in Alaska. *Boggs v. Kelly M. Co.*, 76 Kan. 9, 90 Pac. 765, 15 L. R. A. (N. S.) 461; *Booth & Co. v. Weigand*, 28 Utah, 372, 79 Pac. 576.

[3] It follows that in our opinion the present action can be maintained unless section 660, Compiled Laws of Alaska, p. 331, applies. But that is not pertinent, for it has to do only with contracts entered into by a foreign corporation doing business in Alaska, and failing to comply with the statutes of Alaska, and where the contract is made "with citizens of the district." The section should be construed with reasonable strictness, and unless it appears that the attachment was wholly illegal and void, and the bond was therefore invalid, the sureties are estopped. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567. To apply this rule, it does not appear that the contract between Ohlsen and the corporation was void, and even though the defendants herein could present an issue that their contract is unenforceable because the main contract was void, the issue is not made by any pleading that the obligors were citizens of the district, and there is no finding to that effect. To adjudge a contract wholly void under section 660 as to the corporation, it must clearly appear that the contract was made with a citizen of the district.

[4] The court concluded that the attachment on behalf of Ross-Higgins Company in its suit against Ohlsen was invalid, because the marshal—

"went with said writ to Ohlsen's place of business and made a memorandum of the goods found in his store building, and then left the store building and the goods therein contained, and did not remove any part of said goods, nor place any person in charge thereof, and did not take any of said goods into his custody."

The finding is not altogether harmonious with the return of the marshal, which states that he attached the stock of merchandise in a cabin and warehouse, made an inventory, and left a certified copy of the writ of attachment, together with a notice specifying the property attached with defendant Ohlsen and by "taking possession of the stock of merchandise, the same not being moved, nor a keeper put in charge, \* \* \* by instructions of the plaintiff's attorney." But inasmuch as the obligors in the bond are estopped to deny the regularity or sufficiency of the attachment, the divergence is of no real importance. Unquestionably the bond was effectual in its purpose, and no fraud or collusion appearing, and judgment having been rendered, the weight of

authority precludes the obligors from setting up in this action that the attachment was not properly levied, or was irregular, or that the contract between Ohlsen and the company was voidable. *Huff et al. v. Hutchinson*, 14 How. 586, 14 L. Ed. 553; *McMillan v. Dana*, 18 Cal. 339; *Pacific Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718, 31 L. Ed. 567; *State ex rel. Senter v. Cowell*, 125 Mo. App. 348, 102 S. W. 573; *Moffitt v. Garrett*, 23 Okl. 398, 100 Pac. 533; 32 L. R. A. (N. S.) 401, 404, 407, 138 Am. St. Rep. 818; *McLean v. Wright*, 137 Ala. 644, 35 South. 45, 97 Am. St. Rep. 67; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; *Eisenbud v. Gellert*, 26 Misc. Rep. 367, 55 N. Y. Supp. 952; *Smith v. Fargo*, 57 Cal. 157; *Scanlan v. O'Brien*, 21 Minn. 434.

Under section 978, Alaska Laws, the sureties on the bond could plead, as they did, that the property attached "did not belong" to Ohlsen at the time of the execution of the writ of attachment. But where there is merely a chattel mortgage outstanding the statute is not applicable.

The judgment is reversed, and the cause is remanded, with directions to set aside the judgment entered and to proceed in accordance with the views herein expressed.

# STANDARD WATER SYSTEMS CO. et al. v. GRISCOM-RUSSELL CO.

(Circuit Court of Appeals, Third Circuit. February 2, 1922.)

No. 2689.

## 1. Equity ⚡339—Answer under oath is evidence for defendant.

When a bill does not waive answer under oath, the answer of a defendant under oath, directly responsive to the bill, is evidence in his favor.

## 2. Evidence ⚡591—Witnesses ⚡324—Complainant, calling defendant as witness, is estopped to deny his credibility, and bound by testimony.

A complainant, who calls a defendant as a witness, is estopped to deny his credibility, and is bound by his testimony, unless it is countervailed by other evidence.

## 3. Patents ⚡328—1,131,738, for an evaporator, claim 8, held void for lack of invention.

The Row patent, No. 1,131,738, for an evaporator, claim 8, held void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Suit in equity by the Griscom-Russell Company against the Standard Water Systems Company and others. Decree for complainant, and defendants appeal. Reversed.

Victor D. Borst, William M. Stockbridge, and Herman J. Westwood, all of New York City, for appellants.

W. B. Morton and William H. Davis, both of New York City, for appellee.

Before WOOLLEY and DAVIS, Circuit Judges, and ORR, District Judge.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ORR, District Judge. The Griscom-Russell Company, by its bill, charges the Standard Water Systems Company and three individuals with infringement of United States patent No. 1,131,738, issued to Reuben R. Row, under date of March 16, 1915, for an evaporator. It sets forth that the apparatus of the patent was the invention of one of the defendants, who assigned the same to the Griscom-Russell Company. It charges that the said inventor and the other individual defendants, all three having been in the employ of the Griscom-Russell Company, left such employment and associated themselves with the Standard Company, with the purpose and intent to injure the Griscom Company, by appropriating to themselves and the Standard Company valuable data, engineering designs, drawings, etc., which were the property of the Griscom Company, and that they all conspired together to infringe the letters patent above referred to. Such is a brief memorandum of the charging parts of the bill. The bill does not waive an answer under oath. All of the defendants answered; the three individual defendants joining in an answer verified under their oath. The corporation defendant filed a separate answer. The case was so proceeded with in the court below that a decree was entered adjudging that the letters patent were good and valid in law; that the Griscom Company was the lawful owner; that the defendants had jointly infringed the letters patent, specifically claim 8 thereof; that the plaintiff recover profits, gains, and advantages; and that an account be stated. The court, however, did not issue an injunction against the individual defendants, but against the Standard Water Systems Company only. The individual defendants have appealed from the decree of the court.

[1] We have noted that the individual defendants had filed answers under oath. It is to be observed, also, that two of them, Row and Thompson, were called as witnesses by the plaintiff. By calling them as witnesses, the plaintiff asserts that they are credible persons, and is estopped from impeaching their credibility; yet the plaintiff is not prevented from showing that they are mistaken. The testimony of these two parties called by the plaintiff is explicit in denial of the main charging parts of the bill. Nowhere else in the record there is found any direct testimony of any federation between the individual defendants for the purpose of injuring the plaintiff, as charged in the bill. At most, there are only circumstances and peculiar facts which might perhaps arouse in the plaintiff a suspicion, but such evidence is not sufficient to overcome the positive denial of the defendants, found in their answer, and found, also, in their testimony as witnesses called by the plaintiff.

The cases bearing upon a situation of this kind are rather difficult to find. Of course, there is the case of *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421, holding that, when the plaintiff in a suit in equity does not waive an answer under oath, the defendant's answer directly responsive to the bill is evidence in his favor, and further that the party offering, in a court of the United States, a deposition taken under the Pennsylvania statute, which provides for the examination of the opposite party as if under cross-examination, makes the witness his own, and is not at liberty to contend that he is not entitled to credit.

[2] There is a case somewhat analogous to the case at bar, so far as the calling of a defendant as a witness for a plaintiff is concerned, to be found in *Coonrod v. Kelly* (in this Circuit) 119 Fed. 841, 56 C. C. A. 353. There the bill did not waive answer under oath by the defendants, and the answers to the bill and to the interrogatories therein propounded were responsive, and were in general tenor and effect the same as testimony given by two of the defendants when called by the complainant. As Judge Gray puts it (119 Fed. at the bottom of page 846, 56 C. C. A. 358), alluding to the testimony of the defendants who had been called by the plaintiff:

"By this testimony he is bound, unless he can, by other witnesses and evidence, direct or circumstantial, show that their testimony is false. A complainant, who places the defendant on the stand, is not bound to refrain from contradicting him, where the exigency of the case demands it. In the case before us, however, there has been no testimony adduced to contradict that of Booth and Howlett. Whatever of improbability or suspicion may attend it, owing to the peculiar facts or circumstances of the case, it is not sufficient to countervail the effect of the direct testimony brought out by complainant from the defendants whom he called upon to testify."

In the instant case, no facts or circumstances, of which evidence was offered, are sufficient to countervail the direct testimony brought out by the complainant from the two defendants whom it called upon to testify.

What seemed to weigh most heavily against the defendants in this case is the fact that one of them asserted invention to procure a patent which he assigned to the plaintiff, and that, while all of the individual defendants were subsequently associated with their codefendant, the said codefendant manufactured and sold devices with the patented improvements embodied therein. There is not sufficient evidence in the case to satisfy us that any of the three individual defendants furnished information to the other, with respect to the device of the patent. It appears in evidence that the Standard Company, as early as 1912, was prepared to install in the battleship *New York* an apparatus containing the device of the patent. This was several years before the individual defendants left the employ of the plaintiff.

It is true that the defendant Row, who asserted invention and received the patent, is estopped from denying invention; but he is not estopped from showing to what extent his alleged invention is limited by the prior art. This question, however, seems to be immaterial in this case. The public is interested in every adjudication with respect to the validity of a patent, and it is the duty of courts having jurisdiction of patent causes to have regard, at all times, of the rights of the public, so that such rights may be rather enlarged than diminished by judicial determination. That the public is interested in every patent case is apparent from reading the opinion in *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502. That opinion is also in point, because it emphasizes the doctrine that it is not enough that the thing shall be new, that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful; but it must, under the Constitution and the statutes, amount to invention or dis-

covery. See, also, *Hansen v. Slick*, 230 Fed. 627, 145 C. C. A. 37, decided by this court.

[3] Coming down to the patent itself, we have reached the conclusion that it is invalid, so far as claim 8 is concerned, in view of the prior art. That claim is as follows:

"The improvement in evaporating apparatus for obtaining purified liquid, which comprises a containing shell, a door closing an aperture in said shell, a heating pipe structure secured to said door and projecting within said shell, a supporting roller for said structure within said shell and a second supporting roll for said structure outside said shell, substantially as described."

The process of vaporizing water or other liquid to obtain a purer liquid is old. Apparatus to accomplish the result desired is old. The evaporators used on shipboard for procuring pure water from salt water, although differing in details, are caused to be operated in practically the same way. Salt water is contained in a shell; steam is introduced into coils, which are located within the shell containing the water from which evaporation is to take place, and by the heat of the steam the evaporation is produced, and the vapor rising is carried off to a condenser. They need to be cleaned from time to time. In other words, the residuum from the sea water must be removed from the shell, perhaps by flushing, scraping, or in some other manner. In order to clean the shell effectively, the interior coils through which the steam circulates should be removed. The removal and the return of the coil naturally presented difficulties, especially as the size of the evaporator increased, and the interior coils, suitable for the increased size, became heavier. What the patentee in the patent in suit seems to have done was to have supported the heating pipe structure, consisting of the interior coils, upon rollers above and below. The roller or castor below and outside of the shell was intended to take the place of ordinary pieces of pipe, which, according to the testimony of Capt. Oliver, had been previously used. The supporting roller within the shell took the place of the overhead trolley which, Capt. Oliver testified, was the commonest form of suspension that was found aboard ship for handling weights. It is true, Capt. Oliver speaks of such form of suspension as requiring that the thing suspended should be steadied; that is, perhaps, prevented from having a lateral or forward movement, irrespective of the movement of the trolley, yet the rollers are clearly, under his testimony, substitutes for what had previously been used.

We are of the opinion that there was no invention in the addition of rollers to the evaporator. Fifty years ago, if not to-day, a child experienced the value of rollers upon a trundle bed in which he slept, and which he himself, perhaps, shoved under the big bed when he was through with it in the morning. The addition of rollers to a desk, in order that it may be moved, so that the carpet could be cleaned under it, was an improvement by the man who added the rollers; but that improvement did not rise to the dignity of invention or discovery, within the meaning of the Constitution and the laws passed in pursuance thereof, intended to give an inventor an exclusive right for a time, as against the public.

As before said, regardless of the principle that an assignee of a patent cannot deny invention, it is the duty of the court to determine lack of invention, where apparent, in order that the public interests may be guarded. Plaintiff having wholly failed to make out a case in the court below, the decree is reversed, with directions to the court below to dismiss the bill, at plaintiff's costs.

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IN RE MITCHELL (two cases).

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

Nos. 114-115.

1. Bankruptcy ~~§~~444—Petition to revise should be in name of party aggrieved.

The petition to revise an order of a bankruptcy court should be in the name of the party aggrieved by such order, though the attorney for petitioner may verify the petition on showing cause therefor.

2. Bankruptcy ~~§~~101—Court can prevent dissipation of property between involuntary petition and adjudication.

The estate of a bankrupt is in process of administration from the date of involuntary petition, the filing of which is a caveat and in effect an attachment, and the court has the plain duty to prevent the disappearance and appropriation of property, to which the trustee, when appointed, will or may be entitled, during the period intervening between the filing of the petition and the adjudication.

3. Bankruptcy ~~§~~116—Summary proceedings against third persons depend on whether claim merely colorable.

Summary proceedings by a court of bankruptcy against third persons depend on whether an adverse claim to property is more than merely colorable.

4. Bankruptcy ~~§~~104—Claimants not in good faith may be enjoined pending suit by trustee.

Where claims to property by third persons adverse to the receiver in bankruptcy are unwarranted or colorable only, such adverse claimants may be restrained by injunction from disposing of the property until a plenary suit can be instituted against them by the trustee.

5. Bankruptcy ~~§~~116—Court can require security of third party pending suit by trustee.

Where an alleged involuntary bankrupt had made payments to third persons, whose claims to retain them were colorable only, the bankruptcy court had power to make an order requiring such claimants to deposit in court the amounts so paid to them, or to give bond or to secure the repayment of such amounts pending a suit to recover those sums which might be instituted after the trustee was appointed.

Petitions to Revise Orders of the District Court of the United States for the Southern District of New York.

In the matter of Max Mitchell, alleged bankrupt. On separate petitions by David Haar, on behalf of Betty Gross and on behalf of Dorothy Birenberg, to revise orders of the District Court requiring funds which the alleged bankrupt had delivered to petitioners to be delivered to the clerk of the court, or secured by bond pending the institution of a suit by the trustee in bankruptcy after his appointment. Orders affirmed.

There is no difference between these appeals, except as to names and amounts. The facts in the Gross case are as follows: An involuntary petition was filed against Mitchell April 25, 1921. A receiver was appointed, who conducted examinations (presumably under section 21a) into the acts, conduct, and property of the bankrupt. As a result thereof he filed a petition against Betty Gross, setting forth that on April 20, 1921, Mitchell had realized \$2,500 in cash by the sale of certain merchandise, and immediately handed the same over to Betty Gross. It was further averred that said Betty Gross still held the said cash intact "separate and apart from other moneys" and that the money was so held "in secret trust for the bankrupt." The receiver therefore prayed for an order directing said Gross to surrender said money forthwith.

Betty Gross appeared and by answer (1) denied the jurisdiction of the court, and (2) averred that said \$2,500 was handed to her as "repayment of a loan made by" her "to the bankrupt over a year ago." After hearing, an order was entered granting the receiver's motion "to the extent hereinafter indicated," viz.:

"Further ordered that, within ten days from the date of the service of a certified copy of this order upon the respondent, Betty Gross, the said respondent turn over to deposit with Alexander Gilchrist, Jr., clerk of this court, the sum of twenty-five hundred (\$2,500) dollars, and that the said Alexander Gilchrist, Jr., as clerk aforesaid, hold said moneys to await the outcome of a plenary suit to be instituted by the trustee for the recovery from the said respondent Betty Gross of the sum of twenty-five hundred (\$2,500) dollars claimed to have been paid to her by the bankrupt in fraud of creditors; and it is further ordered that in the alternative the said Betty Gross may file with the clerk of this court within ten days from the service of a certified copy of this order upon her of a good and sufficient bond, to be approved by a Judge of this court, conditioned upon her paying to the trustee in bankruptcy for the said bankrupt herein to be appointed, the said sum of twenty-five hundred (\$2,500) dollars in the event that in said suit brought by the trustee for the recovery thereof judgment is rendered in favor of the said trustee; and it is further ordered that the trustee in bankruptcy herein commence said suit within fifteen days after his appointment and qualification as trustee; and it is further ordered, that in the event that said suit is not so started within the said 15 days, that this order be null and void, and that the sum of \$2,500 so to be deposited with the clerk of the court be returned to the said Betty Gross, or, if she chooses the alternative, that the bond be canceled and the surety thereon discharged."

Thereupon this petition to revise was filed, based upon a record which contains nothing but the petition above referred to, the usual order to show cause, the answer above summarized, and the order complained of. None of the evidence is before us.

David Haar, of New York City, for petitioners.

Bondy & Schloss, of New York City (Eugene L. Bondy, of counsel), for receiver.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The question before us is irregularly presented and almost academic.

[1] The petition to revise is in the name of, and signed and verified by, the attorney for Gross and Birenberg. While the forms and orders prescribed by the Supreme Court do not descend into the particulars of practice on petitions to revise, it is plain that such petition must be by the party aggrieved. In *re* Jemison, etc., Co., 112 Fed. 966, 50 C. C. A. 641. It would be a proper application of familiar local practice to allow the verification of a petition to revise by the attorney, he showing cause therefor in his affidavit; but there is no justification for the

attorney himself and in his own name seeking review, and the reason for this is that he is not the party aggrieved.

The question is academic, or nearly so, because in the absence of any evidence we are ignorant of the facts leading to the order complained of: consequently we can only answer the inquiry whether, under any circumstances, however aggravated by fraud, perjury, and covin, a person not the bankrupt, having possession of property derived from the bankrupt and asserting the right to keep it, can be required to give security therefor. We say "security," because the bringing of the money into court is under the order optional, and the deposit of property in court, there to await the result of a plenary suit, is but one, and a very ancient, method of giving bail to the action.

[2] In involuntary bankruptcies there necessarily intervenes a period, sometimes a long period, between petition filed and adjudication. During this interim it is the plain duty of the bankruptcy court to prevent the disappearance and appropriation of everything to which the trustee when appointed will or may be entitled. The fundamental basis or reason for this exercise of jurisdiction is that the estate of the bankrupt is in process of administration from the date of petition filed (*Cameron v. United States*, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448), and such filing is a caveat and in effect an attachment (*Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405); and more specifically it is the purpose of the act to "hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law" if adjudication follows (*Acme, etc., Co. v. Beekman Co.*, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208).

The application of this principle is not easy where, before there can be any administration in bankruptcy of a particular piece of property, the question must somewhere be decided whether that property belongs to the bankrupt estate or not. No one doubts but that to maintain what may be the estate intact the court may, and daily does, employ the machinery of receiverships, injunctions, stay orders, summary proceedings, and even seizure under the sixty-ninth section of the act (Comp. St. § 9653). *Beach v. Macon, etc., Co.*, 116 Fed. 143, 53 C. C. A. 463.

[3] Summary proceedings against third persons depend on the answer to the questions whether there be an "adverse claim," and whether the claim advanced is more than merely colorable. In *re Friedman*, 161 Fed. 260, 88 C. C. A. 306; In *re Ironclad Co.*, 191 Fed. 831, 112 C. C. A. 345; In *re Yorkville, etc., Co.*, 211 Fed. 619, 128 C. C. A. 570; In *re Midtown, etc., Co.*, 243 Fed. 56, 155 C. C. A. 586. We may assume that these petitioners for revision asserted an adverse claim, but we must also assume that on the facts presented their claims seemed unwarranted, and they themselves unreliable, if not irresponsible.

[4] Under such circumstances, even adverse claimants are by familiar practice restrained by injunction until appropriate action—i. e., plenary suit—can be begun. Under the doctrine evidently accepted by the court below, such plenary suit must await the election of a trustee. Therefore the period of injunction is until the trustee qualifies, and has time to begin suit if he is so advised. Such injunctive relief may be and has been accompanied by demands for security, and this is no

more than the exercise of the ordinary equity powers of the court in aid of the bankruptcy proceeding. *Remington*, § 1905, citing cases, especially *In re Blake* (D. C.) 171 Fed. 298. See also *Remington*, § 359, and cases cited.

All this is no more than a recognition of equity's power to mold its remedies to suit the occasion. If it were settled law that a receiver or any body of creditors could maintain plenary actions for the same purposes that a trustee can sue, equity could without doubt enjoin the dissipation of a fund, and even appoint therefor a receiver *pendente lite*.

[5] Having no facts before us, we hold as a legal abstraction that to require security, pending suit by the trustee, from one alleged to have in possession a part of the bankrupt estate, and in respect of what was obtained from the bankrupt, is within the power of the bankruptcy court, and agree with the court below that such power is necessarily within the language of decision in *Bryan v. Bernheimer*, 181 U. S. 188, and especially pages 196, 197; 21 Sup. Ct. 557, 45 L. Ed. 814, which recognizes under some circumstances the right of actual seizure. Orders affirmed, with costs.

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### CAUDLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 31, 1921.)

No. 5755.

**1. Indictment and information ⇐132(5)—Election between separate offenses growing out of the same transaction not required.**

The court properly refused to require election on which count the case should be submitted to jury, where indictment charged defendant and others with conspiracy under Penal Code, § 37 (Comp. St. § 10201), to commit the crime defined by Act Cong. Feb. 18, 1913 (Comp. St. §§ 8603, 8604), relating to the unlawful breaking of seals of railroad cars containing interstate or foreign shipments and stealing of freight therefrom, and that defendant unlawfully broke the seal of a car and other defendants aided and abetted, and another entered the car and defendant aided and abetted, and defendant stole property from the car and the others aided and abetted, and defendant and another had the stolen goods in their possession, knowing the same to have been stolen, and the others aided and abetted, all being offenses growing out of the same transaction and properly joined in one indictment, under Rev. St. § 1024 (Comp. St. § 1690).

**2. Criminal law ⇐762(3)—Comment by judge on evidence held proper.**

An instruction that, "if the defendant was in N. on those dates, he could not have taken part in the robbery of that car, and if he was there on the 20th and 21st, that would conflict with the witnesses testifying on the part of the government, not only W. and H., but also with the testimony of others, such as S., and other testimony with respect to the visit to the electric light office; no denial has been made as to that, other than his general denial," was not erroneous, where the court plainly told the jury that they were the judges of the evidence and were not bound by any statement of the court on the evidence.

**3. Criminal law § 762(3)—Federal court may comment on evidence.**

A federal court may comment on the evidence, and express his opinion of the facts in the case, and advise the jury of his conclusions thereon, provided the jury is given to understand that it is not bound by the court's expression of opinion.

**4. Criminal law § 400(6)—Record of train auditor held admissible, as best evidence.**

Where auditor went through train to examine transportation of passengers, and made a memorandum of all free transportation, and at the end of the run made a record of all free transportation, which he filed with the railroad company, the record filed with the railroad company was admissible as against an objection that it was not the best evidence; the memorandum made at the time he examined the transportation of passengers being only temporary, for the purpose of aiding his memory, and did not deprive the subsequent entry of its character as an original entry.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

L. D. Caudle was convicted under an indictment charging conspiracy to break seals of railroad cars and steal freight, and the unlawful breaking of a seal and the entering and stealing of property therefrom, and the felonious possession or reception of the same, and brings error. Affirmed.

O. E. Gorman, of Springfield, Mo. (Sam M. Wear and Roscoe C. Patterson, both of Springfield Mo., on the brief), for plaintiff in error.

Sam O. Hargus, Sp. Asst. U. S. Atty., of Kansas City, Mo. (James W. Sullinger, U. S. Atty., of King City, Mo., on the brief), for the United States.

Before HOOK, Circuit Judge, and TRIEBER and NEBLETT, District Judges.

NEBLETT, District Judge. The plaintiff in error, hereinafter called defendant, was indicted, tried, convicted, and sentenced on an indictment which contained five counts. The first count charged defendant, and five others, with a conspiracy under section 37 of the federal Penal Code (Comp. St. § 10201) to commit the crime defined and denounced by the Act of Congress approved February 13, 1913 (Comp. St. §§ 8603, 8604) entitled:

"An act to punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious transportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same."

There were four overt acts charged to have been committed in furtherance of the conspiracy as follows: Defendant Caudle broke the seal of the car; one of the other defendants unlawfully entered the car; defendant Caudle and two others took cigarettes from the car;

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

three of the defendants hauled the railroad car from the yards to the pencil factory switch.

The second count charged the defendant Caudle with unlawfully breaking the seal of the car, and the other defendants aided and abetted. The third count charged defendant Mueller entered the car with the intent to commit larceny, and defendant Caudle and others named aided and abetted. The fourth count charged defendant Caudle and Mueller stole cigarettes from the car, and the other defendants aided and abetted. The fifth count charged defendant Caudle and Mueller with having stolen goods in their possession, knowing the same to have been stolen, and the other defendants aided and abetted.

[1] Defendant assigned as error the refusal of the trial judge to require the prosecution, on his motion, to elect upon which count of the indictment the case should be submitted to the jury. The court's ruling upon this motion was proper. The crimes charged in the several counts of the indictment come within the provisions of section 1024, Revised Statutes (Comp. St. § 1690); separate offenses growing out of the same transaction may be joined in one indictment.

[2] The defendant claims as error instructions given by the court, and the admission of certain evidence. The defendant has failed to set out that part of the court's instructions of which he complains, and has failed to quote in full the substance of the evidence admitted and claimed by him to be error, in his assignments of error, as required by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix). However, we have considered these assignments. That part of the court's instructions which the defendant urges in his brief as error is as follows:

"If the defendant was in Norwood on those dates, then he could not have taken part in the robbery of that car; and if he was there on the 20th and 21st, that would conflict with some of the witnesses testifying on the part of the government, not only Waddle and Harmon, but also with the testimony of others, such as Mrs. Smith and Mr. Smith, and other testimony with respect to the visit to the electric light office. No denial has been made by the defendant as to that, other than his general denial."

[3] His contention being that by this instruction the court practically told the jury that certain evidence introduced by the government was to be taken as true, because not denied by the defendant. The rule is well settled in the federal courts that the judge may comment on the evidence and express his opinion of the facts in the case, and advise the jury of his conclusions thereon, provided the jury is given to understand that it is not bound by the judge's expression of opinion. *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

The judge in his instructions in this case plainly told the jury that they were the judges of the evidence, and were not bound by any statement of the court on the evidence, and that they should not feel bound by the court's statement of facts, but were to determine the truth according to the dictates of their own judgment.

The defendant complains that the court's charge upon the presumption of innocence does not meet the requirements of law. With this contention we do not agree. We have examined the entire instructions given by the court, and find no reversible error in the same.

[4] The defense of the defendant Caudle, other than his general denial of participation in the crimes charged, was an alibi—that he was not in the city of Springfield, Mo., the place where the crimes were charged to have been committed, on the 20th day of May, A. D. 1919, but was in Norwood, Mo., on said date. The defendant Caudle testified that he went from Springfield, Mo., to Norwood, Mo., on train 103, the morning of May 19, 1919, and remained in Norwood until Wednesday, May 21. The prosecution in rebuttal introduced evidence showing that the St. Louis & San Francisco Railroad had issued to L. D. Caudle a system pass on its railroad, No. 21199, for the year 1919, and then introduced the record of the train auditor on train 104 of the St. Louis & San Francisco Railroad, which train ran from Norwood to Springfield, Mo., on May 19, 1919, arriving in Springfield, Mo., about 8:30 p. m., which record showed that the pass of L. D. Caudle, No. 21199, was used on said train 104 from Norwood, Mo., to Springfield, Mo. It appears, from the evidence of the auditor producing the record of the use of said pass, that when the auditor goes through the train to examine the transportation of passengers he makes a memorandum in a book of all free transportation used by passengers on said train, and when the end of his run is completed he immediately makes a record of all free transportation used on his run, which record is filed with the railroad company. This record was introduced in evidence, and at the time the court instructed the jury the defendant requested that this record be withdrawn from the consideration of the jury, for the reason that the record introduced was not the best evidence.

The defendant assigned as error the refusal of the court to withdraw this evidence from the consideration of the jury. The record introduced in evidence is the first permanent record made by the train auditor of free transportation used on his train, and is the report of such transportation furnished by him to the railroad company. It is made about the time of the use of the transportation; memorandum made in his book at the time he examines the pass is only temporary, for the purpose of aiding his memory; the entries on the report were made by the train auditor. The mere fact that a memorandum was made will not deprive the subsequent entry of its character as an original entry. 22 C. J. 887; *Stave v. Stevenson*, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841.

Defendant's seventh assignment is not based upon any matter which appears in the record in this case, and is not urged by him in his brief.

Finding no error in the record, it is ordered that this case be affirmed.

Judge HOOK participated in the hearing of the case and concurred in the conclusion reached, but died before the opinion was prepared.

**THE MORRISTOWN.  
THE FLEMINGTON.**

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 29.

1. Collision ~~¶~~91—Custom cannot override established rules of navigation.  
The existence of a custom for vessels descending the East River to pass between a drill boat and the Manhattan shore could not override the statutory rules of navigation.
2. Collision ~~¶~~95(1)—Violation of state statute held not to have contributed to collision.  
A violation by both tugs of the state statute requiring vessels in the East river to navigate as near as possible in the center of the river was not a contributing cause to a collision, which resulted from a violation by one of tugs of the steering rules.
3. Collision ~~¶~~93—Privileged crossing vessel held at fault for change of course.  
The privileged one of two vessels on crossing courses held at fault for not keeping her course, but instead turning across the course of the other vessel to enter East River.
4. Collision ~~¶~~106—Presence of other vessel held not to have prevented compliance with rules.  
Where there were other vessels in the vicinity which were alleged to have hampered the movement of the privileged vessel, but they did not prevent her compliance with the steering rules, there was not a case of special circumstance.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by the Central Railroad Company of New Jersey against the steam tug Morristown, of which the Delaware, Lackawanna & Western Railroad Company was claimant, in which the claimant impleaded the steam tug Flemington. From a decree dismissing the libel, libellant appeals. Reversed and remanded.

The Central Railroad Company, as owner of Lighter No. 118, filed libel against the steam tug Morristown, to recover damages for a collision on December 26, 1918, at about 4:30 A. M. in the East River, New York, between lighter No. 118 in tow of the steam tug Flemington, and car float No. 32, in tow of the steam tug Morristown.

Libel states that on the morning in question the Flemington, with No. 118 on her port side, left Grand street, East River, bound for Jersey City; the tide was strong flood. The tug and tow proceeded down the East River, and when about opposite Wall Street she observed the red light of a boat, which afterwards turned out to be the Morristown, with car float No. 32 on her starboard side, about a point on the port bow of the Flemington. In this situation the latter blew a signal of one whistle. The Morristown crossed this signal with one of two whistles and her helm was put to starboard. The Flemington saw that a collision was inevitable, and promptly reversed her engines, but the Morristown continued on in the flood tide, and brought the No. 32 in collision with the port side of lighter No. 118 causing the damages sued for.

The Delaware, Lackawanna & Western Railroad Company, as owner and claimant of the steam tug Morristown, impleaded the steam tug Flemington under the former fifty-ninth rule; whereupon libellant stipulated that it owned, controlled, and operated the steam tug Flemington. The lower court dismissed the libel, and libellant appealed.

~~¶~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.  
J. E. Morrissey, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). We find the following facts: At about 5 a. m. on December 22d, the Morristown, with float No. 32 loaded with cars in tow on her starboard side, left the float bridges of the Delaware, Lackawanna & Western Railroad Company at Jersey City, bound for Brooklyn. The cars on float No. 32 were lower than the pilot house of the Morristown, but nevertheless the mate of the Morristown took position as lookout on top of a box car at the starboard forward end of float No. 32. The tug and her tow proceeded down the North River to go around the Battery and up the East River to Wallabout on the Brooklyn shore. The flood tide was at full strength.

There was a drill boat or dredge working on the southerly end of Coenties Reef, off Pier 5, East River; it had been there for about a year. The distance between the southerly end of the reef and the end of Pier 5 was estimated by the witnesses on the trial at about 500 feet. The chart in evidence indicates that this estimate is about correct. The drill boat was about 100 feet long and 80 feet wide, and was fastened to the reef by means of spuds, which ran from the dredge into the bottom of the river, and the drill boat's position was marked by can buoys extending about 50 feet off each corner of the boat.

In rounding the Battery the Morristown claims she was prevented from reaching the Brooklyn side of the East River by two tows coming out of the river. When the Morristown had reached a point opposite the aquarium, and between 300 and 400 feet off shore, a tug with two car floats in tow, one on each side, was observed off her starboard bow, coming out of the East River, headed toward Greenville, N. J., and in such a position that the Morristown was unable to cross her bow.

The Morristown reduced her speed and proceeded to round the Battery, passing the tug with the two car floats at a point about opposite the Governors Island ferry. At this point the master of the Morristown observed a hawser tow coming out of the East River about 500 feet off the Thirty-Ninth Street ferry slips. The tow was made up of six boats, three abreast in two tiers and was about 400 feet long. The Morristown slowed down and then stopped her engines.

After the hawser tow had cleared, the Morristown proceeded ahead under one bell, and when about 300 feet off the Staten Island ferry slips on the New York shore observed the green light of the Flemington, coming down the East River about 800 feet off shore and about 500 feet north of the drill boat working on Coenties Reef. The distance between the boats, as shown by the chart, was approximately 1,400 feet. The Flemington was towing lighter No. 118, stern first, on her port side. The master of the Flemington had seen the Morristown's red light, as above stated, and blown one whistle. This was proper, as the vessels were on crossing courses, and Morristown had the right of way and should have maintained her course and speed. The

Morristown had not at this time straightened up to do what she admittedly intended doing, viz. go between the dredge and the Manhattan shore, but she was following the curvature of the shore.

The Morristown had not heard the Flemington's one whistle and blew a two-whistle signal, which the Flemington did not answer, taking it as a cross to her signal. The Morristown immediately blew the alarm, and followed it with a second two-whistle signal, stopping and backing at full speed; while the Flemington, on hearing the other tug's two whistles, also reversed full speed. Collision was now inevitable; the Flemington's reversed engine tended to swing her bow toward Manhattan, and the course of the Morristown was also directed toward the Manhattan shore. Collision actually occurred about 200 feet off Pier 5.

[1] There was some effort at trial to establish a custom, for descending vessels to pass between the Corlear's Reef drill boat and the Manhattan shore, but the evidence was insufficient, and if established in fact could not override the statutory rules of navigation. The *Hokendauqua* (D. C.) 270 Fed. 270.

[2] Both tugs were disobeying the state statute of 1848 (Laws N. Y. 1848, c. 321), quoted in *The New York Central* No. 17, 256 Fed. 220, 167 C. C. A. 436, in that they were not navigating as near as possible in the center of the river; but that act does not dispense with the steering rules, and we find that failure to observe it was not a contributing cause of the collision, under *The Clara*, 55 Fed. 1021, 5 C. C. A. 390.

[3] In that case we held that disobedience to the statute did not contribute, because there was, despite such disobedience, ample room for the offending vessel to avoid the other, had she seen that other in time. So in this case, while we have found the fact to be that the Flemington first blew one whistle, which the Morristown failed to hear, the most important consideration is that the latter tug saw that she was on a course crossing that of the Flemington, and instead of obeying the rule, and maintaining the course she had, deliberately proposed a change from the rules, and proceeded to swing across the Flemington's path. The Morristown was the privileged vessel, so that, taking her own story, she first gave a signal which proposed a departure from the rules; of that she took the risk. *The Newburgh* (C. C. A.) 273 Fed. 436.

[4] We have stated the claims of the Morristown as to the descending tows which are alleged to have hampered her. Doubtless the tows were there or thereabouts, but there was nothing in their presence or conduct which prevented adherence to the steering rules, or produced a case of special circumstances.

Finding no contributing fault in the Flemington, the decree appealed from is reversed, with costs, and the cause remanded for entry of decree in accordance with this opinion.

THE WILLIAM H. TAYLOR.\*

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 104.

1. Collision  $\S$ 81—Both vessels held at fault for failing to sound fog signals.  
Both tugs, which collided shortly after one of them had emerged from a bank of vapor caused by the intense cold and which had completely hidden the tug, *held* at fault for failure to sound the fog signals required by Inland Rules, art. 15 (Comp. St.  $\S$  7888).
2. Collision  $\S$ 81—Rule requiring fog signals is imperative.  
Inland Rules, art. 15 (Comp. St.  $\S$  7888), requiring signals to be sounded in fogs, is imperative, and omission to sound the signals is a positive breach of the statute, which puts the vessel omitting them in the wrong.
3. Collision  $\S$ 82(2)—Speed through vapor bank held excessive.  
A tug, which passed through a bank of vapor caused by the intense cold, and which was thick enough to conceal her from view, without reducing from full speed, *held* at fault for a collision resulting shortly after she emerged from the bank.
4. Collision  $\S$ 82(2)—Vessel in fog must be able to stop within seeing distance.  
A vessel passing through a bank of vapor is bound to maintain such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she would collide with a vessel which she could not see through the vapor.
5. Collision  $\S$ 81—Vessel outside vapor bank must sound fog signals.  
A tug, which was navigating just outside a bank of vapor sufficiently high and dense to conceal from view a vessel which might be in the bank, should have sounded fog signals to warn any vessels in the bank of her presence.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by the Standard Oil Company of New York against the steam tug William H. Taylor, of which the Morris & Cummings Dredging Company was claimant. From a decree awarding half damages to the libelant, both the libelant and claimant appeal. Affirmed.

Duncan & Mount, of New York City (O. D. Duncan, Warner C. Pyne, and T. J. Healy, all of New York City, of counsel), for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and J. Harvey Turnure, both of New York City, of counsel), for the Taylor.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. This libel was brought by the libelant against the tug William H. Taylor to recover damages sustained by the libelant's tug No. 15 on the morning of December 31, 1917, resulting from a collision between the No. 15 and the tug Taylor. Both vessels were held at fault, and a decree was entered for half damages against the No. 15.

On this morning, the Taylor left Pier B, Jersey City, bound for the slip between Piers 1 and 2, Hoboken. The weather was extremely

$\S$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Certiorari denied 258 U. S. —, 42 Sup. Ct. 461, 66 L. Ed. —.

cold, with a north wind, and the tide was flood. The temperature varied from 2 to 7 degrees below zero. This caused a phenomenon of a bank of vapor on the surface of the water due to the intense cold. At times it became so thick and high above the water that craft was obscured in the vapor. The Taylor had proceeded up the river and reached a point about 500 feet off the Jersey piers and slowed down off Pier 4, and then starboarded her helm in order to enter her slip between Piers 1 and 2. When the Taylor arrived about 200 feet off the pier, she stopped her engine, keeping sufficient way to enter the slip. While about at this point, the No. 15 came out of a bank of vapor off Pier 1, bound down stream close to the piers, with a barge on her starboard side. The No. 15, with a barge light, left Forty-Eighth street, Manhattan, bound for North Tenth street, Brooklyn. For about the first 20 minutes of her voyage, she headed down and across the Hudson river toward Weehawken to proceed along the Jersey shore, in order to keep clear of ice in the river on the New York side. She was hooked up, making her ordinary crossing speed with her tow of about 6 miles.

When the tug was off Seventh street, Hoboken, her course was altered toward the Jersey piers to pass another tow. Just how far she was off the piers is disputed, but is not important. When the presence of the No. 15 was made known to the Taylor, she immediately put her engines full speed astern. The No. 15 rang her engines full speed ahead, and put her helm to port, causing her stern to swing against the Taylor's stem, resulting in damages to the No. 15 and causing her to sink in a few minutes. The Taylor was not damaged. No fog signals were sounded by either vessel. The No. 15 sounded one-blast passing signal a few seconds before the collision. She carried no look-out and was in charge of a mate. That vapor existed to the degree claimed by the Taylor is disputed. We are satisfied that at times and spots the vapor was higher than the tug's smokestack, and in other places it was clear. We are fully satisfied that the vapor did envelop and hide the No. 15 while she was passing through the bank, and we are further satisfied that the No. 15 was obscured for about 80 feet off on the Taylor's starboard bow, which resulted in her looming out of this bank of vapor off the end of Pier 1, upon the Taylor.

[1] Under these circumstances, we think the No. 15 was at fault for failing to sound fog signals. Article 15 of the Inland Rules provides:

"In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely: Steam vessel under way. (a) A steam vessel under way should sound, at intervals of not more than one minute, a prolonged blast." Comp. St. § 7888.

The object and purpose of this rule is to make known the vessel's position in the fog or bank because of the obscured vision. We agree with the District Judge in his conclusion that it was just as needful to blow a signal when the vessel was enveloped in a bank of vapor due to intense cold as would be the case when enveloped in a fog.

[2] The rule is imperative and must be observed, and omission to blow signals on the part of a vessel has long been considered a posi-

tive breach of the statute, which puts her in wrong. *Martello*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; *Baltimore Steampacket Co. v. Coastwise Transp. Co.* (D. C.) 139 Fed. 777; *Richelieu Nav. Co. v. Boston Marine Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398; *Yang-Tsze Ins. Ass'n v. Furness Withy & Co.*, 215 Fed. 859, 132 C. C. A. 201. No whistle was blown by the No. 15 until she was in the jaws of collision. The probability of the phenomenon of a bank of vapor so large and dense as to hide a vessel and to require signals was recognized in the *Belfast* (D. C.) 226 Fed. 362.

[3, 4] We think, also, that the No. 15 was going at an excessive speed, and was at fault for failing to stop when passing through this bank of vapor. She was bound to observe this unusual condition, and to maintain such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed before she would collide with the vessel which she could not see through the vapor. The *Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

[5] The *Taylor* is likewise charged with knowledge of the weather conditions and the bank of vapor. Her opportunity to observe these conditions was as good as the No. 15. She was proceeding between 9 and 10 knots, and blew no fog signals. She had altered her course when about 5 feet off the pier ends to make the slip, and in close proximity to the bank of vapor, which she claims obscured her view of the No. 15. The *Taylor* was under obligation to observe the fog rule, not only when she was actually enveloped in fog or vapor, but also when she was so near to it that it was necessary that her position should be made known to any other vessel which might by chance be enveloped in the fog or vapor. Care and caution required that each vessel exercise ordinary prudence and have regard for the possibility of the vessel being so hidden. We think the court below properly held both vessels at fault.

Decree affirmed.

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**NORTHPORT SMELTING & REFINING CO. v. LONE PINE-SURPRISE CONSOL. MINES CO.**

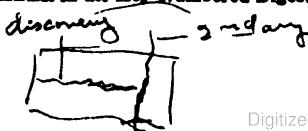
(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 3681.

Mines and minerals — 31(2)—“Discovery vein” determines the end and side lines of claim.

The discovery vein is the primary vein for the purpose of locating a mining claim and determining which are the end and which the side lines, and where the discovery vein crosses the opposite side lines of the claim as located, the side lines become end lines, not only with respect to such vein, but for determination of extralateral rights in any other vein which apexes within the claim.

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes



Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by the Northport Smelting & Refining Company against Lone Pine-Surprise Consolidated Mines Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 271 Fed. 105.

John P. Gray, of Coeur d'Alene, Idaho, and John H. Wourms, of Wallace, Idaho, for appellant.

Wm. E. Colby, of San Francisco, Cal., and Fred S. Duggan, of Spokane, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant, the owner of the Lone Pine lode mining claim, asserted extralateral rights to ores beneath the adjoining Last Chance mining claim, and brought a suit against the appellee, the owner of the Last Chance, to quiet title to said ores and for an accounting and an injunction. The complaint alleged that the Lone Pine is senior to the Last Chance, and that within the Lone Pine is a vein known as the Black Tail vein, which enters the south end line, and passes out of the east side line, and dips in an easterly direction beneath the surface of the Last Chance, giving the appellant extralateral rights in the latter claim. The vein so referred to will be referred to herein as "vein No. 2." The complaint further alleged that about February 28, 1896, the appellant's predecessors in interest discovered another vein or lode within the boundaries of the Lone Pine, located a claim thereon, and posted a notice on said claim "at the point of discovery."

The appellee in its answer denied that the vein No. 2 is a continuation of the Black Tail vein, and alleged that the said vein No. 2 crosses the Lone Pine east side line, and crosses the claim, and goes out through the west side line. The court below found it unnecessary to determine whether the Black Tail vein was a continuation of vein No. 2, and denied the appellant's claim to extralateral rights under the Last Chance, on the ground that, owing to the location of the discovery vein of the Lone Pine, crossing the claim as it does at substantially right angles to the side lines, the side lines became end lines, and that therefore there were no extralateral rights beyond a perpendicular plane drawn through said lines.

The appellant does not dispute that the location notice was posted on what the court below held to be the discovery vein, and does not deny that that vein crosses the opposite side lines of the Lone Pine; but it contends that at the time of the location of that claim the Black Tail vein was known by the locators to exist within the Lone Pine, and that it aided discovery by them and contributed to the delineation of the lines, and that it was also a discovery or original vein, and gave to the locators the right to elect, between the two veins, which they would adopt for extralateral purposes; that there may be more than

one discovery or original vein in a claim, and that the point of discovery fixed in the location notice, or the point where the notice is posted is not controlling in determining whether a vein is the original vein, and if there is another vein, which is known at the time of the discovery and was intended to be covered by the location, and it is a primary or original vein, and passes through an end line, then the end lines are fixed as end lines for all veins in the claim.

(We think that the court below committed no error in denying a locator's right to ignore the discovery vein, and to select another vein as the basis of extralateral rights.) The mining statutes evidently contemplate but one vein as the discovery vein, and they provide that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface. Section 2320, Rev. Stat. (Comp. St. § 4615). That the discovery vein is the primary vein for the purpose of locating the claim, and is the point of departure for the determination of the lines of the claim, is indicated, not only by the language of the statute, but by the decisions of the courts, the rulings of the General Land Office, and the opinions of the textwriters. *Walrath v. Champion Mining Co.*, 171 U. S. 293, 306, 311, 18 Sup. Ct. 909, 43 L. Ed. 170; *In re Helvetia Lode*, *Copp's Mineral Lands*, 279; 2 *Lindley on Mines* (3d Ed.) 1399; *Costigan on Mining Law*, 440; *Morrison's Mining Rights* (15th Ed.) 215.

By the decided weight of the testimony in the case it was shown that the locators of the Lone Pine, at the time of making the discovery and locating the claim, did not know of vein No. 2, and first knew of its existence six days later. The statutes originally gave the locator only the vein which was the occasion of the location. Later the law was amended to give him all the veins which were found to apex within the surface lines of his claim. When, as here, the discovery vein crosses the opposite side lines, the side lines in contemplation of law become end lines (*King v. Amy & Silversmith M. Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510, 38 L. Ed. 419; *Silver King Coalition Mines Co. v. Conklin Mining Co.*, 255 U. S. 151, 41 Sup. Ct. 310, 65 L. Ed. 561), and the side lines become the end lines of all other veins which have their apices within the limits of the claim (*Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; *St. Louis Min. & Mill Co. v. Montana Min. Co.*, 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725).

The appellant cites *Clark-Montana Realty Co. v. Butte & Superior Copper Co.* (D. C.) 233 Fed. 547, in which it was said:

"Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. \* \* \* That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fix extralateral rights upon one vein, as they do upon the Jersey Blue, they fix them upon all veins."

The Rainbow vein was the discovery vein of that claim. The construction so given to the law seems to be wholly unsupported by precedent, and we are constrained to believe that it runs counter to the intentment of the mining laws, as they are expressed and as they have

been construed by the Supreme Court and accepted in practice by the General Land Office.

It becomes unnecessary to consider the other questions in the case. The judgment is affirmed.

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**OZMO OIL REFINING CO. et al. v. COTTON & CO., Incorporated.**

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 3752.

**1. Sales ~~418~~(12)—Measure of damages for breach of contract by seller.**

Where the seller was notified by the purchaser, before the contract was made, that the purchaser had resold the property to responsible parties, though the price was not stated, on failure of the seller to make delivery, the purchaser is entitled to recover as damages the profit it would have made on the resale, subject to its obligation to minimize the damages, if practicable.

**2. Sales ~~418~~(7)—Damages for breach of contract by seller; purchaser held not required to purchase in the market.**

Defendant contracted to sell to plaintiff 700 tons of paraffin wax, to be delivered in monthly installments of 50 tons. Plaintiff resold the wax for delivery in same installments. Defendant made no deliveries, but until the time half the installments were due claimed that it would make delivery and insisted on enforcement of the contract. By that time those to whom plaintiff had resold had canceled their contracts. *Held*, that under the circumstances plaintiff was not required to purchase in the market to establish its measure of damages.

**3. Sales ~~415~~—Burden of proving that purchaser could have lessened damages rests on defendant seller.**

In an action against the seller for failure to make delivery under its contract, the burden of proving that the purchaser could have prevented or lessened its damages rests on the defendant.

In Error to the District Court of the United States for the Southern Division of the Northern District of California; William C. Van Fleet, Judge.

Action at law by Cotton & Co., Incorporated, against the Ozmo Oil Refining Company and Petroleum Products Company. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error brought an action against the plaintiff in error to recover damages for breach of contract. The parties will be named plaintiff and defendant as in the court below. The case was tried before the court without a jury. The following is the substance of the court's findings of fact:

That on October 14, 1918, the parties contracted in writing as follows: The defendant agreed to sell and deliver to the plaintiff at Buffalo, N. Y., 700 tons of paraffin wax, 50 tons to be shipped each month, beginning with November, 1918, and ending with December, 1919, for which the plaintiff was to pay 9¼ cents per pound in car lots, f. o. b. at San Francisco; that the plaintiff complied with the terms of the contract, but the defendant failed to deliver any of said merchandise, and wholly failed to comply with the contract; that on or about September 30, 1918, and prior to the execution of said agreement, the plaintiff sold 600 tons of said wax to the Standard Oil Company of New York, the same to be delivered 50 tons monthly from January to December, 1919, at 10¼ cents per pound in car lots f. o. b. San Fran-

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

disco, which sale was not consummated because the defendant did not deliver any of the wax mentioned in the original agreement; that the plaintiff prior to the execution and delivery of the agreement sold 100 tons of wax to Mitsui & Co., the same to be delivered 50 tons monthly in November and December, 1918, at 10½ cents per pound in car lots f. o. b. San Francisco, which sale was not consummated because the defendant did not deliver any of the wax mentioned in the contract; that prior to the execution and delivery of the contract the defendant well knew, and the plaintiff informed it, that plaintiff was about to purchase the wax mentioned in said agreement for resale, and had resold the same; that on September 17, 1918, the plaintiff notified defendant by letter that it intended to offer the wax in question for sale. On September 30, 1918, it telegraphed the defendant that it had sold the wax to responsible parties, and on October 3, 1918, it wrote the defendant that the wax had been sold to responsible parties, and on October 8, 1918, plaintiff wrote defendant that it had sold the wax to the Standard Oil Company of New York and to Mitsui & Co.; that the total price to be paid by the plaintiff under the contract was \$129,500; that the resale price of 600 tons to the Standard Oil Company was \$121,500, and the resale price of 100 tons to Mitsui & Co. was \$21,000, making a total resale price of \$142,500; that the plaintiff has been damaged in the sum of \$13,000, with interest from May 31, 1919, the average due date of the payments which would have been made from the Standard Oil Company and Mitsui & Co.

William Thomas, Louis S. Beedy, James Lanagan, and Thomas, Beedy & Lanagan, all of San Francisco, Cal., for plaintiffs in error.

Willard P. Smith, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The defendant took no exception to any of the findings of fact and made no request for findings in its favor. Under the well-settled principles of practice in the federal courts, the only question open to discussion in this court is whether the findings of fact sustain the conclusion of law.

[1] It is contended that the notice of resale given by the plaintiff to the defendant was insufficient to form the basis of a demand for damages arising out of loss of profits, in that the notice made no mention of the market in which the wax had been resold, and no information that the resales had been made at a profit, and the defendant contends that, in the absence of such notice to the defendant, the plaintiff must content itself with damages to be estimated on the basis of the general market or the actual value of the goods. The contention is against the decided weight of authority. 24 R. C. L. 81; Guetzkow Bros. v. A. H. Andrews & Co., 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; Howard Supply Co. v. Wells et al., 176 Fed. 512, 100 C. C. A. 70; Armeny v. Madson & Buck Co., 111 Ill. App. 621.

[2] It is contended that it was the duty of the plaintiff to purchase wax in the open market, and thus minimize its damages; the market price during the period covered by the contract having been no greater than the contract price. But to this it is to be said that the undisputed evidence is that the defendant repeatedly and continuously promised delivery until as late as April, 1919. At that time the plaintiff ascertained that it would be impossible for the defendant to furnish the wax in time to be of any benefit to the plaintiff; the Standard Oil Company and Mitsui & Co. having canceled their respective contracts. The

testimony was that the plaintiff made inquiry, but did not make purchases, "in view of the fact of the defendant insisting it was going to compel us to take delivery of the wax which it claimed all the time that it could furnish." Under the circumstances the plaintiff was not bound to purchase in the market. *Benton v. Fay & Co.*, 64 Ill. 417; *Kentucky Distilleries & W. Co. v. Lillard et al.*, 160 Fed. 34, 87 C. C. A. 190; *Howard Supply Co. v. Wells*, 176 Fed. 512, 100 C. C. A. 70; *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837.

[3] The burden of proving that the damages sustained by the plaintiff could have been prevented or mitigated rested upon the defendant. *Mathesius v. Brooklyn Heights R. Co.* (C. C.) 96 Fed. 792, 795.

The judgment is affirmed.

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### REINEKE et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 3, 1922.)

No. 5618.

**1. Criminal law §444—Records held erroneously admitted without proper foundation.**

In a prosecution for larceny from a railroad car and having in possession the alleged stolen property, papers of the consignor, identified by one in charge of its shipping department as made in the regular course of business under his general supervision, who did not see the work done, nor the entries made, were erroneously admitted in evidence, where the absence of the employee who made the records and who did the work recorded on the sheets was unexplained, except by a statement of counsel that he could not be found.

**2. Criminal law §419, 420(12), 444—Railroad records held hearsay, and erroneously admitted without proper foundation.**

In prosecution for larceny from railroad car and possession of stolen property, where agent of railroad was called as witness and shown a certain paper, which he said was the original bill of lading issued to the consignor for the contents of the car from which property was claimed to have been stolen, such bill of lading was erroneously offered in evidence without further identification, and was clearly hearsay.

In Error to the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

H. J. Reineke and another were convicted of larceny from a box car and having the stolen property in possession, respectively, and bring error. Reversed and remanded.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error Reineke.

Eustace C. Wheeler, Asst. U. S. Atty., of St. Louis, Mo. (James E. Carroll, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before HOOK, Circuit Judge, and COTTERAL and JOHNSON, District Judges.

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**PER CURIAM.** The indictment in this case is based upon the Act of Congress of February 13, 1913 (37 Stat. 670 [Comp. St. § 8603]), which, so far as applicable, reads:

" \* \* \* Whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen, \* \* \* shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both."

The indictment contains two counts. The first count charges the defendants with the larceny from a railroad box car No. 23540, initialed S. A. L., of certain automobile tires which were a part of an interstate shipment of freight. The second count charges that the defendants had in their possession the said automobile tires knowing them to have been stolen.

The defendant Lockett was convicted by the jury upon the first count and acquitted by direction of the court upon the second count. The defendant Reineke was convicted by the jury upon the second count and acquitted by direction of the court upon the first count.

The sufficiency of the counts of the indictment was challenged in the court below and is challenged in this court upon various grounds. It will serve no useful purpose to enter into any extended discussion of these various objections. It suffices to say that under the recent decisions of the courts we think the counts of the indictment sufficient. *Kasle v. United States*, 233 Fed. 878, 147 C. C. A. 552; *Bloch v. United States* (C. C. A.) 261 Fed. 321; *Fleck v. United States* (C. C. A.) 265 Fed. 617; *Rosen v. United States* (C. C. A.) 271 Fed. 651; *White v. United States* (C. C. A.) 273 Fed. 517; *Freedman v. United States* (C. C. A.) 274 Fed. 603; *Trope v. United States* (by this court, decided October 21, 1921) 276 Fed. 348.

[1] The automobile tires referred to in the indictment were alleged to be a part of an interstate shipment by the Goodyear Tire & Rubber Company from Akron, in the state of Ohio, to St. Louis, in the state of Missouri. To prove that the tires stolen from the railroad car described in the indictment were a part of an interstate shipment, the government called an employee of the Goodyear Company, of Akron, Ohio, who testified that he had charge of the shipping department of this company. He identified certain papers which came from the files of his office as having been made in the regular course of business, under his general supervision. He did not see the work done of which the papers purported to be a record, nor did he see the entries made which appear on the papers. The absence of the employee who made the records and who did the work recorded on the sheets was unexplained, except by a statement of counsel for the government that he could not be found. On this showing the papers were introduced in evidence over the objection and exception of the defendants. These papers are a record of the loading of car No. 23540, initialed S. A. L., with certain Goodyear automobile tires.

[2] An agent of the Baltimore & Ohio Railroad Company, employed

at East St. Louis, was called as a witness and shown a certain paper, which he said was the original bill of lading issued by the Baltimore & Ohio Railroad Company at Akron, Ohio, to the Goodyear Tire & Rubber Company for the contents of car No. 23540. This bill of lading, without further identification, was offered and received in evidence, over the objection and exception of the defendants. It described car No. 23540, initialed S. A. L., and gave its contents as certain packages of automobile tires, with other goods.

We are of opinion that no proper foundation was laid for receiving these papers in evidence. They were clearly hearsay, and, as we think, prejudicial to the rights of the defendants. *Crowell Brothers v. Panhandle G. & E. Co.* (C. C. A.) 271 Fed. 129; *Granzow v. United States* (C. C. A.) 261 Fed. 172; *Phillips v. United States*, 201 Fed. 259, 120 C. C. A. 149; *Ency. Ev.* vol. 2, p. 868.

We find no other error in the record, but, on account of the errors above mentioned, the judgment must be reversed, and the case remanded to the court below, with direction to grant the defendants a new trial.

It is so ordered.

HOOK, Circuit Judge, participated at the hearing of this cause, but died before a conclusion was reached and the opinion was prepared.

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#### THE R. G. TOWNSEND.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 106.

1. Collision  $\S$  95(1)—Scow owner assumed risk of ice, but not of collision, due to insufficient power of tug.

A scow owner assumed all risk of damage to the scow produced by ice, by consenting that she be towed with the iced condition of the water; but he did not assume risks of collision with other vessels, due to insufficient power of the tug having charge of the tow.

2. Collision  $\S$  95(2)—Steam tug held at fault in endeavoring to navigate without assisting tug.

The steam tug R. G. Townsend was at fault in endeavoring to navigate New York Harbor during an ice floe with 11 scows in tow, without an assisting tug, and was liable for the collision of a scow with a vessel in the harbor.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by Donald J. Sargent against the steam tug R. G. Townsend, her engines, etc.; the Cornell Steamboat Company, claimant. Decree for claimant, and libellant appeals. Reversed.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for appellee.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. The appellant is the managing owner of the scow Willis G. Townes. The appellee owned the steam tug R. G. Townsend, which is 80 feet long, 8 feet 5 inches in depth, and 40 years old. On the 23d of January, 1918, the R. G. Townsend left Edgewater about 9:30 o'clock p. m., having 11 scows in tow, loaded with coal bound for Newton Creek. The scows were made up in tiers, three abreast. The Townes was the starboard hawser scow. The winter of 1917-1918 was one of the coldest experienced in and about the harbor and river of New York, and the ice floe was very heavy. At the time in question the river was filled with ice, and in navigating the tow went down the Hudson river on the ebb tide. The Townsend endeavored to navigate the flotilla without assistance. When she reached about opposite Fifty-Fourth street, Manhattan, she became wedged in the ice and drifted down with the tide. Then the flotilla became unmanageable and the bow of the Townes came in collision with a steamship anchored off the Delaware & Hudson piers at Weehawken. Before the collision, the flotilla had drifted about a mile. After the collision, the Townsend drifted down on the New York side of the anchored steamship and her tow went down on the Jersey side. Thereafter three steam tugs belonging to the appellee came to the assistance of the Townsend and her tow. The Townes was taken in tow by one of the tugs, and while upon a course toward the Jersey flats sank off the pier of the Central Railroad of New Jersey. The weather was clear for seeing lights, and the steamship lights were observed by those in charge of the Townsend, as well as the master of the scow Townes.

[1] Fault is charged against the steam tug, because she had insufficient power to safely handle the boats she had in tow; also because, under the circumstances, she attempted the navigation alone. The scow owner was desirous of making delivery of the coal, and undoubtedly assumed all risks of damage to the scow produced by the ice in his permission and consent that she be towed with the ice condition of the waters; but he did not assume risks of collision with other vessels, due to the insufficient power of the steam tug having charge of the tow. Those in charge of the Townsend had full knowledge of the condition of the ice, and should have had regard of the number of boats which she attempted to tow. The manager of the steamboat company acknowledged that he knew the ice conditions as they prevailed when the left Edgewater on the night in question, and that there was never experienced an ice floe heavier in New York harbor than at this time. Still he permitted the Townsend to go out without a helper. He also testified that the Townsend had 14 boats in tow from Edgewater, and that it was the custom of the tug to go down the North River with the ebb tide, and go into the East River with the first of the flood tide. The Townsend could make no headway with her tow against the tide, and she towed with the tide always. The manager says the Townsend could not tow against the tide with 2 of these boats. It is plain that the master of the Townsend had full knowledge of the ice and tide conditions.

[2] We think the steam tug was at fault in endeavoring to navigate, without an assisting tug, this large flotilla of scows in view of the ice condition of the river. While the Townsend may have undertaken this work on former occasions with safety, the danger arising from heavy ice was too apparent this time. It was always present. Those in charge knew that she did not have sufficient power to take her tow through the ice. They were content to proceed down the river with the tide. While ordinarily the duty of a helping tug may be to take boats out of the tow, in these unusual conditions the contract for towing had implied therein the requirement of doing more than drifting with the tide. These conditions of ice were what ought to have been expected by a prudent navigator, in view of the weather. The master was charged with the knowledge of the tide and its set, and, if he was caught in heavy ice, the tug in tow must go whither the tide set. It was ebb tide that brought about the collision. The Townsend first met conditions involving extreme peril, and went out into the heavy ice, and then found itself unable to change the direction of her tow, and was carried by the ebb tide into collision with the steamship. The owner of the scow did not assume the risk of such navigation. It was not implied in the contract of towing. The collision was due to faulty navigation and a breach of the employment for towing.

We think the libelant should have a decree.

Decree reversed.

### DICKSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 31, 1921.)

No. 5815.

1. Army and navy ~~§~~40—Circumstances must be considered in determining whether words were attempt to cause mutiny.

Where words spoken by defendant are alone relied on as constituting an attempt to cause insubordination or mutiny in the military forces, the circumstances under which they were spoken must be considered in determining whether the words were of such a nature as to violate Espionage Act June 15, 1917, tit. 1, § 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).

2. Army and navy ~~§~~40—Words spoken to person not subject to military service held insufficient to sustain conviction.

Where the indictment charged that the words alleged to have constituted an attempt to cause mutiny in the military forces were spoken to a named individual who was not shown to be subject to military call, and there was no showing that the words were intended to be heard by any one else, a conviction for attempt to cause mutiny in the military forces cannot be sustained.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Elmer G. Dickson was convicted of violating the Espionage Act, and he brings error. Reversed and remanded, with instructions to discharge the defendant.

~~§~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Jo R. Jaques, of Ottumwa, Iowa (W. D. Tisdale, of Ottumwa, Iowa, on the brief), for plaintiff in error.

E. G. Moon, U. S. Atty., of Ottumwa, Iowa (John C. De Mar, Asst. U. S. Atty., of Des Moines, Iowa, on the brief), for the United States.

Before HOOK, Circuit Judge, and TRIEBER and NEBLETT, District Judges.

NEBLETT, District Judge. Plaintiff in error, hereinafter called defendant, was indicted on seven counts, charged with the violation of section 3, title 1, of the Espionage Act, approved June 15, 1917. 40 Stat. 217, c. 30 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c). He was found guilty on the second count, and sentenced to pay a fine of \$5,000 and costs of prosecution. The second count charges him with unlawfully attempting to cause insubordination, mutiny, disloyalty, and refusal of duty in the military forces of the United States, by counseling and advising one G. E. Chapman that the American boys did not have to go to Germany to fight, that there was no law to compel them to go, and that if they would rise up in arms they would not have to go; the said G. E. Chapman then having a son serving in the United States Army.

At the close of the evidence for the United States, and the close of all the evidence, the defendant moved for an instructed verdict of not guilty on count 2:

"Because there is no evidence that the defendant did unlawfully, willfully and feloniously attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States as therein alleged, and the evidence in regard to the charge made in count 2 is insufficient to sustain a verdict of guilty."

The question of the insufficiency of the evidence to sustain a verdict was also raised by defendant's motion in arrest of judgment. These motions were overruled, and proper exceptions saved to the court's ruling thereon. These rulings are assigned as error.

The evidence shows that defendant made the statements charged to have been made by him in count 2 to G. E. Chapman, in West Grove, Iowa, on or about June 30, 1917. Defendant's conversation, in which the statements were made, was addressed to Chapman, and according to the evidence a part of it was heard by Alma Waybill, Finley Collins, and Mrs. Spouse. It does not appear, from the circumstances under which the defendant had the conversation with Chapman, that he addressed his remarks to any of these parties, or knew or intended that any one except Chapman should hear them. There is no averment in the indictment that the remarks were publicly made, or made to any one except Chapman. If there was any attempt to commit the offense charged in the second count of the indictment, the act constituting such an attempt was the conversation with Chapman. It is not shown that Chapman was between the ages of 18 and 45 years, or subject to military service and it will be presumed that he was not.

[1] Where words alone are relied upon as constituting an attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, the circumstances under which

they are made must be considered. If they are not used in such circumstances, and are not of such a nature, as to create a clear and present danger that they would bring about results denounced by the act of Congress, there is no crime committed. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Fontana v. United States* (C. C. A.) 262 Fed. 283; *Doll v. United States*, 253 Fed. 646, 165 C. C. A. 272.

[2] We do not think it would naturally follow, nor is it reasonable to infer, that the utterances of the defendant made to Chapman, who was not subject to military duty, in a private conversation, would cause disloyalty, insubordination, mutiny, and refusal of duty. His request for a directed verdict should have been granted.

The conclusions reached above dispose of the case, and it is not necessary to consider the other assignments of error. The judgment below must be reversed, and the case remanded to the court below, with instructions to discharge the defendant.

Judge HOOK participated in the hearing of this case and concurred in the conclusion reached, but died before the opinion was filed.

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**HIND et al. v. WESTERN UNION TELEGRAPH CO.**  
(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 3690.

**Telegraphs and telephones** §67(5)—**Damages for error in business message limited to actual loss.**

A cablegram from London to plaintiffs in San Francisco, making an offer for a cargo of barley, "including war risk," was changed in transmission by defendant telegraph company, so as not to require plaintiffs to pay the war risk insurance, and was accepted and the barley shipped and paid for. Later plaintiffs were compelled to pay the insurance, which amounted to about \$7,000, in accordance with the terms of the actual offer, and brought suit for its recovery. *Held*, that they were entitled to recover any actual damages sustained by reason of the mistake, but that, it being admitted that they made a profit on the sale, in the absence of evidence that they could have sold for a higher price, no actual damages were shown which warranted a recovery.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Action at law by George U. Hind and James Rolph, Jr., against the Western Union Telegraph Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The plaintiffs were grain merchants at San Francisco. They had barley to sell. On February 24, 1916, they sent their agents in London a message offering a cargo of barley at 63s. 9d., "including war risk insurance," meaning that the sellers would pay the war risk insurance. "On the following day the agents replied that buyers declined the offer, but they submitted an offer to purchase the barley at 62s. 6d., "including war risk," meaning thereby that the sellers would pay such insurance. The message, in its transmission

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from New York to San Francisco over defendant's lines, was altered by the insertion of the word "not" before the words "including war risk." The plaintiffs accepted the offer as it came to them and without knowledge of the alteration, and they shipped the barley and received therefor the purchase price of 62s. 6d. Later they were required to pay the war risk insurance in the sum of \$8,970.54. To recover that sum they brought action against the defendant, alleging in their complaint that the defendant failed to exercise reasonable care, and was grossly negligent in transmitting the message, and that they, the plaintiffs, would not have accepted the offer if it had come to them in its original terms. The cause was submitted to the court below upon an agreed statement of facts, and thereupon judgment was rendered for the defendant. Among the stipulated facts are these: That the plaintiff received a profit of \$30,000 on the sale, that on or about the date of the transaction there was no particular market price for barley, and that the price the plaintiffs actually received was the best which their agents could secure at that time. It was further stipulated that one of the plaintiffs would have testified that the plaintiffs would not have accepted the offer set forth in the message, if the same had been transmitted as filed by the agents.

Andros & Hengstler and F. W. Dorr, all of San Francisco, Cal., for plaintiffs in error.

Beverly L. Hodghead, of San Francisco, Cal., and Francis R. Stark, of New York City, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We can see no ground on which it can be held that the defendant's error in transmitting the message should inure to the benefit of the plaintiffs. They lost nothing by the error, notwithstanding that they failed to receive all that they expected to get. It is true, as the plaintiffs argue, that they parted with the barley on the understanding that they were not to pay the war risk insurance, but the fact that they parted with the grain on that understanding is not a controlling consideration. It was necessary for them to show that they were actually damaged by parting with the barley. They were damaged if they could show that they could have sold the barley at a price higher than that which they received; otherwise not. There is nothing to show that they could have sold the barley at a greater advantage to themselves, or that after parting with the same they could not have purchased other barley at the same, or even at a lower, price. *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Mickelwait v. Western Union Tel. Co.*, 113 Iowa, 177, 84 N. W. 1038; *Acheson v. Western Union Tel. Co.*, 96 Cal. 641, 31 Pac. 583.

The plaintiffs cite *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, a case in which the plaintiff was misled into selling land upon a telegraphic offer of \$1,300, which had been changed in transmission to an offer of \$1,900. She sued to recover \$600 as damages. The court held that she was entitled to recover damages from the telegraph company, measured, however, not by the false figures in the dispatch, but by the actual market

value of the land. That decision is applicable here. The plaintiffs are entitled to recover only actual damages, measured by what they actually lost.

The judgment is affirmed.

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IN re FRANKLIN TRACTOR CO.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1922.)

No. 3876.

**Bankruptcy** §128—Election of trustee by votes cast under proxies held by officer or attorney of bankrupt not necessarily void.

There is no hard and fast rule which renders void the election of trustee for a corporation by the votes of proxies held by an officer or the attorney for the corporation, and where the proxies were given without solicitation, no charge of fraud or collusion is made, and the election has been confirmed by the action of the referee and the District Court, it will not be set aside by the appellate court.

Petition for Revision of an Order of the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

In the matter of the Franklin Tractor Company, bankrupt. On petition to revise order of District Court. Affirmed.

Frank E. Burnett, of Cincinnati, Ohio, for petitioners.

Oliver G. Bailey, of Cincinnati, Ohio, for respondents.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Petition to revise an order affirming an order of the referee which confirmed the election of a trustee. The election is assailed as invalid, for the reason that votes of creditors to an extent necessary to the election were cast under proxies held by either the president and general manager of the bankrupt corporation or its attorneys. The bankruptcy had been preceded by a receivership. District Judge Sater in refusing to set aside the order of the referee said:

"There is no evidence, outside of the statement of counsel, to sustain the petition for review, excepting such as is found in the certificate of the referee. It appears that [the bankrupt's president and general manager] shortly prior to the bankruptcy proceedings became the president of the bankrupt company and under the receivership acted as its manager. Shortly prior, also, to the receivership, the firm [of attorneys referred to] advised in reference to the bringing of receivership proceedings and subsequently acted for the receiver. There is no evidence that either [the president] or any member of the law firm ever asked any creditor for a power of attorney to vote on the election of a trustee in bankruptcy. Whatever powers were given to [the president] or to any such attorneys were given voluntarily by creditors and without any direction as to how the persons holding such powers of attorney should vote. The name of Meeker [the trustee elect] was not suggested for the position of trustee until the day before the election was held, nor was there any determination to vote for him until about the time the vote was cast, when, as between him and the other candidate [the president] and the member of the legal firm holding proxies concluded to vote for Meeker. There is no charge of collusion or bad faith, or that Meeker is not a competent person to act as trustee. The referee, who was cognizant of all that had occurred, approved

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Meeker's election, and I am not disposed to disturb it. It may be said, however, that the conclusion reached is not to be construed as establishing a rule for this district. The danger arising from the officers and counsel of a corporation exercising the controlling power in the election of a trustee is great and not to be encouraged. Each case, however, must stand upon its own facts, and, in the absence of any charge of wrongdoing, I have concluded in this instance to let the election stand, and for the further reason that the trustee elected and the persons casting the decisive vote are all of good repute. The trustee should exercise caution that no favoritism in behalf of any creditor, or prejudice against any one, is shown."

Upon this record we are not disposed to disturb the concurrent action of the referee and District Judge. There is no hard and fast rule voiding an election merely because the decisive votes were cast under proxies held as here. There is nothing to indicate that such measure of judicial discretion as was vested in those officers has been improperly exercised. We are content to rest our affirmance upon the reasons given by the District Judge for his action, which we think supported on principle and authority.

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**GONG SIC OR v. WHITE, Commissioner of Immigration.**  
(Circuit Court of Appeals, Ninth Circuit. February 13, 1922.)  
No. 3774.

**Aliens** ¶32(9)—Record held to show fair hearing on claim of Chinese that he was son of citizen.

A record, showing that a Chinese, who claimed the right to enter as the foreign-born son of a citizen, had a hearing before a board of special inquiry, at the close of which he was allowed 10 days' further time for additional evidence, of which he did not avail himself, and that the entire record was forwarded to the Secretary of Labor, before whom the applicant was represented by attorneys, shows that he was afforded a fair hearing.

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Habeas corpus by Gong Sic Or against Edward White, as Commissioner of Immigration of Port of San Francisco, to procure discharge from an order for deportation. From a judgment denying relief sought, applicant appeals. Affirmed.

Joseph P. Fallon, of San Francisco, Cal., for appellant.

John T. Williams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant claimed to be entitled to admission to the United States as the foreign-born son of a Chinaman named Gong Bing Gow, whose citizenship here is not questioned. They arrived at the port of San Francisco on the same ship, and the right of the alleged son to enter this country was questioned, on the ground that the relationship did not, in fact, exist, which question came on for hearing before a board of special inquiry under the statute of the United States upon the subject, before which it appears from the rec-

ord testimony in behalf of the applicant was heard, first, on December 27, 1920, and again on the next day, at which time, the board not being satisfied that the relationship claimed was established, allowed the applicant 10 days' further time within which to introduce further evidence in his behalf, and thereafter, to wit, on January 3, 1921, being notified by his attorney that no further evidence would be introduced, and asking that final action be taken, the board on January 11, 1921, entered an order denying the applicant admission, and advising him of his right of appeal.

Such appeal was taken January 13, 1921, and the record, including all the exhibits that were introduced, was forwarded to the Secretary of Labor, before which officer the applicant was represented by attorneys, who filed a brief in his behalf, and who subsequently were granted an oral argument before the Secretary. The result was that the Secretary of Labor affirmed the action of the board of special inquiry, and the applicant directed accordingly to be deported. We see in the record no ground for the sole contention here made that the applicant was not afforded a fair hearing before the officers of the Immigration Department. See *Jeung Bock Hong v. White*, 258 Fed. 23, 169 C. C. A. 161; *Quock Ting v. United States*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501.

The judgment is affirmed.

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**In re BERNARD.\***

(District Court, E. D. New York. December 12, 1921. Supplemental Opinion, December 19, 1921.)

**1. Bankruptcy ☞424—Judgment based on prior judgment for libel held not dischargeable.**

A judgment, based on a prior judgment for libel, *held* not a debt dischargeable in bankruptcy, though the pleadings on which the second judgment was rendered did not disclose the nature of the original cause of action, but to retain its character as a liability for willful or malicious injury, within Bankruptcy Act, § 17(2), being Comp. St. § 9601(2).

**Supplemental Opinion.**

**2. Bankruptcy ☞424—Judgment for libel held not dischargeable.**

The fact that the defendant in a judgment for libel was confined within prison limits on a body execution, under the law of New York, *held* not an exaltation which relieved the judgment of its character as one for a malicious injury, not dischargeable in bankruptcy.

In Bankruptcy. In the matter of William Bernard, bankrupt. On motion to expunge claim from schedules as one not dischargeable. Granted.

Milton P. Kupfer, of New York City, for moving creditors.  
Tripple & Plitt, of New York City, for bankrupt.

GARVIN, District Judge. This is a motion by Leo Frank and Israel De Keyser to expunge from the schedules filed by the bankrupt

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\*Order reversed 280 Fed. —.

the claim of the moving parties, consisting of a judgment in the sum of \$3,788.43; the motion being made upon the ground that the debt is neither a provable nor a dischargeable claim herein.

The applicants recovered a judgment against the bankrupt on February 19, 1909, for the sum of \$2,151.41 in an action for libel. After supplementary proceedings upon said judgment had been instituted, defendant filed a petition in bankruptcy in the United States District Court for the Southern District of New York. A stay of examination in said supplementary proceedings granted by the District Court was later vacated, and the examinations in supplementary proceedings were directed to proceed. They were thereafter closed. The defendant was never discharged in bankruptcy. In September, 1921, an action was brought upon said judgment in the Supreme Court of the state of New York, and judgment was duly entered therein against the bankrupt on October 20, 1921, for the sum of \$3,788.43.

Within a few days thereafter, the bankrupt filed the pending petition in bankruptcy, seeking a discharge from said judgment. Subsequent to the judgment recovered February 19, 1909, the bankrupt was arrested thereunder and confined within the jail limits of New York county for a period of six months; this being prior to the judgment of October 20, 1921.

[1] It is well settled that a judgment for libel is not a dischargeable debt. *Thompson v. Judy*, 169 Fed. 553, 95 C. C. A. 51, 22 Am. Bankr. Rep. 154, *McDonald v. Brown*, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659, 10 Am. Bankr. Rep. 58, *National Surety Co. v. Medlock*, 2 Ga. App. 665, 58 S. E. 1131, 19 Am. Bankr. Rep. 654. The applicants claim that, inasmuch as the original judgment was predicated upon liability for a malicious act, the malicious nature of the liability remained unchanged, in spite of the fact that the judgment now involved was recovered upon an existing judgment. This would seem to have the support in authority. *Peters v. United States*, 177 Fed. 885, 101 C. C. A. 99; *Thompson v. Judy*, supra; *In re Kuffer* (D. C.) 155 Fed. 1018; *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; *McDonald v. Brown*, supra.

In *Thompson v. Judy*, supra, it was stated:

"The contention of the appellant is that when a judgment has been obtained, the liability is merged therein, and the claim no longer adheres to the liability, but is transmuted into another species of right, which was excepted by the original act, but, since the amendment, is no longer excepted. But notwithstanding the ingenuity of the argument by which this contention is sought to be maintained, we are of opinion that the intention of Congress was to declare that such liability should be excepted whether a judgment had been rendered upon it or not. The general doctrine of merger of the cause of action by judgment cannot, of course, be disputed. No suit or proceeding can thereafter be brought upon the original liability, but only for the enforcement of the judgment. The power of the court cannot be again invoked to adjudicate the question of liability. It is for the interest of the public that litigation shall come to an end, and the inconvenience of preserving the original liability as a continuing cause of action would be great. The pursuit must proceed along the line adopted, and the satisfaction of the claim must be sought through the judgment. But this rule of law prevails only to the extent that the reason for it exists. It does not prevent the recognition in the judgment of the attributes of the original cause of action. For the purposes

of relief, the judgment embodies those attributes and gives ground for their enforcement. The rights of the parties are established, and are in no wise diminished thereby. So, when the judgment is general in form, it is often necessary to go behind it and see upon what liability it is founded, to the end that the characteristics of the cause of action may be impressed upon it. \* \* \* Now, we cannot resist the impression that Congress in making this amendment was looking to the substantial nature of the liability, and regarded the question as to whether a judgment had been rendered upon it as immaterial, that its intrinsic nature had not been altered and was in reality the cause of action intended by the original exception, and that Congress meant to protect that from the discharge. Apparently the requirement in the original act that the claim should have been reduced to judgment was intended to obviate the delay which a proceeding in the bankruptcy court for the liquidation of the damages would involve. And, finally, it would seem that in plain English a judgment on such a cause of action is a 'liability' therefor."

There is no merit in the contention that the defendant was confined to jail limits under a body execution has had the effect of a satisfaction of the judgment. The motion to expunge the claim is granted, and the applicants are permitted to proceed to the collection of the judgment in the state courts in such manner as is provided by law.

Whether the defendant may be imprisoned again under process issued by the state court must be submitted to the latter tribunal for determination.

#### Supplemental Opinion.

[2] The attention of the court has been called by counsel to this statement appearing in the foregoing opinion:

"There is no merit in the contention that the defendant was confined to jail limits under a body execution has had the effect of a satisfaction of the judgment."

Three words were inadvertently omitted. The opinion should read:

"There is no merit in the contention that the fact that the defendant was confined to jail limits under a body execution has had the effect of a satisfaction of the judgment."

But, further, neither party contended that such confinement had had the effect of such satisfaction, and what the court intended to decide, and does now decide, was that plaintiffs have the same rights under the second judgment as under the first; more specifically, that the confinement to jail limits under the first judgment did not expiate the malicious character of the original injury.

There was no election by the plaintiffs, when they brought suit upon the first judgment and failed to set forth the facts upon which said judgment was predicated, to waive the malicious character of the original injury.

**O'NEIL v. CO-OPERATIVE LEAGUE OF AMERICA.**

(District Court, M. D. Pennsylvania. March 10, 1922.)

No. 313.

**1. Courts ⇐280—Jurisdiction must affirmatively appear.**

The United States District Court has no jurisdiction, except that conferred by the Constitution and Laws of the United States, and a cause is presumed to be without its jurisdiction, unless the contrary affirmatively appears.

**2. Courts ⇐23, 37(1)—Jurisdiction cannot be conferred by consent or waiver.**

When jurisdiction of the United States District Court depends on diverse citizenship, the absence of facts in the record showing the required diversity is fatal, even if the parties fail to call attention to the defect, or consent that it be waived, since consent cannot confer jurisdiction.

**3. Courts ⇐272—Plaintiff can elect to sue in own district, if jurisdiction depends on diversity of citizenship.**

Under Judicial Code, § 51 (Comp. St. § 1083), providing that in a civil suit, where jurisdiction is founded on diversity of citizenship only, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, the plaintiff, where jurisdiction depends on diversity of citizenship, may bring it either in the district of the defendant or in his own district, if defendant can be there served.

**4. Courts ⇐315—Unincorporated association has citizenship of its members.**

An unincorporated association has no citizenship by reason of its organization, and its citizenship for jurisdictional purposes is dependent on that of its members.

**5. Courts ⇐279—Bill showing neither plaintiff nor defendant resides within district defeats jurisdiction.**

A bill, in a suit where jurisdiction depends on diversity of citizenship, which shows that plaintiff was a citizen and resident of another state, and that the members of defendant unincorporated association were citizens of another district in the same state as the district of suit, affirmatively shows that the court has no jurisdiction, and must be dismissed.

**In Equity.** Suit by Daniel J. O'Neil against the Co-Operative League of America. On exceptions to the master's report. Bill dismissed for want of jurisdiction.

Andrew B. Dunsmore, U. S. Atty., of Wellsboro, Pa., for plaintiff.

C. R. Savidge, F. A. Witmer, and J. P. Carpenter, all of Sunbury, Pa., and H. E. Elliott, of Cleveland, Ohio, for defendant.

**WITMER, District Judge.** The bill alleges that the plaintiff, Daniel J. O'Neil, is a citizen of the state of New York; the defendant the Co-Operative League of America is "an unincorporated association duly organized and existing under the laws of the state of Pennsylvania with its home office in the county of Allegheny, said state, doing business there and elsewhere in the state and in this district; and that the persons comprising said association and in charge of the offices thereof are citizens and residents of the state of Pennsylvania, county of Allegheny."

[1, 2] It is the duty of the court to inquire whether the showing made entitles the plaintiff's case to consideration here. The jurisdiction of this court is limited, in the sense that it has no jurisdiction ex-

cept that conferred by the Constitution and laws of the United States, and a cause is presumed to be without its jurisdiction, unless the contrary affirmatively appears. It is well established that when jurisdiction depends upon diverse citizenship, as in this case, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Martin v. Baltimore & Ohio R. Co.*, 151 U. S. 673, 689, 14 Sup. Ct. 533, 38 L. Ed. 311; *Powers v. Chesapeake & Ohio Ry.*, 169 U. S. 92, 98, 18 Sup. Ct. 264, 42 L. Ed. 673. In the case of *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 63, 24 Sup. Ct. 598, 601 (48 L. Ed. 870) it was said:

"Consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare and make such order as will prevent that court from exercising an authority not conferred \* \* \* by statute."

The record here not only fails to set forth averments conferring jurisdiction, but it affirmatively discloses facts clearly indicating the contrary.

[3] The jurisdiction of the United States District Court is fixed by the Judicial Code of March 3, 1911, c. 231, § 51, U. S. Stat. at Large, volume 36, page 1087, Federal Statutes Annotated Supplement 1912, volume 1, p. 153 (Comp. St. § 1033), wherein it is provided:

"Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a District Court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is evident from the language employed that a person can be sued only in the court of the district whereof he is an inhabitant, unless the sole ground of jurisdiction is founded on diversity of citizenship of states, in which event the plaintiff may elect to bring his action either in his own district or that of the defendant. The last clause is by way of proviso to the next preceding clause, which restricts the jurisdiction to the defendant's resident district, and it, the proviso, extends the right of the plaintiff to sue under certain circumstances in the district of his own residence; that is, when both of the parties plaintiff and defendant, are citizens of different states. The purpose of the proviso is to afford the plaintiff the same advantage of litigation in his own district that the defendant has, if he can there obtain service of process.

[4, 5] The defendant, it is said, is an unincorporated association duly organized and existing under the laws of Pennsylvania. It is not a body corporate, created by the state, and thus a citizen by reason of its incorporation. Its citizenship for jurisdictional purposes is dependent on its members comprising the association (*Thomas v. Board of Trustees of Ohio State University*, 195 U. S. 211, 25 Sup. Ct. 24,

49 L. Ed. 160; *Saunders v. Adams Express Co.* [C. C.] 136 Fed. 494), who it is alleged are citizens of Allegheny county, this state, beyond the limits of this federal judicial district. The conclusion reached by the learned master, that the contract sought to be annulled is a binding legal obligation, would no doubt be affirmed; but, in view of the decision reached, an opinion need not be expressed.

The bill is dismissed.

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In re SHANIN.

(District Court, D. Massachusetts. March 15, 1922.)

No. 58864.

1. Aliens ~~§~~62—"Well disposed" toward government refers to mental attitude.

Within Naturalization Act, § 4, par. 4 (Comp. St. § 4352), requiring an applicant to be well disposed to the good order and happiness of the United States, the expression "well disposed" refers particularly to the mental attitude of the applicant, with intent to exclude from citizenship persons disbelieving in our form of government or hostile to it.

2. Aliens ~~§~~62—"Attached to principles of Constitution" implies willingness to support them.

Within Naturalization Act, § 4, par. 4 (Comp. St. § 4352), the provision requiring petitioner to be attached to principles of the Constitution means attachment to the principles of free government, and "attachment" is a stronger word than "well disposed," used later in the section, and implies a depth of conviction which would lead to active support of the principles in question.

3. Aliens ~~§~~62—Claim of exemption from draft held to disprove attachment to Constitution.

The fact that an alien, who was unmarried and without dependents, claimed exemption from draft during the war as a nondeclarant alien, and shortly after the Armistice filed his declaration of intention, relying on the period of the war as part of the period of residence entitling him to naturalization, is sufficient to show that he is not attached to the principles of the Constitution, and not entitled to naturalization.

4. Aliens ~~§~~62—Legal right to claim exemption does not prevent alien from disproving attachment.

The fact that an alien had a legal right to claim exemption from the draft, and that the courts should not inquire into his motives for exercising that right, does not prevent such exercise, under the circumstances of the case, from disproving that the alien was attached to the principles of our Constitution.

Petition by Benjamin Shanin for naturalization. Petition dismissed.

Homer Albers, of Boston, Mass., for petitioner.

The United States Attorney, for the United States.

MORTON, District Judge. The facts are as follows: Shanin, the petitioner for naturalization, came to this country in 1912, being then 17 years old, and he has since continuously resided here. At the time of our entry into the war he was unmarried and without dependents, a resident of Massachusetts. He registered under the draft, and in his questionnaire claimed exemption from military service as a non-declarant alien. Exemption was duly accorded to him on that ground.

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About three months after the Armistice, on February 13, 1919, he made a declaration of intention to become a citizen of this country. On May 31, 1921, he filed the present petition based on that declaration. He is a student of law and desires to be admitted to citizenship, in order, among other reasons, to be eligible to the bar examination. He appears to be a man of good moral character; the only objection made to his admission being based on his claim of exemption from military service here.

The provisions of the Naturalization Act which are here in question read as follows:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record." Paragraph 4 of section 4, Act June 29, 1906 (Comp. St. § 4352).

[1, 2] The expression "well disposed to the good order and happiness of the same" refers more particularly to the mental attitude of the petitioner toward this country, and doubtless was inserted in order to exclude from citizenship persons who disbelieve in the form of government embodied in our Constitution or are hostile to it. I see no reason to doubt that the petitioner is "well disposed to the good order and happiness of" this country. The present case appears to turn on the preceding phrase, "attached to the principles of the Constitution of the United States." Attachment to the principles of the Constitution means, I take it, attachment to the principles of free government which are embodied in that instrument. "Attachment" is a stronger word than "well-disposed." Used in this connection it implies, I think, a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them. It is to persons holding such views, and to them only, that citizenship in this country is open.

[3] If this be the correct interpretation of the statute, the petitioner is not entitled to admission. Although he had been for several years resident here at the time of the war, and was so situated that he could with a minimum of hardship render military service to this country, he was not willing to do so. His attitude was very different from that of many thousands of nondeclarant aliens, who waived exemption and served in its armies. Nevertheless he contends that the period during which he refused to serve should be included in the five years as to which it is necessary for him to show, not only that he resided here, but also that he was attached to the principles of the Constitution. Without undertaking to say that a refusal to do military service would in every case and under all circumstances be convincing evidence of lack of such attachment, I think it is so in this instance. Moreover, the

petitioner made no declaration of intention until the danger of the war was passed, and then he speedily filed the one on which he now relies. It seems probable, in spite of his protestations to the contrary, that he withheld his declaration for the purpose of avoiding military service, which emphasizes his lack of attachment to the country, and amounts, perhaps, to a fraud on the law.

[4] The petitioner contends that he exercised his legal rights, and that the court ought not to inquire into the motives, whether creditable or the reverse, which actuated him in so doing. Subject to what is said in the preceding paragraph, I agree with this contention. The difficulty with the petitioner's case is that he does not appear to have been "attached to the principles of the Constitution," as those words are used in the statute, during the five years preceding the filing of his petition; and I so find.

Petition dismissed.

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MARCUCCI v. UNITED CAN CO., Inc. \*

(District Court, E. D. New York. October 19, 1921.)

**1. Trade-marks and trade-names and unfair competition ¶=70(4)—Unfair competition by imitation of labels.**

Complainant, a manufacturer of tin cans for olive and cotton seed oil, who adopted and has used for several years a distinctive label by which his cans have become widely known to the trade, *held* entitled to an injunction to restrain the use by a competitor on similar cans of a label which is, and was intended to be, a practical reproduction of complainant's.

**2. Trade-marks and trade-names and unfair competition ¶=3(4)—Identifying label held subject of protection against imitation.**

Where a label was adopted by a manufacturer of cans to identify cans on which it is used as his product, the fact that it also identifies the contents of the can does not bar him from relief against unfair competition by a competitor by using imitations of his label.

In Equity. Suit by Cesare Marcucci, doing business as the National Tin Can Manufacturing, against the United Can Company, Inc. On motion for preliminary injunction. Granted.

Fritz Ziegler, Jr., of New York City, for plaintiff.

Harry Aaron, of New York City, for defendant.

GARVIN, District Judge. Plaintiff moved for a preliminary injunction in this action, enjoining defendant from committing acts of unfair competition. The motion was argued and briefs were to be submitted September 28, 1921. None were received by me on that day, and after examining the papers I directed that a preliminary injunction issue. It now appears that the briefs and an additional affidavit were actually filed with the clerk of the court on the day mentioned and were not transmitted to me forthwith. I shall therefore consider the matter anew, and as though no decision had been rendered.

[1] The plaintiff is a manufacturer of tin cans of various sorts,

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\*Decree affirmed 230 Fed. —.

and the greater part of his output is sold to olive oil and cotton seed oil dealers. He began business in 1909, and has been successful. His sales during the year 1920 exceeded 2,000,000 cans. In 1912 he placed upon the market an olive oil can and a cotton seed oil can, with a distinctive label by which his cans could be easily identified by the trade, and has continued to sell cans bearing these labels, with an increasing demand therefor, until his sales were upwards of 35,000 per month. During this period he has been spending large sums in advertising cans bearing the label in question. The defendant was incorporated in 1920, and in April, 1921, placed upon the market tin cans bearing labels which are practical reproductions, and intended to be such, of those which have been characteristic of plaintiff's cans. Defendant alleges that in November, 1886, one Gounelle registered a trade-mark in the United States Patent Office, which was used by him in his business as a dealer in oils, and which was similar to plaintiff's; but, however this may be, it is equally clear that there is nothing to indicate that, when plaintiff began to employ the labels, the Gounelle labels were in use. Indeed, the contrary appears. Defendant also alleges that a label similar to that of plaintiff was registered in the United States Patent Office in 1908 by one Macaluso. But again there is nothing to indicate that this was in use when plaintiff's label appeared. It appears, also, that one Bellatoni has a label similar to plaintiff's; but there is no proof that it has ever been in use since plaintiff's label was put upon the market. A label now in use by Cordiano Bros. is no defense, since plaintiff admits the similarity and avers an intention to take legal proceedings forthwith to prevent further infringement by the user thereof. There is no proof that this latter label was in use when plaintiff's label was adopted.

[2] While plaintiff might not be entitled to the exclusive use of a trade-mark for his cans, when the trade-mark necessarily, from its nature, distinguished the contents, rather than the cans themselves, yet when the label also identifies plaintiff as the maker of cans bearing the labels, he should not be denied relief merely for the reason that the label happens to serve a double purpose. The fact that the label indicates to the using public that the cans contain a certain quality of oil is not controlling. Very much the same question was involved in the case of *International News Service v. Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, in which the court said:

"The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. \* \* \* The question here is not so much the rights of either party as against the public, but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. \* \* \* Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

\* \* \* The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's rights to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what the defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown. \* \* \* The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

See, also, *Bayer & Co. v. United Drug Co.* (D. C.) 272 Fed. 505, in which the court recognizes the difference between two classes—in that case, one representing manufacturing chemists, retail druggists, and physicians; the other, the consuming public—and granted a limited injunction.

A careful examination of the motion papers and of all the authorities to which I have been referred has not altered the conclusion at which I originally arrived.

Motion granted. Settle order, and fix amount of bond on notice.

**In re ASTELL ENGINEERING & IRON WORKS, Inc.**

(District Court, E. D. New York. November 12, 1921.)

**Corporations** ~~477~~(6)—Chattel mortgage given without written consent of holders of two-thirds of stock void, under New York statute.

A chattel mortgage executed by a New York corporation, but without the written or recorded consent of the holders of two-thirds of the stock, as required by New York Stock Corporations Law, § 8, held void.

In Bankruptcy. In the matter of the Astell Engineering & Iron Works, Inc., bankrupt. On motion of trustee to confirm report of special commissioner, holding chattel mortgage by bankrupt void. Granted.

Abraham L. Doris, of New York City, for the motion.

James S. Regan, of New York City, opposed.

GARVIN, District Judge. The trustee in bankruptcy has moved to confirm the report of a special commissioner holding a chattel mortgage executed by the bankrupt null and void. While the application to have the mortgage declared void was based on four grounds, two were waived, and a third raises no serious question, leaving only the fourth, which will be now considered.

The trustee claims that the mortgage was void because of failure to obtain the consent of two-thirds of the stockholders, as required by section 6 of the New York Stock Corporation Law (Consol. Laws, c. 59), which is as follows:

"Every stock corporation \* \* \* may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for

~~477~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May 1, 1891, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation, and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county where in the corporation has its principal place of business."

A special meeting of the board of directors of the bankrupt was held January 19, 1921, at which were present Richard S. Groves, George Brown, and James S. Regan. The capital stock of the bankrupt consisted of 200 shares of common stock, par value \$100 each, of which Regan held 4 shares, Brown 78, and Groves 118, of which latter number 5 were later transferred to Frank Groves.

Whatever confusion or conflict of authority may be revealed by an examination of earlier decisions, section 6, *supra*, has been construed by this circuit in the Matter of Post, 219 Fed. 171, 135 C. C. A. 69, where the court observes:

"The language of the statute is most clear and specific; manifestly it was made so to accomplish some purpose. That purpose is very plainly indicated on the face of the statute; it substitutes for mere oral expressions of assent, casually given it may be, an orderly permanent record which can be referred to. The provision, in the language of the New York Court of Appeals, 'involves an application to the stockholders, and, on their part, consideration, judgment, and final determination, and, on the part of the assenting stockholders, a written expression of their conclusion.' *Rochester Bank v. Averell*, 96 N. Y. 475. The same court has been liberal in its construction of the statute as to details of compliance. Thus in *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 335, a written assent was held good although it did not itself state the amount of the debt which it was given to secure; the court saying: 'The defendant could not have been misled. The consent \* \* \* was ample to put him on inquiry.' In *Rochester Savings Bank v. Averell*, *supra*, it was held that a mortgage dated January, 1874, and invalid when originally filed because of the absence of any written assent, was validated by the signing of such an assent in November, 1894; the mortgage being then reacknowledged. 'Such assent,' says the court, 'makes the instrument, as of the time it was given, a valid mortgage.' It has also been held that a court of equity will enforce a mortgage given by a corporation without the written assent, where the mortgage is given by the corporation pursuant to a valid agreement made by it to give the mortgage; and in consideration of which agreement and in reliance upon which, the mortgagee gave property or other valuable consideration to the corporation. *Paulding v. Chrome Steel Co.*, 94 N. Y. 340; *Hamilton Trust Co. v. Clernes*, 163 N. Y. 423, 57 N. E. 614; *Black v. Ellis*, 197 N. Y. 402, 90 N. E. 958. Such mortgages are of the same type as the 'purchase-money mortgages,' which the statute itself expressly excludes from the operation of the section above quoted. The mortgage in the case at bar is not of this type; it was given to secure past indebtedness for moneys loaned from time to time during the five preceding years. To hold that written assent of two-thirds of the stockholders may be dispensed with in this case would go much further than any decision of the New York Court of Appeals to which we have been referred or which we have found. There is no pretense that any written assent was ever signed, or that it was ever voted at any stockholders' meeting, special or general. If the statute had been so construed by the state court of last resort, we should follow its construction of the state statute; but until such a decision is cited, we are unwilling to fritter away the specific provisions of

an act which manifestly were put there to accomplish a plain purpose. Respondent finds support for her contention in *Black v. Ellis*, 129 App. Div. 140, 113 N. Y. Supp. 558, but that cause was decided by a divided court, and we are in accord with the views as to the construction of this statute expressed by the minority. *Black v. Ellis* was affirmed in the Court of Appeals (197 N. Y. 402, 90 N. E. 958), but on another ground."

The learned commissioner has found as a fact, after hearing the testimony, that the mortgage was given without the written consent of two-thirds of the stockholders at the meeting aforesaid or at any other time. There is ample justification for this finding, and the court sees no reason for reaching a different conclusion.

The mortgagee, upon the argument, urged that the mortgage was good, having been given pursuant to a valid contract, duly made by the bankrupt with the mortgagee, in consideration of which and in reliance upon which the latter advanced money to the bankrupt, citing *Black v. Ellis*, 129 App. Div. 140, 113 N. Y. Supp. 558, *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614, and *Matter of Post*, supra. This point does not appear to have been passed upon by the commissioner, but I have examined the record in order to ascertain whether the claim is justified. No such contract was proved to have been made.

Motion to confirm report of special commissioner granted

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POCOMOKE GUANO CO. v. EASTERN TRANSP. CO. et al.

(District Court, D. Maryland. February 18, 1922.)

No. 762.

1. Shipping Ⓒ208—Owner of barge held entitled to limit liability for loss of cargo.

The sinking of a barge through the breaking of a corroded iron discharge pipe from the toilet held not with the privity or knowledge or through the negligence of the owner, which precluded it from limiting its liability for loss of the cargo; it appearing that the use of iron pipes on such barges was usual and not considered dangerous, and that a short time before the sinking the barge had been delivered to a repair yard to be overhauled and such repairs made as found to be required.

2. Shipping Ⓒ207—Implied warranty of seaworthiness in oral contract of carriage.

The implied warranty of seaworthiness of a barge furnished on oral request to carry a cargo does not stand in all respects on the same footing as an express warranty by the owner, and does not preclude him from limitation of liability for loss of cargo through unseaworthiness, due to an unknown defect not readily discoverable, and the failure to discover which was not due to his negligence, but to that of a repair yard employed to overhaul and repair the barge.

In Admiralty. Suit by the Pocomoke Guano Company against the Eastern Transportation Company, owner of the barge *Columbia*, and others. On petition for defendants for limitation of liability. Granted.

Harrington, Bigham & Englar, of New York City, and Frank, Emory & Beeuwkes, of Baltimore, Md., for libellant.

Samuel K. Dennis, of Baltimore, Md., for respondents.

ROSE, District Judge. The libelants, original and intervening, lost manure salts to the value of some \$25,000 by the sinking of the barge Columbia, belonging to the respondent, hereinafter called the owner. The iron discharge pipe from its toilet had been in use for many years. After the accident it was apparent that it had become badly corroded, and had broken. It had no protecting valve to prevent the inrush of the sea, and in good weather and in quiet water the barge went down.

[1] She had recently come from a marine railway, whither she had been sent by her owner for her annual overhauling, under instructions to the shipyard people to go over her and to do whatever was necessary. An examination of the pipe, although not easy, was possible. It should have been made; but it was not, doubtless because nobody gave it a thought. It follows that the barge, when she took her cargo on board, was not only unfitted for the work she undertook to do, but the agents and the employees of her owner had not exercised due diligence to make her seaworthy. The Harter Act consequently affords the owner no protection. It nevertheless seeks to limit its liability. The libelants say it may not do so because: (1) The barge was not seaworthy, to the privity or knowledge of her owner. (2) Whether she was or not, the owner had personally contracted that she was seaworthy, and cannot limit its liability for the breach of its undertaking.

Certain experts produced by the libelants have testified that for some time it has not been considered good practice to use iron pipes for such purposes; but the evidence on the whole satisfies me that, whatever may be the case as to sea-going ships, and as to perhaps other kind of craft in other parts of the country, barges built and used in Chesapeake waters have not been equipped with lead or copper pipes. Moreover, so far as my experience goes, and so far as the reported cases seem to show, accidents from defects in their iron pipes have been extremely rare.

There is no evidence that the owner had knowledge or suspicion that the iron pipe was in itself dangerous, and therefore to permit its use could hardly be said to be negligence, and surely falls far short of justifying a contention that the barge was unseaworthy to the privity and knowledge of her owner. The defect in the pipe was not readily detectible, and the possibility of there being one was unlikely to suggest itself to any one not either practically or theoretically concerned with the building or repairing of ships.

[2] The barge was old, but at frequent intervals was sent to repair yards to be gone over. There was no personal negligence on the part of the owner, as distinguished from that for which the shipyard people were blameworthy. In this case there was no express warranty of seaworthiness. The agents of the libelants over the phone called up the owner's Norfolk agent and asked for a barge to take their cargo. The Columbia was sent, and that was all the bargain that was made. Whenever a vessel undertakes to do anything for hire, there is an implied warranty of seaworthiness, and, if such an implied undertaking stands in all respects upon the same footing as an express warranty personally made by the owner, then *Pendleton v. Benner Line*, 246 U.

S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770, requires here a denial of the right to limit liability.

The Circuit Court of Appeals, however, for the Second Circuit, in *The Ice King*, 261 Fed. 897, intimated grave unwillingness so to hold. I am of the same mind. To take the view for which the libelants contend would be to hold that the owner may never limit his liability, either to cargo owner or to passenger, for any harm resulting from any lack of seaworthiness existing at the inception of the voyage, if it could have been discovered by the exercise of due diligence on the part of any agent, servant, or employee of the owner. It does not seem to me that the Supreme Court said anything in *Pendleton v. Benner Line*, supra, and the cases which followed it, to suggest that it had any such far-reaching consequences in contemplation.

It follows that the owner may limit its liability.

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In re HARTMAN-BLANCHARD CO., Inc.

(District Court, N. D. New York. March 6, 1922.)

No. 9455.

1. Bankruptcy ¶123—Referee should grant opportunity for short examination of a creditor before vote for trustee.

Where there is an objection to a claim of a creditor, and a request for opportunity to examine the claimant before the election of trustee, the referee should grant such opportunity, if the examination can be speedily had, and may adjourn the creditors' meeting for the purpose of the examination; but if a lengthy examination will be required, the referee can make such summary investigation as the circumstances require and base his decision thereon.

2. Bankruptcy ¶123—Denial of examination of creditor before voting held not abuse of discretion.

Where the determination of the claim of the principal stockholder of the bankrupt corporation involved the determination of the ownership of property in another state, which would be a long proceeding, the referee was justified in holding that such determination could not be had before the creditors' meeting, and he did not abuse his discretion in allowing the claim and refusing the examination.

3. Bankruptcy ¶120—Disinterested trustee should be selected, where claims may be litigated.

Where several of the claims against a bankrupt must be carefully scrutinized, and where litigation may result, it is important that a disinterested trustee, who does not owe his selection to any creditor whose claim may be involved in the litigation, shall be selected.

In Bankruptcy. In the matter of the Hartman-Blanchard Company, Inc., bankrupt. On review of the action of the referee in allowing the claim of one Blanchard for the purpose of voting for a trustee, and in selecting B. Roger Wales as trustee, because of the failure of any person to receive the vote of the majority of the creditors. Decision of the referee affirmed.

Harry A. Yetter, of Binghamton, N. Y., for bankrupt.

Hinman, Howard & Kattell and Stewart, Moody & Chamberlain, all of Binghamton N. Y., for creditors.

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COOPER, District Judge. This is a review of the action of the referee for Broome county in allowing the claim of one Blanchard for the purpose of voting for a trustee, and in selecting B. Roger Wales as trustee, because of the failure of any person to receive a majority in number and amount of claims filed and allowed.

At the first meeting of creditors called for the purpose of electing a trustee, the referee is vested with power to make a summary examination into the facts when objection is made to claims, proofs of which in proper form have been filed with him, and on such summary examination to allow or disallow a claim for the purpose of voting. Objection was made to a claim in the sum of \$85,000, filed by Blanchard, who was the largest stockholder and the directing force of the bankrupt corporation. The objections were not in writing nor verified. The statute (Comp. St. §§ 9585-9656) does not seem to require this, but the decisions say it is far better that objections be in writing. The objections were based chiefly upon statements in the involuntary petition, in which Blanchard was one of the petitioners.

[1] On the face of the record as it is, it does not appear that in the objections to the bankrupt claim, specific request for an opportunity to examine the claimant or any other person was made by the objecting creditors. If such request is made, ordinarily the referee should grant such opportunity, if it appears with reasonable probability that such examination can be speedily made and completed. Indeed, the meeting may be adjourned for the purpose of the examination. If, however, it appears that the determination of the allowance of the claim will involve a tedious, laborious, and expensive investigation, in short, a suit in equity, the referee has discretion to make such summary investigation as he thinks the circumstances require, and to base his decision thereon.

[2] In this case it may be assumed that the referee examined the involuntary petition, the proof of claim, and the schedules filed by the bankrupt corporation. From them he would be justified in drawing the inferences that the so-called offset against the Blanchard claim would depend upon the determination of the ownership of a culm bank in the state of Pennsylvania, a long proceeding. The referee was justified in holding that such determination could not be had on the hearing, nor within reasonable time. This was a summary examination into the facts involving the Blanchard claim. The statement of the referee that he could not go behind the face of the claims must be taken as an inadvertent statement, as he has such power. It cannot be said, however, that the referee abused his discretion in allowing the Blanchard claim and in refusing the examination, especially in view of the power of the referee and the court to disapprove the selection of a referee brought about by the vote of such a claim.

[3] In a case where several of the claims must be carefully scrutinized, and where litigation may result, it is important that a disinterested trustee, who does not owe his selection to any creditors whose claims may be involved in litigation should be selected. Though the referee was in error in refusing the examination, yet under the circumstances

it cannot be said to have been such abuse of discretion as requires reversing his action.

In view of the assumptions in the foregoing memoranda, which in substance assume that the record is amplified as desired by the contesting creditors, it is not necessary to further consider that motion, and the decision of the referee in refusing to amplify, as well as his selection of a trustee, is affirmed.

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IN re ANN ARBOR MACH. CO.

Petition of BOURNE-FULLER CO.

(District Court, E. D. Michigan, S. D. March 18, 1922.)

No. 4562.

1. Bankruptcy §288(2)—Creditor's right to determination in plenary suit held waived.

Where a judgment creditor, after sale of the property seized on execution had been enjoined, filed a petition to have his claim paid as a preferred claim, and, on denial thereof by the referee, filed a petition to review, he had waived his right to insist on a determination of his lien in a plenary suit brought against him by the trustee.

2. Bankruptcy §199—Levy within four months not void, unless debtor was then insolvent.

Under Bankruptcy Act, § 67f (Comp. St. § 9651), making invalid all levies against a person who is insolvent, made at any time within four months prior to the filing of a petition in bankruptcy against him, a lien obtained by levy of execution within four months before the petition in bankruptcy is not invalid, unless at the time it was levied the bankrupt was insolvent.

3. Bankruptcy §51—Voluntary adjudication does not establish insolvency prior thereto.

Since a voluntary adjudication in bankruptcy is not dependent on insolvency of the bankrupt, either at the time of such adjudication or at any time prior thereto, a voluntary adjudication does not establish the insolvency of the bankrupt, when an execution was levied against his property within four months before the bankruptcy adjudication.

4. Bankruptcy §303(1)—Trustee seeking to avoid lien of execution has burden of proof.

Under the rule that he who asserts a fact, the proof of which is necessary to support a benefit claimed, the effect being to change a normal condition into an abnormal one, has the burden of proving the fact, the trustee in bankruptcy has the burden of proving that an execution lien, valid when obtained, was invalidated by the subsequent bankruptcy proceedings, because the bankrupt was insolvent when the execution was levied.

5. Bankruptcy §357—Trustee held in equity moving party on petition for preferred claim.

Where the sheriff, holding property under execution, was entitled to have his right thereto determined in a suit against him by the trustee in bankruptcy, and his voluntary surrender of the property to the trustee could not affect rights of the creditor, equity can regard the trustee as the moving party, who has the burden of proof on the application of the lien creditor to have his claim preferred for payment out of the proceeds of the trustee's sale of the property subject to his lien.

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In Bankruptcy. In the matter of the estate of the Ann Arbor Machine Company, bankrupt. On petition of the Bourne-Fuller Company to review an order of the referee denying the claim of petitioner as a preferred claim. Order reversed, and cause remanded to the referee.

A. F. Freeman, of Detroit, Mich., for petitioner.

Finkelston & Lovejoy, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of one of the referees in bankruptcy for this district. The referee has filed his return, stating his conclusions and decision, and reciting that attached to the return are the pleadings, but no transcript of testimony, as none was taken at the hearing before the referee which preceded and resulted in the order complained of. From an examination of the entire record in the cause and of the briefs filed by the parties to this proceeding, the following facts appear to be, and for the purposes of this opinion will be treated as, undisputed:

On August 18, 1920, and within four months prior to the filing of the voluntary petition in bankruptcy herein, the petitioner obtained a judgment against the Ann Arbor Machine Corporation, now the bankrupt in this cause, in the circuit court for the county of Washtenaw, Mich., for the sum of \$4,649.95, including costs. On August 23, 1920, petitioner obtained a writ of execution upon said judgment, and said execution was, on the same day, levied by the sheriff of said county upon certain personal property belonging to the bankrupt, by seizure thereof under such writ of execution, which then and thereby became a lien on such property. Thereupon a sheriff's sale under said seizure and levy was set for September 18, 1920, at 10 a. m., at a certain place, and notices thereof duly posted and advertised.

On September 15, 1920, the execution debtor filed a voluntary petition in bankruptcy in this court and on the same day was adjudicated a bankrupt. No showing, nor even allegation, of insolvency of the bankrupt at the date of such adjudication, or at any time prior thereto, was made by said bankrupt, or by any other person, unless the filing of said voluntary petition or said adjudication can be considered as constituting such showing or allegation, as matter of law. On September 18, at the hour and place set for the aforesaid execution sale, as the said sheriff was about to offer the said property for sale, he was served with a restraining order issued by the state court, upon the application of the receiver of the bankrupt estate, enjoining such sale and any further proceedings under said execution. Thereupon said sheriff announced the abandonment of the sale and left the place. Who thereafter had possession of said property, or what disposition was made thereof, the record fails to show. It appears, however, that all of the assets of the bankrupt, including the aforesaid property, have been sold by the trustee in bankruptcy, and that the proceeds realized therefrom exceed the amount of the aforesaid judgment and costs and lawful interest thereon to this date.

On September 7, 1921, and after the bankruptcy sale, petitioner herein filed a petition with the referees in bankruptcy asking that the trustee in bankruptcy be required to pay to it the amount of said judgment,

costs, and interest. The trustee moved to dismiss said petition, the substantial ground urged being:

"That the alleged lien acquired through judicial proceedings is within the provisions of section 67f of the Bankruptcy Act, and is therefore null and void."

The referee entered an order granting the motion to dismiss the petition, and directing that said petition be—

"dismissed in so far as it is a proof of claim \* \* \* asking for payment \* \* \* as a preferred claim and \* \* \* that such petition may stand as a proof of a general claim."

Thereupon petitioner filed the petition now before this court, praying for a review of the said order of the referee.

[1] In view of the extent to which the petitioner has voluntarily asserted and invoked the jurisdiction of the referee to adjudicate the validity of its claim in these bankruptcy proceedings, and the waiver implied from such conduct, it is unnecessary to consider any question as to the right of petitioner, as an adverse claimant, to insist upon a determination of such validity in a plenary suit to be brought against it by the trustee. The meritorious questions involved upon this petition for review may be conveniently grouped and stated as follows:

(1) If a creditor obtains an execution lien against his debtor while the latter is solvent, but within four months prior to the filing by such debtor of a voluntary petition in bankruptcy on which the latter is subsequently adjudged a voluntary bankrupt, is such execution lien nullified by such adjudication?

(2) Does a voluntary adjudication in bankruptcy conclusively show that the bankrupt was insolvent at or prior to the time of the filing of the voluntary petition in bankruptcy on which such adjudication was based?

(3) Where a lien creditor of a bankrupt is claiming the benefit of a lien whose validity depends on the question whether such bankrupt was solvent or insolvent at the time of the attaching of such lien, who has the burden of proof upon such question?

[2] 1. It is correctly conceded by both parties hereto that the provision of the Bankruptcy Act applicable to this matter is section 67f of the act (Comp. St. § 9651), the language of which section material here is as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

It is urged by the trustee, as I understand his position in this connection, that an execution lien obtained within four months prior to the filing of a petition in bankruptcy is nullified by the subsequent adjudication of the execution debtor, regardless of the question whether such debtor was solvent or insolvent at the time of the attaching of such lien, and even if the debtor were solvent at such time. This contention was apparently upheld by the referee. Although numerous authorities

are cited in support of such contention (*Metcalf v. Barker*, 187 U. S. 173, 23 Sup. Ct. 67, 47 L. Ed. 122; *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; *Chicago, Birmingham & Quincy R. Co. v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306; *In re South Arizona Smelting Co.* [C. C. A. 9] 231 Fed. 87, 145 C. C. A. 275; *Wagner v. Mount Carmel Iron Works* [C. C. A. 3] 270 Fed. 80, and others), a careful examination thereof discloses that, with perhaps one exception hereinafter more fully discussed, in none of such cases was involved the precise question presented in the present case. Therefore, although certain language is found among the cases thus cited which, if standing alone and used in a case really involving this question, might merit serious consideration here, none of those decisions can be considered controlling or applicable here.

The decision principally relied upon by the trustee is that of the Circuit Court of Appeals for the Ninth Circuit in the case of *Cook v. Robinson*, 194 Fed. 785, 114 C. C. A. 505. That is the only case which I have been able to discover expressly holding that an inquiry as to the insolvency of the bankrupt at the time of the attaching of the lien is immaterial. There, however, the position of the trustee was based on the alleged insolvency of the bankrupt at the time of the levy of the attachment lien involved, and the argument made in the present case was not there presented until the Circuit Court of Appeals, on its own initiative, expressed the opinion that the questions which had been argued in the court below were irrelevant in view of the adjudication in bankruptcy, saying:

"This judgment of adjudication is preclusive of all these questions [urged]. This, although the petition of intervention was framed upon the theory that it was essential to show that the bankrupt was insolvent at the date upon which the levies of attachment were made, and although the cause was tried upon that theory."

It is difficult, if possible, to follow the reasoning of that court in support of the conclusion just referred to. Without attempting to do so here, I deem it sufficient to state that I am unable to accept or adopt either the argument advanced in support of the conclusion reached, or the conclusion itself.

I am wholly unable to agree with the contention of the trustee in this respect. It is, in my opinion, entirely plain that each of the liens mentioned in section 67f, including that involved herein, is dissolved by the subsequent bankruptcy of the debtor only if the latter was insolvent at the time when such lien was obtained. It will be noted that this section expressly provides that levies and other liens obtained through legal proceedings "against a person who is insolvent \* \* \* shall be deemed null and void in case he is adjudged a bankrupt." "A person who is insolvent" is an "insolvent person," and the meaning of the language just quoted would be no different if it had referred to "liens obtained \* \* \* against an insolvent person." I am of the opinion that if, when a levy or other lien be obtained in legal proceedings against a person, he "is insolvent" and later, and within four months thereafter, a bankruptcy petition is filed on which he "is adjudged a bankrupt," such levy or other lien becomes void; and, con-

versely, unless such person be insolvent at the time of the attaching of such lien, his subsequent adjudication as a bankrupt will not nullify such lien. In re Rhoads (D. C.) 98 Fed. 399; Simpson v. Van Etten (C. C.) 108 Fed. 199; In re Chappell (D. C.) 113 Fed. 545; Stone-Ordean-Wells Co. v. Mark (C. C. A. 8) 227 Fed. 975, 142 C. C. A. 433; Martin v. Oliver (C. C. A. 8) 260 Fed. 89, 171 C. C. A. 125; Jackson v. Valley Tie & Lumber Co., 108 Va. 718, 62 S. E. 965; Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; W. S. Danby Millinery Co. v. Dogan, 47 Tex. Civ. App. 323, 105 S. W. 337; D. C. Wise Coal Co. v. Columbia Zinc & Lead Co., 157 Mo. App. 315, 138 S. W. 67; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 88 Atl. 657.

[3] 2. Does a voluntary adjudication in bankruptcy conclusively show that the bankrupt was insolvent at the time of the attaching of an execution lien against his property prior (in this case, by over three weeks), to such adjudication?

As the adjudication in the present case was voluntary, it is unnecessary to discuss the effect of an involuntary adjudication upon the question of the insolvency of the bankrupt at the time of the commission of an act of bankruptcy upon which such adjudication is based, or at the time of the creation of an execution lien against him, although the rule is now apparently settled to the effect that, at least so far as section 67f is concerned, an involuntary adjudication has no more effect in this respect than a voluntary adjudication.

That a voluntary adjudication does not conclusively show insolvency on the part of the bankrupt at any time prior to such adjudication is made clear by bearing in mind that a voluntary adjudication in its very nature is not dependent upon, and does not even tend to show, such insolvency, either at the time of such adjudication or at any time prior thereto. In re Chappell, supra; In re Carleton (D. C.) 115 Fed. 246; In re Foster Paint & Varnish Co. (D. C.) 210 Fed. 652; In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155; In re Pyatt (D. C.) 257 Fed. 362; Collier (12th Ed.) 141. The contention of the trustee and the conclusion of the learned referee in this connection must therefore be overruled.

[4] 3. On whom, in the present case, rests the burden of proof with respect to the question of solvency or insolvency of the bankrupt at the time of the levy of the execution constituting the lien involved? If no evidence were produced by either party, who would prevail?

It may be stated as a general rule in the federal courts that he who asserts a fact the proof of which is necessary in order that he may obtain the benefit of a condition resulting from, and dependent upon, such fact, the effect being to change a "normal" condition into an "abnormal" one, has the burden of proving such fact. Inasmuch, then, as the lien obtained by petitioner was lawful and valid at the time of its creation and would normally continue so, and as it can become void (that is, its very existence destroyed) only by the presence of the facts mentioned in section 67f, it is clear that unless and until all of those facts, including insolvency at the time of the attaching of the execution lien, are established by legal evidence, such lien continues to be, as it originally was, a valid, existing lien. He, therefore, who asserts

that the life of this lien has been destroyed by reason of the facts mentioned, has the burden of proving such facts (*Stone-Ordean-Wells Co. v. Mark*, supra; *Martin v. Oliver*, supra; *Keystone Brewing Co. v. Schermer*, supra; *W. S. Danby Millinery Co. v. Dogan*, supra; *Newberry Shoe Co. v. Collier*, supra), just as he who asserts that a living man has been killed has the burden of showing that fact.

[5] Another consideration adds strength, if any be needed, to the conclusion just reached. As has already been stated, prior to the filing of the bankruptcy petition the property involved had been seized under writ of execution by the sheriff of the state court, and such property was, therefore, in his possession as an officer of such court and as an adverse claimant. Whether that condition continued up to the time of the filing of the petition in bankruptcy does not appear, but if it had there can be no doubt that the right of such sheriff to retain possession and make proper disposition of such property could have been determined adversely to him only in a plenary suit brought by the trustee in bankruptcy and not in these summary bankruptcy proceedings. Nor can any abandonment or voluntary surrender of possession of the property by the sheriff affect the real situation or prejudice the rights of petitioner in this connection, at least without its consent.

In aligning, then, as this court of equity has the right to do, the parties hereto according to their real interests, the trustee is, in substance and effect, the moving party, and in equity should be so considered and treated. Viewed from any angle, I reach the conclusion that the trustee has the burden of proving that the bankrupt was insolvent at the time of the attaching of the execution lien in question.

The cause will be remanded to the referee for further proceedings not inconsistent with the terms of this opinion.

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### VILLAGE OF HUBBARD, OHIO, v. UNITED STATES et al.

(District Court, N. D. Ohio, E. D. March 13, 1922.)

No. 690.

1. Commerce § 95—Interstate Commerce Commission's findings, supported by evidence, are conclusive.

The findings of the Interstate Commerce Commission are conclusive on the court, if supported by substantial evidence.

2. Commerce § 98—Municipality can sue to enjoin Commission's order contravening franchise contract.

In view of Interstate Commerce Act, § 13 (Comp. St. § 8581), permitting municipal corporations to apply by petition to the Interstate Commerce Commission for the correction of certain forbidden practices, and conferring on the Commission authority to institute inquiries, on its own motion or on the petition of any carrier, into any rate or fare made or imposed by authority of any state, a municipal corporation, which has a franchise contract with a transportation railway company fixing the rate or fare, has the right in its corporate capacity to bring suit under Act Oct. 22, 1913 (Comp. St. § 998), to restrain the enforcement of an order of the Interstate Commerce Commission establishing different rates,

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especially where the corporation might, under Gen. Code Ohio, §§ 4311, 4312, be a party to an action to enjoin a violation of the franchise or to enforce its terms.

3. Commerce ¶85—Interstate Commerce Commission is not given jurisdiction over all interstate commerce.

The Interstate Commerce Act does not, by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers or all interstate commerce or traffic.

4. Commerce ¶85—Electric railways not subject to interstate commerce, unless they possess characteristics specified in transportation act.

Under Interstate Commerce Act, § 1, as amended by Transportation Act of 1920, making the act applicable to carriers engaged in the interstate transportation of passengers or property wholly by railroad, which was the same in that respect as the language of the original act, when construed with amended section 13 of that act, particularly in view of paragraphs 3 and 4 thereof, and sections 15a and 20a, which are added by sections 422 and 439 respectively of the Transportation Act of 1920, and with title 4, § 402, par. 22, title 2, § 209, and title 8, § 300, of that act, an electric street or interurban railway is not subject to the Interstate Commerce Commission unless it is being operated as part of a general steam railroad system, is engaged in the general business of transporting freight in addition to its passenger and express business, or does not have, as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both.

5. Commerce ¶85—Electric interurban railway held not "operated as part of system of steam railroads."

An interurban electric railway which had two connections with a steam railroad system and received from it cars containing carload shipments for delivery to points along its line from the steam railroad, but was not related in management to the latter, or part of its system, was not operated as part of a general steam railroad system of transportation.

6. Commerce ¶85—Interurban electric railway held not engaged in "general transportation of freight."

Proof that an interurban electric railway carried some parcels, designated by the Commission as freight, in less than carload lots, but the receipts from which did not exceed 5 per cent. of its gross earnings, and the service was more nearly like that which is called express than freight traffic, does not show that the railroad was engaged in general transportation of freight, in addition to its passenger and express business.

In Equity. Suit by the Village of Hubbard, Ohio, against the United States and others, to restrain the enforcement of an order of the Interstate Commerce Commission. On motion by plaintiff for a preliminary injunction, and by defendants to dismiss the bill. Motion to dismiss denied, and preliminary injunction granted.

John J. Boyle and Moore, Barnum & Hammond, all of Youngstown, Ohio, for village of Hubbard.

Blackburn Esterline, Sp. Asst. Atty. Gen., for the United States.

Walter McFarland, of Washington, D. C., for Interstate Commerce Commission.

Douglass D. Storey (of Hause, Evans & Baker), of Harrisburg, Pa., and Union C. De Ford (of Harrington, De Ford, Huxley & Smith), of Youngstown, Ohio, for Pennsylvania-Ohio Power & Light Co.

Before DONAHUE, Circuit Judge, and KILLITS and WESTENHAVER, District Judges.

WESTENHAVER, District Judge. This suit is brought under the terms of the Act of October 22, 1913 (U. S. Comp. Stat. § 998). Plaintiff seeks a preliminary injunction restraining the Pennsylvania-Ohio Power & Light Company from putting into effect an order of the Interstate Commerce Commission made November 7, 1921. This order requires that company to cease and desist from practicing a certain undue prejudice, preference, advantage, and unjust discrimination found by the Commission to exist in the relation of intrastate and interstate passenger fares, and to establish, put in force, and maintain a certain schedule of passenger fares for the transportation of passengers in intrastate commerce between Hubbard, in the state of Ohio, and Youngstown, in the state of Ohio.

This cause has been heard, argued, and submitted upon plaintiff's application for a preliminary injunction, upon the motion of the defendants the United States and the Pennsylvania-Ohio Power & Light Company to dismiss plaintiff's bill, and upon the merits as affecting plaintiff's right to relief, as they arise upon an answer filed by the Interstate Commerce Commission. The motion to dismiss is on two grounds: (1) That plaintiff is without interest in the controversy and has no standing in this court to maintain its bill; (2) that the bill is without equity on its face and does not state a cause of action. The answer of the Interstate Commerce Commission sets up its findings of fact and its order, and contends that, inasmuch as these findings are supported by substantial evidence, they are conclusive upon the court, and hence that the plaintiff is not entitled to any relief. On this hearing the full transcript of the proceedings and testimony taken by the Interstate Commerce Commission, in addition to its report and order, were introduced in evidence, and are considered in disposing of the several matters presented for consideration.

Plaintiff assails the validity of the Interstate Commerce Commission's order on several grounds, which, stated in our own language, reduce themselves to two: (1) That Congress has not conferred jurisdiction on the Commission over an electric interurban railway company of the kind which the record shows the Pennsylvania-Ohio Power & Light Company to be, particularly over its purely intrastate transportation of passengers, conducted under state and municipal franchises which are in legal effect binding contracts; (2) that the franchise granted by the village of Hubbard to the predecessor in title of the Pennsylvania-Ohio Power & Light Company, and duly accepted by it and binding as a contract on the present defendant, requires the transportation of passengers between Hubbard, Ohio, and Youngstown, Ohio, at a fixed rate of fares, which franchise contract cannot be impaired by an order of the Interstate Commerce Commission, and is, indeed, beyond the constitutional power of Congress itself to annul and impair. Such, in brief, are the respective contentions.

The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published (64 I. C. C. 498), it will not be repeated here, except so far as is necessary to show clearly the questions to be decided and the basis of our decision. In 1901 a franchise ordinance was passed by the village of

Hubbard and accepted by the Youngstown & Sharon Railway Company, a corporation chartered as a street railway under the statutes of Ohio, to operate between Youngstown, Ohio, and Sharon, Pa. In 1917 this company was merged with four other Ohio corporations and one Pennsylvania corporation, under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. On November 21, 1920, a new corporation, the present defendant, the Pennsylvania-Ohio Power & Light Company, was organized to take over and operate the Youngstown-Sharon line. The line thus acquired by defendant, and now operated by it, extends from Youngstown, Ohio, only to the Ohio-Pennsylvania state line, and the defendant operates its cars from the state line into Sharon, Pa., a fractional part of a mile, over the tracks of the Shenango Valley Traction Company.

The maximum distance from Youngstown to Hubbard is 8.75 miles, and from Hubbard to Sharon is 7.18 miles. The franchise provides for the maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon of a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets good for 22 rides for \$2, and 54-trip commutation tickets for \$3.80. Effective February 15, 1920, this Mahoning & Shenango Railway & Light Company, then the owner and operator of defendant's line, by a tariff filed with the Interstate Commerce Commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to \$5, and canceled the round trip and special tickets between these points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, also filed with the Interstate Commerce Commission a tariff, in which it proposed to establish the same rates of fare between Hubbard and Youngstown as those in effect between Hubbard and Sharon, as above stated, and also to increase and establish certain through fares between Sharon and Youngstown, being substantially the sum of the local fares.

A tariff carrying these same fares was presented to, and rejected by, the Public Utilities Commission of Ohio, in so far as it attempted to increase the fares between Hubbard and Youngstown, on the ground that this commission was without jurisdiction to allow and establish rates and charges in excess of those prescribed by franchise contracts. This seems to be the present state of the Ohio law. See *Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission*, 98 Ohio St. 303, 120 N. E. 835; *Interurban Ry. Co. v. Public Utilities Commission*, 98 Ohio St. 267, 120 N. E. 831, 3 A. L. R. 696; *Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission*, 98 Ohio St. 305, 120 N. E. 835. In consequence of these complications the Pennsylvania-Ohio Power & Light Company filed its petition with the Interstate Commerce Commission, complaining of the undue preference and discrimination existing between interstate and intrastate passenger fares, which, after notice and on hearing, resulted in the order above stated, which plaintiff is seeking to enjoin.

[1] The Interstate Commerce Commission's findings of fact, it is settled law, are conclusive upon this court, if supported by substantial evidence. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 481, 38 Sup. Ct. 383, 62 L. Ed. 831; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62, 41 Sup. Ct. 24, 65 L. Ed. 129. The Commission's findings of fact in this situation are: That the interstate passenger cash and 54-ride commutation fares between Sharon and Hubbard, and also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted, and will result, in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the state of Pennsylvania and between points in the state of Ohio and Sharon, Pa., in undue preference and advantage to persons traveling intrastate between points in Ohio, and in unjust discrimination against interstate commerce; also that, whether the passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can, and should, be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found to be reasonable as between Hubbard and Sharon. It is ordered that passenger fares between Hubbard, Ohio, and Youngstown, Ohio, shall be charged which shall not be less than 20 cents when paid in cash and \$5 for 54 rides when a commutation ticket is purchased.

Plaintiff's contention, that defendant's railroad is not that kind of a railroad engaged in interstate commerce or transportation which is made subject to the jurisdiction of the Interstate Commerce Commission, requires an inquiry as to whether the facts found in this respect by the Commission support its assumption of jurisdiction. Plaintiff contends that it is not engaged in the general business of transporting freight in addition to its passenger and express business, and that it is not operated as a part of a general steam railroad system of transportation. The controversy before the Commission involved nothing except passenger fares. In the Commission's report it is said:

"Petitioner is also engaged in the transportation of freight, as will be later explained."

Later in the report the facts in this regard are stated. The defendant has two connections, one direct, and the other over a private siding at Masury and at Stop 41, both between Hubbard, Ohio, and Sharon, Pa., with the New York Central Railroad. It does not originate and deliver freight traffic to the New York Central Railroad, but, during the years 1919 and 1920, 922 cars of freight were received by it from that line for delivery chiefly at points on defendant's line. The defendant also operates a daily less than carload freight or parcel

package service between Youngstown and Sharon, and on three days a week operates a through car for such service from Sharon, in Pennsylvania, to Newcastle, Pa. This through car, it will be noted, is loaded and operated wholly outside of the state of Ohio, and is transported on a line not owned by defendant. In 1919 this less than carload freight amounted to 6,240 tons and produced a gross revenue of \$18,000. The revenue from carload and switching services on cars received from the New York Central was \$6,246.52. In 1920 the less than carload freight was 5,474 tons and produced a revenue of \$21,221, and the carload and switching traffic yielded \$5,259. The passenger revenue receipts for 1920 were \$332,173.43, and in 1921 were \$367,529.22. Thus it appears that the entire receipts from freight and switching services, including the carload freight from Sharon, in Pennsylvania, to Newcastle, Pa., are equal, substantially, to 7 per cent. only of the entire gross earnings. Plaintiff asserts that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line, and that its less than carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight traffic.

[2] Upon these facts logically the first proposition of law to be considered is whether defendant's objection is sound, that the plaintiff is without interest in the controversy and has no standing in court. Neither in the oral argument nor in the briefs filed is this proposition given much consideration, and no authorities are cited supporting the contention. We assume this contention to be that the village of Hubbard in its corporate capacity has no such interest in the rights of passengers on defendant's railway, even though citizens and residents of the village of Hubbard, as will entitle it to maintain an action in their behalf, and that this case falls within the rules of law announced in *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277, 31 Sup. Ct. 434, 55 L. Ed. 465. In this case it was held that the state of Oklahoma might not sustain an original bill in the United States Supreme Court to enjoin undue discrimination against its citizens in favor of citizens of the state of Kansas. The principles of that case are not applicable.

The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared, and was heard. Section 13, Interstate Commerce Act (Comp. St. § 8581), permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the Commission to institute inquiries on its own motion or on the petition of any carrier into any rate or fare made or imposed by authority of any state. Obviously, therefore, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard, and, if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the Commission. It has long been the practice to permit representative associations and exchanges to insti-

tute and maintain proceedings before the Commission and to be heard in court against its orders. See *Judson on Interstate Commerce* (3d Ed.) § 437. In *City of New York v. United States et al.* (D. C.) 272 Fed. 768, a municipal corporation, the city of New York, was the party plaintiff, and, although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action.

Moreover, Ohio municipal corporations, when parties to a franchise contract, may be parties to actions to enjoin a violation or to enforce the terms thereof. G. C. §§ 4311 and 4312; *City of Springfield v. Springfield Gas Co.*, 12 Ohio Cir. Ct. R. (N. S.) 392, affirmed without report 81 Ohio St. 537, 91 N. E. 1139. No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not, both here and before the Interstate Commerce Commission, become a party to and maintain such suits as are necessary to assert and protect its contract rights.

Defendant's objection that plaintiff's bill does not state a cause of action, and plaintiff's objection that the order of the Interstate Commerce Commission is void because defendant's electric street or inter-urban railway is not brought within the power and authority conferred by Congress on the Commission, depend upon the same considerations, and will be considered together. Plaintiff's objection that the order of the Commission, if within the apparent power thus conferred on the Commission, is none the less void because it invades the reserved power of a state over purely intrastate transportation, or because it impairs the obligations of a franchise contract, depends upon separate and independent considerations. We shall consider these propositions in the reverse order.

In the view we take of this case it becomes unnecessary to consider any question of constitutional power on the part of Congress. It is true that franchise grants, under the law of Ohio, are contracts binding upon both parties, and that the state of Ohio may not impair the obligation thereof. It is also true that a franchise of the kind under consideration, fixing the rate to control beyond the limits of the municipality granting it, is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it. See *Interurban Railway & Terminal Co. v. City of Cincinnati*, 93 Ohio St. 108, 112 N. E. 186; *Interurban Railway Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696; *City of Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648. It may also be true that the principles of law announced in *Houston & Texas Ry. Co. v. United States*, 234 U. S. 343, 34 Sup. Ct. 833, 58 L. Ed. 1341, known as the *Shreveport Case*; *American Express Co. v. Caldwell*, 244 U. S. 617, 37 Sup. Ct. 656, 61 L. Ed. 1352; *Illinois Central Railway Co. v. Public Utilities Commission*, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. Ed. 425; and particularly in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. —, 42 Sup. Ct. 232, 66 L. Ed. —, decided by the United States

Supreme Court February 27, 1922, known as the Wisconsin Passenger Fare Case—are not applicable to the precise situation here presented. However, we pass, without deciding, the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention.

Plaintiff contends that upon the facts as found the Pennsylvania-Ohio Power & Light Company is not a street electric passenger railway engaged in the general business of transporting freight in addition to its passenger and express business, nor a street or suburban electric railway operated as a part of a general steam railroad system of transportation, nor an interurban electric railway operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, but, on the other hand, is a street or interurban electric railway of a different character, and such as has not been made subject to the jurisdiction of the Interstate Commerce Commission.

[3] Apparently, then, the question at issue comes down to one of power in the Interstate Commerce Commission; that is to say, the power and authority conferred on the Commission by the Interstate Commerce Act (24 Stat. 379). That act does not by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers, or all interstate commerce or traffic. It is limited to interstate commerce or transportation carried on by certain kinds of interstate carriers. Thus Mr. Justice Lamar, delivering the opinion in *Omaha Street Railway v. Interstate Commerce Commission*, 230 U. S. 324, 336, 33 Sup. Ct. 890, 891 (57 L. Ed. 1501, 46 L. R. A. [N. S.] 385), said:

"When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887."

It was accordingly held that an electric street railway, operating in and between Council Bluffs, Iowa, and Omaha, Neb., over a bridge across the Missouri river constructed for freight and passenger traffic under an act of Congress, was not subject to the jurisdiction, nor its rates within the control, of the Interstate Commerce Commission. A careful examination, therefore, of the several provisions of the Interstate Commerce Act becomes necessary.

From 1887 to 1906 the purview of the act was limited to commerce between the states carried by railroads. By the Hepburn Act of 1906 (34 Stat. 584) oil pipe lines, express companies, and sleeping car companies were brought within its scope. By the act of 1910 (36 Stat. 539) were added telegraph, telephone, and cable companies. The Transportation Act of 1920 (41 Stat. 456) leaves the provisions of the act as to the carriers subject to the jurisdiction of the Commission as they were in these previous acts, but refers more frequently to street or suburban and interurban electric railways, in order to exclude them from the purview of certain provisions and sections of the act. Section 400 provides, among other things, as follows:

"That the provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property *wholly by railroad*,<sup>1</sup> or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment, \* \* \* but shall not apply (a) to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, *wholly within one state* and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

The most material language of the provision above quoted are the words "wholly by railroad" and "transportation of passengers or property \* \* \* wholly within one state." This language was in section 1 of the act of 1887, and has been repeated in this section every time the section has been amended. This section was amended and re-enacted with this language in the Transportation Act of 1920, and must, in ascertaining the meaning of the act, be given equal weight and significance with new paragraphs 3 and 4 of amended section 13, so much relied on by defendants. For the purposes of this case our inquiry is limited to a determination of what are common carriers by railroad, and the further inquiry is: What is a railroad, within the purview of this act? The definitions of "common carrier" and of "railroad" and of "transportation" in paragraph 3, section 400, Transportation Act, 1920, give no aid in answering these inquiries.

It was not until the amendments of June 18, 1910, that street electric railways are mentioned in the act. The authority previously conferred to establish through routes, subject to the limitation "that no reasonable or satisfactory through routes exist," was by the 1910 amendment enlarged, so that the Commission might thereafter, whenever it deemed it necessary or desirable in the public interest, establish through routes without regard to existing routes. This power, however, was limited by a provision in these words:

"The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."

This language is ambiguous. Previous to its enactment, the Interstate Commerce Commission had assumed jurisdiction over electric street railways carrying passengers alone in numerous cases. See *Willson v. Rock Creek Ry. Co.*, 7 Interst. Com. Com'n R. 83; *Chicago & M. Electric R. Co. v. Illinois Cent. R. Co.*, 13 Interst. Com. Com'n R. 20; *Beall v. Washington, A. & Mt. V. Ry. Co.*, 20 Interst. Com. Com'n R. 406; *Cincinnati & Columbus Traction Co. v. Baltimore & O. S. R. Co. et al.*, 20 Interst. Com. Com'n R. 486. The provision above quoted, it was argued, was an indirect recognition that this jurisdiction was rightfully assumed, and also a recognition by implication that electric street railways were railroads as defined in section 1, and were therefore subject to the jurisdiction of the Commission. On the other hand, it was urged that this proviso was inserted out of an abundance of caution, and to repel the implication that the word "railroad," as used

<sup>1</sup> Italics in this opinion are ours.

in section 1, did include street electric railways as well as railroads, well-known highways of interstate commerce, as understood when the original act was passed. In *Omaha Street Railway Co. v. Interstate Commerce Commission*, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, decided June 9, 1913, this difference of opinion was settled by holding that "railroads," as used in the Interstate Commerce Act, was limited to railroads, as distinguished from street railroads, and that the proviso of June 28, 1910, above quoted, was probably inserted out of an abundance of caution, and did not warrant the holdings, previously made by the Interstate Commerce Commission and by the Commerce Court, that ordinary street electric railways engaged in interstate transportation of passengers had been brought within the jurisdiction of the Interstate Commerce Commission.

This case will be referred to again at more length, but, before doing so, the several additional references to street electric railways in the Interstate Commerce Act should be noted. In section 402, paragraph 22, Transportation Act 1920, it is provided:

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

New section 15a (Transp. Act 1920, § 422) is, in part, as follows:

"When used in this section \* \* \* the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies; (b) *street or suburban electric railways* unless operated as a part of a general steam railroad system of transportation; (c) *interurban electric railways* unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

It should be noted that this definition of the word "carrier" is for the purposes of section 15a. That section has for its object the establishment of such tariff rates as will enable the carriers, either as a whole or in groups, to earn an annual net railway operating income equal as near as may be to a fair return upon the aggregate value of their property. In passing, it should also be noted that the provisions of this section and of section 20a are the main support of the enlarged jurisdiction of the Interstate Commerce Commission to fix purely intrastate rates, as will appear from a reading of Chief Justice Taft's opinion in the *Wisconsin Passenger Fare Case* above cited.

New section 20a (Transp. Act 1920, § 439) provides, in part, as follows:

"That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation), which is subject to this act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act."

This definition likewise is for the purposes of that section, and the section deals with the issue of capital stock or other securities by rail-

roads, and confers wide powers with respect thereto upon the Interstate Commerce Commission.

The foregoing are all the references to street electric railways or interurban railways found in the Interstate Commerce Act. However, two other references thereto are found in other parts of the Transportation Act of 1920. In section 209, providing for a guaranty to carriers during a limited period after termination of federal control, it is provided:

"When used in this section—the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under federal control at the time federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under federal control; and (2) a sleeping car company whose system of transportation is under federal control at the time federal control terminates; but does not include a street or interurban electric railway not under federal control at the time federal control terminates, *which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.*"

In section 300, title 3, creating the Labor Board, to deal with disputes between carriers and their employees and subordinate officials, it is provided:

"When used in this title—(1) The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Summarizing and bringing together the references to carriers above quoted, otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is:

"Street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

In section 15, as amended June 18, 1910, and re-enacted February 28, 1920, the reference is to:

"Street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business."

In new section 15a the reference is to:

"Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation."

Also to:

"Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

In new section 20a the reference is to:

"Street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

In section 209, title 2, Transportation Act of 1920, the reference is to:

"A street or interurban electric railway \* \* \* which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic."

In section 300, title 3, the reference is:

"A street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

[4] Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the Commission. These characteristics are: (a) Being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission, unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

As already stated, the Interstate Commerce Commission early assumed jurisdiction over street or interurban electric railways, if engaged to any extent in the interstate transportation of passengers, even if not engaged in the general transportation of freight. See the references above given. In *Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission* (C. C.) 179 Fed. 243, Circuit Judges Sanborn, Hook, and Adams, differing from the Interstate Commerce Commission, held that street railway companies engaged in operating street cars by electricity for the transportation of passengers were not within the definition of common carriers by railroad, as used in section 1 of the Interstate Commerce Act, but that common carriers by railroad meant commercial railroad companies engaged in the general transportation of freight and passengers. Accordingly a preliminary injunction was awarded against the Commission's order undertaking to regulate interstate transportation of passengers by an electric street railway. This case was transferred to the United States Commerce Court, and that court, on final hearing, reversed the Circuit Judges. See 191 Fed. 40. The United States Supreme Court, in *Omaha Street Railway Co. v. Interstate Commerce Commission*, *supra*, reversed the Commerce Court and affirmed the Circuit Court. In appraising the force and effect of this decision it is necessary to take into account the long line of Interstate Commerce Commission decisions prior thereto holding to the contrary, and to note carefully the reasoning of the Commerce Court in sustaining them. There is marked similarity in that reasoning and in the reasoning of the later opinions of the Interstate Commerce Commission, upon the basis of which the order now under consideration was made.

Mr. Justice Lamar, delivering the unanimous opinion of the Supreme Court, holding that street electric railways, although engaged in inter-

state transportation of passengers, were not common carriers by railroad, as defined in section 1 of the Interstate Commerce Act, gives reasons therefor which, it seems to us, are as sound to-day as they were in 1913. He says:

"Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines or under different municipal control. When these street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887."

Further:

"The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The mischief which Congress intended to remedy by the Interstate Commerce Act is adverted to as a reason tending to show that street electric railroads were not within the purview of section 1. Street railroads, he said, "had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit." The question, it is true, is left open as to the proper classification of that new type of interurban railway developed since 1887 and which, "with electricity as motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed." It is intimated that such electric interurban railways might be included within the definition of "common carrier by railroad," as used in section 1, but no opinion is expressed.

So far as we have discovered, the United States Supreme Court has not again given any consideration to this precise question. It has, however, considered the definition of a street or electric interurban railway as used in the Safety Appliance Act (Comp. St. § 8605 et seq.) and the federal Employers' Liability Law (Comp. St. §§ 8657-8665)—see *Kansas City v. McAdow*, 240 U. S. 51, 36 Sup. Ct. 252, 60 L. Ed. 520; *Spokane & Inland R. Co. v. Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125—and has held that an interurban electric railway, operating from city to city and engaged in interstate traffic, is within the purview thereof. The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, and inasmuch as interurban electric railways engaged in the interstate transportation of passengers are within the mischief to be remedied just as much as interstate steam railroads, the exception should be limited to street railways within cities and upon city streets and in their immediate suburbs. On the other hand, the rule of construction applicable to acts of Congress encroaching upon the power of a state to regulate and

control the transportation of passengers and property within a state is one of strict construction, and will not include intrastate traffic unless the intent is plainly expressed. Thus, in *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 510, 38 Sup. Ct. 170, 176 (62 L. Ed. 425), it is said:

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

In *South Covington & Cincinnati Street Railway Co. v. City of Covington*, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792, much relied on by defendants, the decision is wholly inapplicable and deals with entirely different questions. Nor does it seem to us that the question under consideration is materially affected, much less controlled, as is contended by defendants' counsel, by the *Shreveport Case*, supra, *American Express Co. v. Caldwell*, supra, *Illinois Central R. R. v. Public Utilities Commission*, supra, nor by new paragraphs 3 and 4, section 13, Interstate Commerce Act, nor by the decision in the *Wisconsin Rate Case*.

The question here is what interstate carriers by railroad and what classes of interstate and intrastate traffic are brought within the jurisdiction of the Interstate Commerce Commission. This is a question of intention, and is to be ascertained from the provisions of the Interstate Commerce Act, including its original as well as amended provisions, and the several decisions of the Supreme Court construing the same. The decision in the *Wisconsin Rate Case* rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13, apply only to railroads of a certain character, and do not include electric street and interurban railways unless thus engaged. Assuming for the purpose of this opinion the existence in Congress of a power to include all street and interurban electric railways, and to invalidate all municipal and state franchises relating to purely intrastate traffic, upon the principles of the *Shreveport* and the *Wisconsin Rate Cases*, nevertheless the intent so to do will not be inferred unless and except so far as it is clearly manifested.

From the foregoing considerations we deduce these conclusions:

Electric street, suburban, or interurban railways are included within "common carriers by railroad," as that expression is used in section 1 of the Interstate Commerce Act, only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the Interstate Commerce Act and the Transportation Act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation, or they must be engaged in the general business of transporting freight in addition to their passenger and express business, or they must be operated as a part of a general steam railroad system of transportation or engaged in the

general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act, nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business.

This, it seems to us, is the only proper interpretation and effect of the several amendments to the Interstate Commerce Act, made since the decision in the Omaha Street Railway Case. In that case, as already stated, it was left a query as to whether the act included the new type of interurban railroad developed since the original act was passed, which operates with electricity as motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway Case.

This conclusion is greatly strengthened by the additions to the Interstate Commerce Act made by the Transportation Act of 1920. The establishment of the Labor Board to settle controversies between carriers and employees, the guaranty for a limited period of a fixed return upon railroads, the grouping of railroads into classes, and requiring rates to be fixed so as to allow a fair return to be earned on the property as a whole, the control assumed and exercised over the construction of new railroads, and the making of extensions and the issuance and sale of securities, are all a part of a general scheme from which all street or interurban electric railways are excluded, unless possessing these characteristics.

[5] The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation, or was engaged in the general transportation of freight, in addition to its passenger and express business. Plainly and admittedly the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads; but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway.

[6] Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the Commission's

report refers thereto as less than carload freight; but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business cannot be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the Interstate Commerce Act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed.

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CITY OF WELLSVILLE, OHIO, v. UNITED STATES et al.

(District Court, N. D. Ohio, E. D. March 13, 1922.)

No. 682.

**Commerce §85—Interurban electric railway held not engaged in "general transportation of freight."**

The fact that a street and interurban electric passenger railway carried a small amount of freight in less than carload lots, from which its revenues were less than 5 per cent. of its gross revenues and were reported under express earnings, does not establish that the railway was in the general transportation of freight.

In Equity. Suit by City of Wellsville, Ohio, against the United States and others. On motion of plaintiff for a preliminary injunction and motion of defendants to dismiss the bill. Motion to dismiss denied, and preliminary injunction granted.

Charles Boyd, City Sol., James E. O'Grady, both of Wellsville, Ohio, for city of Wellsville.

Blackburn Esterline, Sp. Asst. Atty. Gen., for the United States.

Walter McFarland, of Washington, D. C., for Interstate Commerce Commission.

Agnew Hice, of Beaver, Pa., and S. H. Tolles (of Tolles, Hogsett, Ginn & Morley), of Cleveland, Ohio, for Steubenville, E. L. & B. V. Traction Co.

Before DONAHUE, Circuit Judge, and KILLITS and WESTENHAVER, District Judges.

WESTENHAVER, District Judge. This suit is the counterpart of the Village of Hubbard v. United States et al., 278 Fed. 754, this day decided. It was heard, argued, and submitted at the same time, and involves substantially similar facts and precisely the same questions of law. These questions likewise arise upon plaintiff's application for a preliminary injunction and upon motion of defendants the United States and the Steubenville, East Liverpool & Beaver Valley Traction Company to dismiss, and upon an answer to the merits filed by the

Interstate Commerce Commission setting up its order and its findings of fact. The same conclusion and judgment is required.

The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found, is a street and interurban electric passenger railway, and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant, than in the Village of Hubbard Case. In the company's annual reports its gross receipts from these freight earnings are reported under express earnings. The company is not, in our opinion, subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in our opinion in the Village of Hubbard Case.

The motion to dismiss will be denied. A preliminary injunction will be granted as prayed.

#### QUEEN INS. CO. OF AMERICA v. GLOBE & RUTGERS FIRE INS. CO.

(District Court, S. D. New York. March 11, 1922.)

##### 1. Collision ⚡40—Vessels in meeting convoys held both at fault.

Where two convoys of vessels sailing without lights met nearly head on, each of two colliding vessels *held* at fault, the east-bound vessel for failing to turn back to the designated course after porting to pass a vessel in the first tier of the meeting convoy, and in stopping across the path of a vessel in the second tier, and the west-bound vessel for not immediately slackening speed when the other convoy was sighted.

##### 2. Collision ⚡108—Faults in navigation in meeting convoys held not errors in extremis.

Faults in navigation by vessels in two convoys, which met nearly head on at night while sailing without lights, *held* not excusable as faults in extremis, notwithstanding the confusion which would naturally be caused by the situation.

##### 3. Collision ⚡35—Prime cause of collision between vessels in meeting convoys held failure of naval authorities to prevent meeting.

The original cause of a collision between two convoys of vessels, which met nearly head on at night while sailing without lights, was the failure of the naval authorities, either those in charge of the convoys or those on the shore, to prescribe courses for the convoys which would have prevented their meeting.

##### 4. Insurance ⚡406—Character of cargo immaterial in determining whether loss was war risk.

In view of the known purpose of Germany to destroy ships, regardless of the nature of the cargo, the character of the cargo carried by a vessel under convoy, whether munitions, contraband or noncontraband, is immaterial in determining whether the loss of the vessel was due to a war risk.

##### 5. Insurance ⚡413—Liability for collision on marine war risk policy is question of proximate cause.

In deciding whether the insurer of a vessel against war risks was liable for loss of the vessel, the determining issue is the proximate cause of the loss in the legal sense of that phrase.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. Insurance ¶413—Word “consequences,” in marine policy, refers to totality of causes.

Where a marine insurance policy speaks of the “consequences” of an enumerated list of happenings, the word “consequences” refers to the totality of causes and not to their sequence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consequence.]

7. Insurance ¶406—“Acts in prosecution of hostilities” is not equivalent to “all consequences of hostilities or warlike operations.”

Where a war risk policy insured against “acts in prosecution of hostilities between belligerent nations,” it did not fully supplement a policy insuring against other perils “free from all consequences of hostilities or warlike operations.”

8. Insurance ¶146(1)—Marine insurance clause should be construed to secure uniformity in the commercial world.

The interpretation of a marine insurance policy is not a question of morals or of public policy, and the important thing is to secure uniformity of an interpretation in a commercial world embracing more than one continent and more than one ocean.

9. Insurance ¶406—Sailing in convoy under naval directions is not “warlike operation.”

The fact that a merchant vessel sailed in convoy under compulsion of the war situation and subject to naval direction, and thereby increased the danger of collision, which is one of the perils of the sea, was not in itself a “warlike operation,” so as to render the insurer against war risks liable for loss of the vessel due to a collision which resulted when two such convoys met nearly head on at night.

In Admiralty. Libel by the Queen Insurance Company of America against the Globe & Rutgers Fire Insurance Company. On final hearing. Libel dismissed.

Bigham, Englar & Jones, of New York City (Oscar R. Houston, of New York City, of counsel), for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City (Charles C. Burlingham, Van Vechten Veeder and Ralph W. Brown, all of New York City, of counsel), for respondent.

HOUGH, Circuit Judge. The Italian steamship Napoli sailed from New York for Genoa in June, 1918. At Gibraltar she became one of a convoy of cargo boats proceeding from Gibraltar to Genoa. On this trip Napoli collided with the British steamship Lamington, which was one of another convoy of similar vessels then proceeding from Genoa to Gibraltar. About an hour after collision, and as a result thereof, Napoli sank; both ship and cargo became a total loss.

Part of Napoli's cargo was covered by what is commonly known as a “marine policy,” issued by libelant, Queen Company, and the same cargo was further covered by what is called a “war risk” policy issued by respondent, Globe Company. Loss being admitted, but each underwriter asserting that the other should pay, each by agreement and without prejudice paid the insured half the amount due by some one, whereupon libelant (having succeeded in the familiar manner to the rights of cargo owner) brought this suit against the “war risk” underwriter, seeking to recover as of right the amount not already advanced by respondent.

Thus this question is presented, viz.: Under the circumstances in evidence, was the collision between Napoli and Lamington (which admittedly produced the loss of the insured cargo) due to a "marine risk" or "war risk"?

The libel asserts both convoys were "directed by competent naval authorities"; the west-bound convoy was ordered to make certain designated courses; all vessels were required to travel in specified formation, without lights, and to obey the orders of the convoying warships in the event of known proximity of German submarines; finally the duly constituted naval authorities so laid out the courses of the convoys that "they would meet in the course of their navigation." It is then alleged in substance that, as the result of these convoy regulations, the collision occurred, in that, shortly before midnight of July 4-5, the convoys met "approximately head on," producing a situation of such danger, difficulty, and confusion that, although both Lamington and Napoli "acted with all due care," collision occurred. This is in effect an averment that collision was proximately caused by the method of convoying.

It is also alleged that in the east-bound convoy "some or all of the vessels [therein] carried munitions and/or contraband, and all of them were liable to condemnation or destruction under the German law." This is an endeavor by the pleader to assert that Napoli's going in convoy was (in the language of the policy in suit) "an act of kings, etc., authorized by and in prosecution of hostilities."

Before considering the words of contract, the facts must be stated, so far as the meager record permits their ascertainment. The parties have united in seeking information about the collision; but the naval authorities of Great Britain and Italy refused assistance, wherefore the evidence consists of logs and statements from such of the escorting vessels as were of the United States navy, affidavits or depositions from officers and men of Napoli, given in legal or administrative proceedings, and opinions rendered therein in Italy and England, together with excerpts from the manifest of the Napoli.

Unsatisfactory as this is, there is, I think, enough to enable the court to treat the legal questions, without feeling that, were the facts really known, there might appear some error or fault in ship management that would dispose of the case, before reaching the problem of interpreting policy clauses in question.

Without resting decision even partly on the truth that libellant must bear the burden of proof, I find, on all the evidence, nothing to show that Napoli or any other merchantman was compelled to go in convoy. For all that appears, she was free to sail alone. But it is an inference easily made, from what is proven, that she would have run far greater danger by avoiding convoy than by joining one. She sought the protection of a convoy, and so did all other well-advised vessels of no greater speed than Napoli possessed (12 knots).

If a vessel took convoy, she was obliged to conform to instructions as to courses and management given by "competent naval authorities," and such instructions came from three sources: (1) General orders at Genoa or Gibraltar, as the case might be, emanating from shore or

port authority, or perhaps the admiral on the station, (2) the senior naval officer in escort, who enforced the general orders and exercised his own judgment in departing from them in detail, if necessary, and who might or might not be (3) the commodore of the convoy, who carried his flag on a merchantman, and sought to keep the other cargo boats in rank, at proper speed, etc. If, however, this commodore ranked the commanders of all the escorting vessels, he was also the senior naval officer present, and functioned as such.

Of the two convoys in question, the west-bound was in charge of a rear admiral of the Italian navy, on a merchantman, the Italian steamship *Ansaldo III*, who was both senior officer present and convoy commodore; the escort consisting of small vessels from British, Italian, and American navies. The east-bound convoy had for commodore a commander in Italian navy on board the *Napoli*, the senior naval officer was a captain in the British navy, and the escorting vessels were of the same diverse nationalities as were those of the other convoy.

It is not, however, true that either convoy or both were obliged by orders given on or before departure to pursue fixed courses for the entire contemplated trip. The west-bound vessels were merely ordered after leaving a buoy outside Genoa harbor to take "courses according to the signal of the commodore" on *Ansaldo III*; while the east-bound fleet was given definite courses until such time as they should reach 42° 58' N. and 7° 50' E., from which position, called "Genoa rendez-vous," they were to proceed "according to instructions from Genoa," which, so far as appears, were never given. This point is about 70 miles from Genoa, and the place of collision was, according to the repeated statements of *Napoli's* master, 43° N., 7° 58' E. In other words, the *Napoli* had proceeded beyond the limit of courses antedecently laid down, and was presumably taking whatever direction was ordered by Captain Ryan, R. N., as senior naval officer present. This is even more true if the Lamington's calculation of position be accepted—43° 8' N., 7° 46' E. It is therefore not true that the convoys met, by reason of pursuing courses predetermined for them at the places of departure.

By no formal written order were the vessels of either convoy spaced apart or given distances; nor is any written order produced directing them to navigate without lights. It is, however, inferable from the evidence, and is matter of common knowledge, that they were expected and required (warships and merchant vessels alike) to keep their lights screened, but ready for instant exhibition. The arrangement of vessels in convoy formation, while not formally prescribed in writing, was a matter evidently so well known as to be left to the senior naval officer; the convoy was arranged according to a system obviously accepted and understood by all officers interested.

It is not easy to ascertain with exactness what were the distances between the vessels in each tier or rank, or the distances between the several tiers. Each convoy consisted of three tiers, but not of the same number of vessels in each tier. The Lamington's or west-bound convoy had eight vessels in the front tier, either five or six in the second, and three in the third. The *Napoli's* or east-bound convoy had

apparently seven vessels in the first tier and a smaller number in the second and third. Some of the east-bound vessels had left that convoy before collision, bound for Marseilles.

Libellant's Exhibit 2 (document 10) is an endeavor to depict the position of Napoli, Lamington, and certain other vessels at and shortly before collision occurred. That exhibit seems to be inaccurate, in that it shows Napoli as in a front rank or tier of six only; she was the middle ship of seven. The vessel immediately behind her was the Swedish steamship Otto Sverdrup.

Document 10, again, cannot be reconciled with the order issued by the Italian admiral in charge at Genoa for the arrangement of vessels in the west-bound convoy. If that order was complied with, the flagship Ansaldo III was the fourth vessel in the first tier of eight (counting from port to starboard), and the vessel immediately behind her in the second tier was the Plymouth, and not the Lamington, as shown in document 10. In fact, there is no Lamington named in the list of west-bound vessels; but the Harington, which is taken to be the Lamington, was in the second tier, and behind the third front tier vessel. That the vessel called the Harington was the Lamington is conclusively shown by an entry in log of Yankton, the American naval vessel with west-bound fleet. On the morning of July 5 Yankton signaled to vessel U. B.: "Were you injured last night, and are you able to proceed?" U. B., according to Genoa orders above referred to, was the Harington; and U. B.'s answer was, "Consider it inadvisable to proceed, due to damages sustained last night in collision with unknown steamer." If Lamington had been directly behind Ansaldo III, she would have been vessel V. B., which was not injured, and was American steamship Plymouth, to which the Italian admiral transferred his flag.

I think it fairly shown that vessels in the same tier were expected to remain (from beam to beam) not over 500 yards apart, probably somewhat less, while the distance between tiers (or fore and aft) was about 600 yards, except when the convoy was "zigzagging," in which case the distance was lengthened to about 800; but these distances are approximate only, and the figures given are for the east-bound vessels. Distances for those west-bound were slightly shorter.

The log of Castine, the American naval vessel escorting the east-bound convoy on the port flank, shows that that convoy had great difficulty in maintaining distances fore and aft, and the Otto Sverdrup was an especially persistent straggler. But as midnight of July 4th approached the log shows that the convoy was in no worse plight than "poor formation." It can be said with certainty, however, that as the two convoys approached each other the east-bound fleet presented a front from the port to the starboard escort (escorts endeavored to maintain position of 400 yards off the flanks) of something less than two nautical miles, and the west-bound convoy something over that distance.

By all the evidence the weather was "hazy," yet the testimony is unanimous that the loom of vessels in the west-bound fleet was seen by Napoli's observers at a distance of 1,000 meters, and the commanders of Castine and Yankton think the range of visibility three-quarters of a mile or a little less, and from the Castine's deck (some 400 yards

off the port flank of the east-bound convoy) it is agreed that her observers could see three vessels, in the front tier of her convoy. It is plain that the whole range of visibility, at and before the time of collision, was for a moonless night unusually high.

The fleets met by computation (document 10) at an angle between their courses of about 30 degrees; yet the testimony from Napoli (evidently adopted by the pleader for libellant) is uniform that the west-bound vessels, when seen, seemed almost end on, and I think that navigation was on that theory of direction. There was no fixed or inflexible rate of speed for either convoy. The west-bound ships were out of Genoa harbor about 10:50 a. m. July 4th, and about an hour later the commodore and senior naval officer on Ansaldo III signaled to Yankton, "Can you tell me the exact speed of the convoy as we have no log?" to which the Yankton replied, "Speed about 7.3 knots." This or a slightly greater speed was evidently maintained, because any material variations therefrom would have been noted in the log in evidence. The east-bound fleet was proceeding at about the same rate; on this point there is ample evidence. It follows that the vessels were approaching at between 14 and 15 knots an hour.

At approximately 7 p. m. of July 4th a vessel in the west-bound convoy was injured by a submarine at a point about N. 50° E. (true) of the place of collision, and rather less than 30 knots distant therefrom. Thereupon the west-bound escort vessels set out in search of the attacking submarine, and for that reason the navigation records in evidence are more meager in respect of the west-bound than of the east-bound fleet. It is plain that the west-bound convoy immediately began to zigzag; it is not plain whether, when the convoys sighted each other, the original course had been made good; but I take the opinion (it is no more) of Lieut. Burns, of the Yankton, who was "reasonably sure that [his] convoy was off the course laid down before the attack" at the time of sighting the other fleet. But it is quite impossible to say whether it was off course to the south or north.

The fleets sighted each other almost exactly in the middle of the passage between northeastern Corsica and France, a stretch of water between 95 and 100 miles wide. As soon as the loom of the other ships appeared, both fleets turned on their navigating lights, so that I find the precollision situation was this: Upwards of 35 vessels with their accompanying escorts, divided into two approximately equal fleets, were approaching each other nearly end on, at the rate of over 14 knots an hour, when the distance between the leading tiers of each fleet was not over three-quarters of a nautical mile.

Of this situation at least the first tiers of both convoys were instantly aware. Each thought the other vessels were approaching almost end on. In point of fact they were not so approaching; but their navigation must be judged by what the navigators believed at the time. It is to me plain beyond argument that under the apparent circumstances the duty of every navigator was to slow down to steerage way and stick as nearly to his course as possible, in the hope that the vessels of each fleet would pass through the lanes between the fore and aft lines of the other fleet.

Most of the steamers must have done this, for otherwise it is inconceivable that no more than six vessels out of so many got into collision. In respect of the collisions that did occur, that between the Albatross (west-bound) and Hjelfjord (east-bound) was very reasonably attributed by the Italian investigating commission to the fact that the Albatross never turned on her lights. That between Ansaldo III and the Sverdrup was found by the same commission to have been contributed to, if not caused, by the failure of Ansaldo III "to stop by reversing the engines and giving the three regulation whistles to warn the ships in the vicinity." Thus presumably competent investigating authority has attributed fault in navigation to certain of the other vessels colliding at the same time as did Napoli and Lamington.

[1] The convoys approached each other, so that if courses and speeds were maintained there would have been a collision between Napoli and Ansaldo III. This was avoided by the vessels passing each other port to port, though how near does not appear. This is the natural result of what, by his statements before the commission in Genoa and before the English court, the captain of Napoli did, to wit, port his helm. But he did not, by his own statement, endeavor to straighten up and keep on down the lane, which he must have known to exist. On the contrary, he either kept going to port, or indulged in what he admitted "might be called the serpentine," and stopped. In my opinion he stopped directly in the path of the Lamington, which vessel I am convinced (differing from document 10) was traveling (if in reasonably good formation) from 500 to 800 yards on the port quarter of Ansaldo III. In no other way can the collision be accounted for with so broad an angle between the colliding vessels as is admitted all round. Meanwhile Lamington had continued to proceed at least 6 knots until she saw the Napoli, or the latter's lights, so near at hand that collision was inevitable.

It is my opinion, and I find from the material furnished, that both the vessels here involved navigated faultily. The Napoli, in that, having ported to such an extent that she ought to have known she was getting in the way of the next fore and aft convoy line, stopped and (as it seems to me) invited collision with any vessel in that line that came up out of the night; while the Lamington was at fault for maintaining so great a speed that she could not possibly take off her way before colliding with whatever she could clearly make out ahead. It may be noted that the speed of the Lamington is not only admitted, but would necessarily be found from consideration of the violent blow she struck the much larger and more powerful Napoli.

I have felt obliged to make these criticisms on the navigation of the two vessels, although not unmindful of the Italian and English findings. The commission felt—

"it their duty to point out the circumstances under which the maneuvers in question had to be executed, and are of opinion that the anxiety of the commanders must have been very great because, besides having to avoid the steamers ahead, they had also to seek to avoid being struck by those astern. Moreover the sudden appearing of so many lights, the noise of so many sound signals directing the maneuvers, must necessarily have generated a confusion which was entirely to the disadvantage of the necessary calm

which every commander had to preserve in order to avoid collisions which appeared impending from all sides."

This is undoubtedly true, but after all amounts to no more than saying that navigation at the time and place was attended with great difficulties. The English trial (of a suit by owners of cargo on Napoli against owners of Lamington) resulted in a judgment by Hill, J., finding no fault in Lamington (with which I do not agree), but declaring concerning the whole situation that—

"It seems to me to be quite clear that this is one of those cases in which two convoys, unlighted, suddenly became aware of one another's presence at a very close distance, became greatly confused in their formation and in the efforts they made to avoid one another, without any fault on the part of anybody the collision took place."

[2] The force of this is thoroughly recognized, but I strongly incline to the opinion notwithstanding, that such excusatory remarks as this amount to a refusal to find fault whenever the circumstances are sufficiently alarming to furnish some excuse for losing one's head. Result is that I consider this collision as having resulted, not only immediately, but, in the legal sense, proximately from poor navigation on the part of both colliding vessels.

Yet, though entertaining the foregoing opinion, I recognize the force of an argument contra, which may be thus stated: Allowing for Napoli's slowing and stopping and for Lamington's ultimate reversal full speed astern, there could not have been more than 2,000 yards between Napoli and Lamington when the navigating lights were flashed on, and the time between that moment and collision could not have been more than five minutes, and quite probably less. It may be argued that in such a situation, assuredly one of terror and confusion, faults of navigation such as I think occurred may be regarded as in extremis, and the cardinal, and in a legal sense proximate, cause of collision be found in whatever train of circumstances or whatever human direction, or lack of it, produced such a situation of danger, confusion, and terror.

[3] In my opinion the causa causans of all the collisions of that night was the total disregard by each convoy of the other. Instead of courses and distances having been laid down (as alleged in the libel) which were certain to produce a meeting of convoys, I am persuaded that neither convoy paid any attention to the approach or proximity of the other, and there was no central or controlling authority which guided, could guide, or was expected to guide the movements of both convoys in relation to each other.

It is not believed that the torpedoing of a vessel in the west-bound convoy five hours before meeting the east-bound fleet affected this matter at all, or, if it did, it was pure ill luck. For all that the naval or navigating authorities did or expected to do (so far as this record shows) it was chance, and no more, whether the senior naval officers of the respective fleets did or did not steer courses that would intersect with those of the other convoy. And with each officer navigating (so far as shown) absolutely for himself, it was quite natural that each would steer for the middle of the passageway between Corsica and France, and that is exactly where they met. The one fairly certain re-

sult of torpedoing Merida (vessel T. B. west-bound) was to slow up the convoy, so far as getting toward Gibraltar was concerned. It is rather less than 30 nautical miles from the scene of Merida's mischance to that of collision, and it required five hours to make that distance. If the speed was anything over 6 miles (and estimates vary from 7.3 to 8.5), there was a great deal of "zigzagging" done; but all without any reference to the other convoy.

It follows that, in my opinion, a certain and important navigator's fault lay with the senior naval officers of both convoys in failing to take any steps to prevent just such a meeting as did occur. But this latter fault (assuming it now to exist) raises a question which is one of law, viz. whether such careless navigation on the part of the convoys produced a risk for which protection must be sought under the policy of the libellant rather than that of respondent.

[4] It remains to consider the facts with regard to the cargo of the Napoli. It is agreed that the major portion of her large cargo could fairly be described as general; but in Mr. Hann's affidavit libellants exhibit a list of cargo articles which they declare to have been "intended for use by the Italian government in prosecution of war." The list is considerable in itself, but insignificant as compared with the lading of a vessel of Napoli's size. It is my opinion that this list contains certainly one and perhaps two articles which may be called munitions of war, to wit, certain tubes for "Italian 80-foot sub-chasers," and "artillery case heading press." The rest of the list is beyond question contraband, and more than conditional contraband, too; but that is all. But the goods are in my opinion no more closely allied to warlike operations, or to the waging of war, than was the asbestos which constituted the portion of the cargo insured by both parties to this litigation.

In the light of what is now history, it seems to me rather absurd to ground argument concerning the presence or absence of war risk solely upon the nature of even an entire cargo, not to speak of the nature of scattered and numerically insignificant articles thereof; this because the war risk was the same, no matter what the character of cargo. It is history that in the summer of 1918 the sea power of Germany outside the North Sea was represented solely by submarines, whose object was to destroy commerce, and that meant to destroy ships; the nature of cargo was a matter of no consequence. Thus I think consideration of the law is reached.

[5, 6] Some points are admitted all round: (1) That declaring liability upon such a policy as that in suit is (after ascertaining the sequence of happenings) a quest for proximate cause in the legal sense of that phrase; and (2) that, where a policy speaks of the "consequences" of an enumerated list of happenings, the word refers to the totality of causes, and not to their sequence. For the first proposition sufficient authority in this court is to be found in *The Canadia* (*Muller v. Globe*, 246 Fed. 759, 159 C. C. A. 61; and the second has not been doubted since the *Ionides Case*, 14 C. B. (N. S.) 274 (290).

It is now necessary to consider the exact phrasing of the policy in suit, for, whatever may be accepted general principles, there can be no liability except under one particular policy. The history of the f. c.

and s. clause and the rise and development of the war risk clause are, however interesting, only important as casting light on the habits of mind or methods of reasoning pursued by courts whose authority is generally recognized and who spoke before the great development of war risk which has marked the period since 1914. This history and the standard or commonly used forms of marine and war risk clauses may be found sufficiently stated in Gow, Mar. Ins. pp. 114, 115, 360, and Gow, Sea Ins. pp. 84, 85. It is observable that the forms of words used by the American underwriters both for marine and sea perils in this case are quite different from the forms which in the opinion of the learned author referred to had become common in English and continental marine circles prior to 1914.

It may also be noted that the clause sued on in *The Canadia*, supra, was quite peculiar, and I now note as my opinion that that decision is of no value in this litigation, except on the point of proximate cause, because decision was based on the finding of fact that the "Canadia and her cargo were seized, arrested, and detained within the meaning of the policy" there at bar. No such contention is here made. Having thus laid aside *The Canadia*, supra, it is admitted that this is a pioneer action in the courts of this country upon a war risk policy, but that there is in Great Britain a long line of cases arising upon the forms of war risk there lately used. These British forms were so well known that the exact wording does not always appear in the reported cases; but they were obviously so uniform that it may reasonably be assumed that all in substance resemble the phrases of *The Matiana* and *The Petersham*, [1921] A. C. 99. 'There the f. c. and s. clause warranted free "from all consequences of hostilities and/or warlike operations whether before or after declaration of war," and the war risk clause covered "all consequences of hostilities and warlike operations by or against the king's enemies before or after declaration of war."

The f. c. and s. clause in libellant's marine policy is as follows:

"Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction and the consequences thereof, or of any attempt thereat, and also from all consequences of riots, insurrection, hostilities or warlike operations, whether before or after declaration of war, and whether lawful or unlawful, and whether by the act of any belligerent nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise."

And the assumption clause in respondent's war risk policy is as follows:

"It is agreed that this insurance covers only the risk of capture, seizure, or destruction, or damage, by men-of-war, by letters of marque, by takings at sea, arrests, restraints, detentions, and acts of kings, princes, and people authorized by and in prosecution of hostilities between belligerent nations."

[7] The war risk clause ought logically to be the supplement of the f. c. and s. clause in the marine policy. This logical result is reached in the English cases, so far as they reveal the exact language of the several policies. In the present instance it seems to me entirely plain that, whereas, the marine underwriter excluded in terms "all consequences of hostilities or warlike operations," the war risk underwriter did not assume "all consequences." His undertaking is not the supple-

ment of the marine policy, but (for the purposes of present litigation) he only assumed liability for "acts of kings authorized by and in prosecution of hostilities." This is very far from being the equivalent of "all consequences of hostilities or warlike operations."

But I shall not dwell upon this difference; it is preferred to treat the case as one of principle, and therefore I shall speak as though the respondent had insured (as the defendants in the reported British cases did) against "all consequences of hostilities or warlike operations." The question may be reduced to its lowest terms as follows: Admittedly the loss flowed directly from the collision between Napoli and Lamington. Therefore the question is this: Was that collision a consequence of hostilities or warlike operations?

On the reason of the matter I have already stated my view of the argument based upon the nature of the Napoli's cargo. But further, upon authority, it is the nature of the operation, not the character of the cargo, which is the material thing determining the query whether the vessel is engaged in an act of hostilities or in a warlike operation. *The Larchgrove*, 36 Times L. R. 108. I have not overlooked *Hindustan*, etc., *Co. v. Admiralty*, 37 Times L. R. 856, *Peninsular v. Commonwealth*, 9 Lloyd's List, 208, and *Atlantic*, etc., *Co. v. Director*, 38 Times L. R. 160. Whether these first instance cases are all reconcilable with each other, or with ruling authority, is not a matter of importance; it suffices to note that none of them is in terms applicable to the facts at bar.

The main contention of libellant may be, I think, thus formulated: There was in substance compulsion upon the Napoli and other vessels to sail in convoy and not otherwise. It makes no difference whether the compulsion arose from the folly and danger of going alone or from positive governmental direction; it was compulsion just the same. She and the other vessels did sail in convoy, and were therefore entirely under the direction and guidance of naval authorities. In convoy the vessels did sail without lights; and, to sum the matter up, they were from start to disastrous finish conducted, controlled, ordered, and in effect navigated (in the larger sense) by the representatives of their own or another sovereign power.

To this major premise may be added the following subordinate proposition: Napoli and Lamington did display ordinary care and skill on the part of their respective navigators, but (if this be not absolutely true) such errors of navigation as were committed were faults in extremis, and therefore the collision was proximately caused either (1) by the necessity of going in convoy under admitted conditions, or (2) by the personal fault of the senior naval officers of both convoys and/or by the shore authorities at each end of the Genoa-Gibraltar line in taking no steps to prevent the meeting of convoys sailing in opposite directions exactly as these two convoys did meet.

[8] It would be a professional pleasure to feel at liberty to treat both these questions from what I regard as the standpoint of reason: but I do not think that pleasure can be accorded. The question is not one of morals, nor of public policy; it is no more than the interpretation of certain forms of words, which are not sacred, which have varied,

and may be changed at any time to suit the apparent necessities of commercial profit. The important thing is to secure uniformity of view in a commercial world, which now embraces and long has included more than one continent and more than one ocean. I shall therefore briefly state my own view, and decide this case on what I conceive to be authority.

The baldest statement of libellant's position is to say that the act of sailing in convoy without lights is in and of itself a warlike operation; and from this flows the conclusion that such marine disasters as may reasonably be expected to result from convoy dangers are themselves the result of warlike operations. My own view on this matter is that of Bailhache, J., expressed in *The Petersham, Britain, etc., Co. v. The King*, [1919] 1 K. B. 575 (580), and *The Matiana, British, etc., Co. v. Green*, [1919] 1 K. B. 632 (636), viz.:

"However peaceful the immediate business upon which a ship is engaged. if she is sailing as one of a convoy she is engaged, in my opinion, in a warlike operation. The assembling, presence, protection, and movements of the king's ships protecting the convoy are a warlike operation, and both convoyed and convoying ships are taking part in it, and that character attaches to the whole flotilla and covers the whole operation."

And the learned judge continues:

"Suppose a dangerous route from which lights had been removed was prescribed (by the authorities) to deceive the enemy; and a ship taking such a route, without negligence, runs ashore and is lost as the direct result of the removal of the lights; would such a loss be covered by the words 'warlike operation'? I think it would, but not because the ship was carrying out a warlike operation. The warlike operation would be the removal of the lights."

This I think to be the large and common sense view of the situation. Quite possibly there was a time when war was no more than the *ultima ratio regum*; and while kings wrangled traffic might continue subject to the right of search and most oppressive Stowell-made rules as to contraband; but still it was essentially peace-time traffic, peacefully conducted in the main. But, when war became what it was between 1914-1918, it is now history that commerce existed only as an adjunct to war, and for the purpose of creating and maintaining armed forces to insure the economic defeat of the enemy.

The Napoli was taking a cargo from America to Italy, and even courts may take cognizance of the fact that in June, 1918, no such cargo was a possibility that did not in the opinion of governmental representatives from at least three governments (British, Italian, and American) directly assist in the task of defeating Germany. In a large sense the very act of sailing was a consequence of hostilities. In short, almost every act of the warring countries, after the home-staying population was fed, clothed, and sheltered, was but a manifestation of war. For these reasons I agree in principle with Bailhache, J., and particularly sympathize with the defiance flung by him at the reasoning of *The Ionides* Case, supra, indicated in the last of the above quotations.

But the spirit of *The Ionides* decision triumphed when the *Matiana* and *Petersham* Cases had gone through the Court of Appeals ([1919] 1 K. B. 670) and received final treatment in the House of Lords ([1921] 1

A. C. 99). The majority opinions start with the proposition that collisions, strandings, and the like are normally marine perils; they are normally covered by the ordinary marine policy; the turn of mind evidenced by insistence upon this commonplace is manifest. It is the same habit of thought that dominates all the early cases, and especially the *Ionides* decision, to wit, that that precaution of war, or, indeed, that warlike operation, which no more than heightens the old well-known pre-existent perils of sea navigation, does not change in kind such peril.

The cases above referred to and the citations therein may furnish many illustrations of this kind of reasoning, which has been accepted to the full by the English courts. My personal opinion is that the doctrine now established by authority is best expressed by *Atkin, L. J.*, in the Court of Appeals, and *Lord Wrenbury* in the House of Lords in *The Petersham* and *Matiana* decisions.

[9] It is thus, I think, settled by authority that sailing with a general cargo, however contraband (for, municipally speaking, there is nothing unlawful about contraband) cannot be a warlike operation; the mere joining of a convoy, though compulsory, is not a warlike operation; the management or mismanagement of a convoy is likewise not a warlike operation; and, indeed, operations only become warlike when they are designedly offensive (*McGregor v. Martin*, 34 Times L. R. 504), or where the injury causing loss is proximately due to an enemy effort. Thus, in the present case, if the submarine that sank the *Merida* 30 miles from collision had chased the west-bound convoy, while exercising ordinary navigational skill, into a collision or stranding, the case would have fallen under war risk. But where war and its necessities had no more to do with the resultant collision, stranding, or foundering than to multiply pre-existing dangers, and known dangers at that, the foundation is not laid for discharging the marine underwriter and resting upon the war risk policy.

The case of *The Matiana* is a far more aggravated instance of directed dangerous navigation than is the present one. Here, in my judgment, there was a singular and inexcusable lack of care in indicating any lanes of traffic to the opposing streams of convoy travel between Genoa and Gibraltar, and these convoys were moving almost like ferries. But in *The Matiana* there were orders to run through dangerous waters, amid treacherous currents, and without the advantage of a lighthouse. Yet the *Matiana* war risk underwriters were discharged. Result is that:

First. It is my personal opinion on this record that, acknowledging the danger in which these two convoys found themselves at midnight of July 4, 1918, the navigators of both *Napoli* and *Lamington* failed in their ship management to exercise the ordinary care and skill of their calling. Therefore such negligence was the proximate cause of collision, and the loss must fall upon the marine underwriters.

Second. But, passing this first holding, and admitting that whatever faults were committed by the colliding vessels were errors in extremis, it must be held under authority, to which for business purposes the courts of the United States should conform, that the collision in

question was not proximately caused by any act of hostility or by the consequences thereof; because

Third. The act of joining a convoy, the act of sailing therein without lights, and the act of steering courses directed by naval authority are not, whether separately or conjointly considered, to be regarded as a warlike operation.

For these reasons the libel is dismissed, without costs.

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PRATT LUMBER CO., Inc., v. T. H. GILL CO.

(District Court, E. D. North Carolina. February 26, 1922.)

No. 404.

1. Highways  $\S$ 113(4)—Right to lien under construction contract depends on state statutes.

The right of laborers and materialmen to liens under a contract for the construction of highways made and to be performed in North Carolina depends on the statutes of that state.

2. Highways  $\S$ 113(4)—No lien on highway in favor of contractors, laborers, or materialmen.

Under C. S. N. C. §§ 2433, 2437, et seq., one contracting to construct a highway and subcontractors, laborers, and materialmen have no lien on the highway.

3. Highways  $\S$ 113(4)—Laborers and subcontractors held without right of priority over other creditors of contractor.

As one contracting to construct a highway has no lien under the laws of North Carolina, subcontractors and laborers are simple contract creditors, having no right of priority in respect to the amount due on the contract superior to other creditors.

4. Assignments  $\S$ 52—Liens  $\S$ 7—Provision for payment of subcontractor following receipt of money by contractor held not to constitute equitable assignment or give equitable lien.

A provision of a subcontract, requiring the general contractor to pay the amounts coming due thereon on the day succeeding the day in each month when the state highway commission should pay the general contractor, but in no case later than the 16th day of the month, did not amount to an equitable assignment of the amount received from the highway commission, or give an equitable lien thereon.

5. Receivers  $\S$ 209—Court in which ancillary suit pending may protect resident creditors.

The court in which a suit ancillary to a receivership suit in another state is brought for the purpose of collecting assets of a corporation and turning them over to the court in which the main cause is pending has power to protect claims of residents of its state based on state statutes, liens, etc.

6. Subrogation  $\S$ 33(2)—Surety, paying creditors who have no lien on highway or money due under construction contract, acquires none by subrogation.

Since creditors of one contracting to construct a highway holding claims for material furnished or labor performed have no lien under the laws of North Carolina on the highway or the funds due the contractor, its surety, on payment of their debts, can take no lien by way of subrogation or substitution.

7. Principal and surety  $\S$ 169—Contractor's surety held to have contractual right to have reserved percentages applied in payment of claims for which it was liable.

A contractor's surety executing bonds conditioned for payment of subcontractors, materialmen, etc., on applications providing that all per-

$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

centages retained on account of the contracts or due at the time of any breach were thereby assigned to the surety, etc., though having no claim on the reserved percentages by way of subrogation or equitable assignment, *held* to have a contractual right, measured by the terms of the contract to have such reserved percentages applied to the exoneration of the loss sustained by the contractor's failure to pay laborers and materialmen.

In Equity. Suit by the Pratt Lumber Company, Inc., against the T. H. Gill Company, in which creditors furnishing materials and labor intervened and sought priority. Interlocutory decree in accordance with the opinion.

H. G. Connor, Jr., of Wilson, N. C., for Pratt Lumber Co. and City Nat. Bank of Binghamton, N. Y.

Edwin H. Moody, of Binghamton, N. Y., for receiver.

Rouse & Rouse, Dawson, Manning & Wallace, Cowper, Whitaker & Allen, and G. G. Moore, all of Kinston, N. C., for intervening creditors.

S. Brown Shepherd, of Raleigh, N. C., and John L. Baker, of New York City, for National Surety Co.

CONNOR, District Judge. This cause is ancillary to an original bill filed by plaintiff against defendant company in the District Court of the United States for the Northern District of New York in which, upon the allegation of the original bill and answer, an order was made in said court, July 13, 1920, appointing Douglas V. Ashley receiver of said defendant company, who duly qualified by filing the bond prescribed in said order, and entered upon the discharge of his duties as receiver.

On the 23d day of July 1920, plaintiff filed in the District Court of the United States for the Eastern District of North Carolina a duly certified copy of the original bill and answer, together with a copy of the orders made in said cause by said court, and at the same time filed in said court for the Eastern District of North Carolina an ancillary bill, praying that, upon the facts appearing in said bill and answer, said Douglas B. Ashley be appointed by this court ancillary receiver of said T. H. Gill Company, whereupon this court on said day made an order appointing said Douglas V. Ashley ancillary receiver of said T. H. Gill Company in said district. Said receiver duly qualified as such ancillary receiver, and entered upon the discharge of the duties of said office, all of which will appear by reference to the records of this court in said cause.

At the time said Douglas V. Ashley was appointed receiver of said T. H. Gill Company in the Eastern District of North Carolina, said T. H. Gill Company was engaged in the construction of three highways in the county of Lenoir, state of North Carolina, known as Federal Aid Projects, Nos. 1, 49, 53, and 60, under a contract entered into by and between said T. H. Gill Company and the state highway commission of North Carolina. The work to be performed by said T. H. Gill Company in accordance with the said contract was not, at that time, completed. That said contract was, after his appointment, completed by

said receiver under the order of the said court and with the approval and consent of the National Security Company.

Pursuant to the provisions of the contract between the T. H. Gill Company and the state highway commission, the National Security Company, at the request of said T. H. Gill Company, executed a bond as security of said T. H. Gill Company, bearing date January 6, 1920, in the penal sum of \$50,000, conditioned that—

The said T. H. Gill Company should, "In all respects, comply with the terms of the contract and conditions thereunder, \* \* \* complete the work contracted for and save harmless the state highway commission of North Carolina, from any expense incurred through the failure of said contractor to complete the work as specified, or for any damages growing out of the carelessness of said contractor, or its agents or servants, or for any liability for payment of wages due or material furnished said contractor; and should well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him or them, or any of them, for all such labor and materials for which the contractor is liable."

At the time said Douglas V. Ashley was appointed receiver of said T. H. Gill Company, in the Eastern District of North Carolina, said T. H. Gill Company was also engaged in the construction of a highway in the county of Lenoir, state of North Carolina, known as the Pink Hill Road, under and pursuant to a contract entered into between the highway commission of Lenoir county and T. H. Gill Company. The work to be performed under said contract was not, at that time, completed.

At the request of said T. H. Gill Company the National Surety Company executed, as surety for said T. H. Gill Company, a bond in the penal sum of \$15,000, conditioned that said T. H. Gill Company should "perform the provisions of said contract for building said road and pay all claims of subcontractors, materialmen, furnishers of equipment or apparatus, foremen and laborers, any or all claims arising from the carrying forward, performing and completing the attached contract. \* \* \* It is expressly understood that this bond shall be for the benefit of the materialmen or laborer having a just claim, as well as for the benefit of the highway commission of Lenoir county and the county."

At the time of the appointment of said Douglas V. Ashley, receiver, certain persons had, prior to the appointment of said receiver, furnished material and performed labor in and about the construction of the roadways for the construction of which the said contracts were made; there was, at that time, and is now, due certain persons for labor and material aggregating about \$12,500.

The contracts between the said T. H. Gill Company and said highway commission provide that payments shall be made for the work once a month up to 85 per cent. of the relative value of the work done as estimated by the engineers in charge, and that, pursuant to such provisions, there has been retained by said highway commission 15 per cent. of the estimated price to be paid for the work performed by said T. H. Gill Company prior to the receivership and 15 per cent. of the agreed price of the work completed by said Douglas V. Ashley under the receivership which sum amounts to approximately \$35,000.

Said Douglas V. Ashley, as receiver, has completed the work which said T. H. Gill Company agreed and contracted to complete under the terms of said contract, and there is now due him, or such parties as may be entitled thereto, the sum of approximately \$35,000, in addition to certain other sums, the amount of which is not now ascertained, which sum was in part for work done under the receivership and in part for the percentages retained out of each monthly estimate of work done prior to the receivership.

In respect to the claim of D. Ferris and A. W. Wooten, hereinbefore set forth, the contract entered into between said Ferris and Wooten and said T. H. Gill Company, upon which said claim accrued was in writing, bearing date May 21, 1920. The seventh paragraph thereof contained the following language:

"The said first party [T. H. Gill Company] shall pay unto the second parties [Ferris and Wooten] the amounts to become due thereon for the performance of the above specified work under this contract on the day succeeding that day each month when the state highway commission shall pay unto the first party herein its estimate covering the work herein provided for, but in no month shall the payment to the second parties herein be later than the 16th day of the month; provided the first party herein may withhold 15 per cent. of each monthly payment becoming due the second parties until the work provided for is completed and accepted by the state highway commission, treating each project separately."

The aforesaid creditors of the said T. H. Gill Company, furnishing material and performing labor as hereinbefore set forth, have intervened in this cause, and ask the court to adjudge that, in respect to their said claims, they are entitled to a priority in the distribution of the amounts due the receiver over and in preference to the rights and claims of the general creditors of T. H. Gill Company.

On July 20, 1921, the National Surety Company filed in the court a motion for an order directing the receiver to hold certain funds in North Carolina, and also that an order be made for the deposit of sufficient funds received or to be received from the state highway commission by said receiver to cover the claims for labor and material as found herein.

The Pratt Lumber Company, plaintiff herein, and the City National Bank of Binghamton, N. Y., general creditors of T. H. Gill Company, intervened for the purpose of resisting the claims of the intervening creditors of T. H. Gill Company and the National Surety Company, insisting that said creditors have no lien upon, or priority in, the distribution of the amounts received by said receiver or to be received from said highway commissions on account of said contracts or the work performed thereunder.

An order was made referring to Joseph B. Cheshire, Jr., Esq., as special master, the questions of fact raised by the several matters in controversy. The foregoing statement is based upon his findings of fact and the agreement submitted by the parties and the intervening petitioners.

The first question, in order, is presented by the claim of the creditors who furnished material and performed labor under contracts with T. H. Gill Company in the construction of the roadways pursuant to the

terms of the contract between said T. H. Gill Company and the highway commissions as hereinbefore set forth.

[1] It is manifest that the rights of such creditors, in respect to liens, are dependent upon and fixed by the statute law of North Carolina. The contract was made and was to be performed in this state. Whatever rights, therefore, in respect to a lien upon the property in the construction of which, or furnishing materials or performing labor thereon, said creditors may have, if any, is dependent upon the statutes of this state.

[2] The lien provided for work and material, or the laborers and materialmen's lien, is secured by the statutes of North Carolina. Consolidated Statutes 1919, § 2433. The Supreme Court of North Carolina has uniformly held that a public building, constructed and used for public purposes, is not subject to this lien. In *Snow v. Commissioners*, 112 N. C. 335, 17 S. E. 176, it was held that: "A courthouse cannot be made subject to any lien for labor or materials." In *Hardware Co. v. Graded School*, 150 N. C. 680, 64 S. E. 764, 134 Am. St. Rep. 953, 17 Ann. Cas. 130, the principle was applied to a debt for supplies furnished in the building of a public schoolhouse and, upon the authority of *Snow's Case* it was held that such creditor had no lien. Decisions by courts of other states to the same effect were cited by Mr. Justice Walker, notably the opinion of Mr. Justice Holmes in *Lessard v. Inhabitants of Revere*, 171 Mass. 294, 50 N. E. 533; also *Foundry v. Aluminum Co.*, 172 N. C. 704, 90 S. E. 923; *Hutchinson v. Commissioners*, 172 N. C. 844, 90 S. E. 892. It is settled that the right to a statutory lien given by the statute (Consol. Stat. 1919, § 2433) does not apply to public works as uniformly held by the Supreme Court of this state. The decisions are in accordance with those of other courts, state and federal. In *re Fowble* (D. C. Md.) 213 Fed. 676; In *re Schilling* (D. C.) 251 Fed. 966; *Illinois Surety Co. v. Davis*, 244 U. S. 376 (380), 37 Sup. Ct. 614, 61 L. Ed. 1206.

Such right as the subcontractors, furnishing material or performing labor, under contract with T. H. Gill Company, the contractors, have in the fund, is dependent upon the provisions of the North Carolina Statute. Consol. Statutes 1919, § 2437, c. 49, art. 2, which provides that—

"All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building \* \* \* any house or other improvement on real estate have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter," etc.

Section 2438 et seq. prescribes the mode of procedure by which the subcontractor or laborer may effectuate and enforce the lien conferred by section 2437.

In *Foundry Company v. Aluminum Company*, 172 N. C. 704, 90 S. E. 923, Justice Allen, after reviewing the legislation and decisions of the court relating to the lien of the subcontractor and laborer and the method prescribed for its enforcement, concludes that—

"The right, however, to share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner; and if no lien on the property is or can be acquired, no duty or obligation is imposed upon the owner by giving the notice."

This language is quoted by the court in *Hutchinson v. Commissioners*, supra, saying in conclusion:

"And the authorities are all to the effect that no lien can be acquired against public buildings. \* \* \* It follows that as the Cruse Company [the subcontractor] acquired no lien upon the property by giving notice to the owner, it thereby imposed no obligation upon the owner with reference to the amount due the contractor." *Hall v. Jones*, 151 N. C. 419, 66 S. E. 350.

The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, cannot be sold under execution or other final process, and applies with peculiar force to materials furnished or labor performed in the construction or repair of public highways. The public has only a right of way or an easement over the land upon which they are laid out and constructed for the public use. The county authorities, nor any other public agency to which the power to contract for their construction or improvement, have no power to sell such easement or dispose of it nor by any contractual obligation to impose any burden or lien upon it. It would be to keep the promise to the ear and break it to the sense to give a lien upon property and deny the power to enforce it. *Hardware Company v. Schools*, 151 N. C. 507, 66 S. E. 583. It is therefore clear that neither *T. H. Gill Company* nor its subcontractors, nor persons to whom it became indebted for materials or labor furnished or performed in the performance of its contract, acquired any lien upon the highway constructed by it or them. It was to meet this condition and protect such subcontractors, materialmen, and laborers for amounts due them from contractors engaged in the construction of public buildings or structures belonging to the National government that Congress passed the act requiring the contractors' bond and providing for the payment of the claims of materialmen and laborers. Act August 13, 1894, as amended by Act February 24, 1905; 32 Stat. L. 811 (Comp. St. § 6923); 8 Fed. Stat. Anno. (2d Ed.) 374; *People v. Met. Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *Illinois Surety Co. v. U. S.*, 226 Fed. 653 (659), 141 C. C. A. 409; *Illinois Surety Co. v. Davis*, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206. The same purpose to meet the same condition moved the Legislature of North Carolina to pass the Acts of 1913 and 1915; section 2445, Consol. Stat. 1919. The acts have substantially the same provisions as to materialmen and laborers as the federal statute.

It follows, therefore, that as the contractor had no lien on the highway, the subcontractors, materialmen, and laborers to whom it is indebted can have none. As said by the court in *Charlotte Pipe & Foundry Co. v. Aluminum Co.*, 172 N. C. 704, 90 S. E. 923:

"The right to share in the fund due by the owner to the contractor \* \* \* is a statutory right and is dependent upon acquiring a lien upon the property

by giving notice to the owner and if no lien on the property is nor can be acquired no duty or obligation is imposed upon the owner by giving notice."

[3] In the absence of a lien by the contractor, the subcontractor or laborer on the building or structure is a simple contract creditor of the contractor, and has no lien or priority upon or in respect to the amount due from the owner of the property superior to other creditors. It was so held by the Supreme Court of North Carolina in *Mfg. Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418, Ann. Cas. 1916A, 763, and *Ingold v. Hickory*, 178 N. C. 614, 101 S. E. 525, in which the legislation upon the subject is reviewed by Justice Allen. The claim of priority over the general creditors of T. H. Gill Company asserted by the creditors who furnished materials or performed labor cannot be sustained.

[4] Ferris and Wooten, who performed labor and furnished materials to T. H. Gill Company on account of the construction of the highways, for which the special master finds that said company is indebted, rest their claim to be paid out of the amount due the receiver by the highway commission upon the terms of the contract under and pursuant to which the work was done, by the terms of T. H. Gill Company obligated to pay them—

"the amounts to become due thereon for the performance of the above specified work under this contract on the day succeeding that day of each month when the state highway commission shall pay unto the party of the first part herein its estimate covering the work herein provided for, but in no month shall the payment to the second parties herein be later than the 16th day of the month."

It is contended by counsel for these creditors that this language constitutes an equitable assignment of so much of the amount due T. H. Gill Company at the end of each month as is sufficient to pay the subcontractors the amount due them on said contract at that time.

In *Christmas v. Russell*, 14 Wall. (81 U. S.) 69, 84 (20 L. Ed. 762), it is said:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor."

In *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, Justice Harlan quotes, with approval, the following from *Pinch v. Anthony*, 8 Allen (Mass.) 536:

"It is well stated that a party may, by express agreement create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation."

In *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, Justice White, after stating the facts in the instant case, says:

"It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity."

The learned Justice also quotes with approval the following from Pomeroy's Eq. (vol. 3) par. 1235:

"That every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, a fund, therein described or identified, a security for a debt or other obligation, \* \* \* creates an equitable lien upon the property so indicated." *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; *Barnes v. Alexander*, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530; *U. S. v. Taylor* (D. C.) 268 Fed. 635.

Tested by these authorities and the principles announced by them, it would seem clear that the contract between T. H. Gill Company and Ferris and Wooten constituted neither an equitable assignment of the amount received, or to be received by it, from the highway commission nor an equitable lien thereon. The reference to the payment of the installments by the highway commission simply fixed the time at which the T. H. Gill Company were to pay for the work, as it progressed by the subcontractor. The contention of Ferris and Wooten cannot be sustained.

The next claim in order is asserted by the National Surety Company by its petition filed July 20, 1921. The petition states that—

"The contract between the highway commission and T. H. Gill Company provides for the retention of 15 per cent. of the contract price as each payment is made until final settlement; that the highway commission has retained over \$15,000 so far on account of said contracts; that claims for materialmen and laborers have been made against the said surety company; that the receiver has not made provision for the retention of funds in the state of North Carolina that have been or may be, received from the highway commission on these projects in which the surety company looks for protection."

It prays that the receiver be required to deposit in North Carolina a sufficient amount of funds to cover all claims for material and labor, and that said funds be distributed under the orders of this court.

[5] It may be that this claim should have been set up in the court having original jurisdiction in the cause rather than here, where the proceeding is only ancillary and for the purpose of collecting the assets of the corporation to the end that they may be turned over to that court, where all of the creditors and other parties in interest are before the court, and final decrees may be made disposing of the claims and priorities. It is, I think, within the power of this court in the ancillary suit to protect claims of residents of the state, based upon state statutes, liens, etc. This question has not been raised by the receiver or the general creditors. The several parties in interest have, through their counsel, filed able and enlightening briefs.

The contention of the surety company is based upon several grounds, each requiring consideration.

[6] It is first suggested that the surety company is entitled to invoke the right of subrogation; that is, that upon the payment of such

amount as it may be liable for on account of its suretyship of T. H. Gill Company to creditors of said company for materials furnished or labor performed on the highways, pursuant to the terms and provisions of the contract between T. H. Gill Company and the state highway commission, it is entitled to resort to all liens, rights, or equities held by such creditors against the Gill Company or the highway commission.

"Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. \* \* \* Accordingly it has been held that the sureties on the official bond of an insolvent sheriff, who had been compelled to pay money collected by a defaulting deputy, may recover of the sureties on a bond given to the sheriff by the deputy, conditioned upon the faithful performance of his duties. \* \* \* As soon as a surety has paid the debt an equity arises in his favor to have all the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done." Shepherd, C. J., in *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 106, 37 Am. St. Rep. 627.

The learned Chief Justice further says:

"It is further to be observed that the party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none." Sheldon on Subrogation; 1 Beach, Modern Eq. Jur. 797.

So, in *American Bonding Co. v. National Bank*, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466, it is said:

"The general equitable doctrine of subrogation by which a surety who has paid the debt of his principal becomes entitled to all the rights of the creditor against the principal debtor and to the benefit of all securities for the debt held by the former against the latter, is universally recognized."

The doctrine has not been more strongly and clearly stated than by Chancellor Kent in *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554, in which he says:

"A surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor and have his securities transferred to him, and to avail himself of those securities against the debtor."

The limitation upon the right to subrogation is incident to the essential character of the right itself—substitution. Therefore it is well settled that—

"One for whose benefit the doctrine of subrogation is invoked and enforced can acquire no higher or greater rights than those of the person for whom he is substituted. The rights of the person subrogated are measured by those of the original creditor, and cannot be extended further. He succeeds to no rights not held by the creditor." Note to *Am. Bonding Co. v. National Bank*, supra, 99 Am. St. Rep. 486, and cases cited.

The principle upon which courts of equity proceed in administering the doctrine is sometimes illustrated by saying that, as equity regards that as done which ought to be done, the rights, remedies, liens, and securities held by the creditor whose debt is paid by the surety will be regarded as having been assigned by such creditor upon the payment of his debt by the surety.

If, therefore, the creditors of T. H. Gill Company, holding claims against it for material furnished or labor performed on the highway for the payment of which the surety company is bound, have no lien, statutory or otherwise, upon the highway, or the funds due T. H. Gill Company on account of the contract and its performance, it is clear that the surety company, upon the payment of their debt, can take no lien by way of subrogation or substitution. This is well illustrated by the case of *Am. Surety Co. v. Finletter* (C. C. A. 3d Cir.) 274 Fed. 152, relied upon by the intervenor. In that case Peoples Bros. entered into a contract with the city of Philadelphia, for the erection of a power house. The contractor executed a bond to the city, conditioned for the payment of all claims for labor performed and material furnished under the contract. The contractor failed to perform the contract, and a receiver was appointed. During the progress of the work the city retained 15 per cent. of the amount due. The surety company completed the contract, and received from the city the amount due, including the retained percentage. The receiver demanded so much of the retained percentage as was due on the work completed by the contractor before the receivership. The District Court awarded this amount to the receiver for the benefit of general creditors, thereafter treating the surety as a general creditor from which decree the surety company appealed. The surety company invoked the right to subrogation.

Affirming the decision of the District Court, it is noted that, under the law of Pennsylvania the laborers and materialmen did not have any right against, or lien upon, the percentage retained by the city, but were merely general creditors of the contractor. Judge Woolley said:

"In this state of the law—laborers and materialmen having no right to reserved percentages—there were, as to them, no rights to which the surety company could be subrogated. Likewise Peoples Bros., Inc., has no rights in the fund to which the surety company could be subrogated. Obviously there was no right of subrogation anywhere."

In *National Surety Co. v. Berggren*, 126 Minn. 188, 148 N. W. 55, the claim of the surety company was based upon an assignment and subrogation. Bunn, J., putting aside the assignment theory, says:

"It must be, and is, conceded that the Stromberg-Carlson Company, had its claim not been paid by plaintiff, would have had a right to be paid out of the fund retained by the state that would be superior to any assignment of the fund by Berggren. It is clear that plaintiff was obliged, under the terms of the bond, to pay this claim. It would seem to follow that upon such payment plaintiff was subrogated to all the rights of the Stromberg-Carlson Company."

In *Alfred Richards Brick Co. v. Rothwell*, 18 App. D. C. 516, the right to subrogation by the surety, who had paid claims against the principal, adopted by the court, that—

"There is therefore by necessary implication, an equitable lien and preference secured in favor of the parties who furnish labor and materials in the execution of the court, in the application or distribution of the contract price remaining to be paid; and when the government, as in the present instance, holds in its hands any part of the money contracted to be paid for the work, and there remain unpaid claims for labor and materials supplied, it holds such fund as quasi trustee for the benefit of those entitled to receive it under the condition in the bond; that is to say, the laborers and materialmen remaining unpaid."

From this basic proposition, that the materialmen and laborers have a lien on the contract price, the learned judge logically concludes that the sureties on the bond are subrogated to such lien, upon payment of the claims. That the court rested its decision upon the proposition that the materialmen and laborers had a lien is manifest from the language of the judge who says:

"The practical effect of the statute is to confer a special lien in favor of such persons \* \* \* and to substitute the bond, in the place of the public building as the thing upon which the lien is charged."

The decision is based upon the construction of the federal statute. As we have seen, under the statutes, as construed by the Supreme Court of this state, the laborers have no such lien. Herein lies the distinction between these and the instant case. This distinction is clearly stated in *American Surety Company v. Finletter*, supra.

The equitable lien, or charge, theory, under substantially the same conditions as in the instant case, was sought to be applied in *Re Fowble*, (D. C. Md.) 213 Fed. 676. The facts, as stated by Judge Rose, were that Fowble contracted to construct a state building. The Fidelity & Deposit Company became security on its bond. Certain persons supplied materials to the contractor for the building, and, their debts not being paid, filed notice of lien under Maryland lien laws. The contractor was adjudged a bankrupt, and a trustee appointed. The balance due on the contract price was paid into the registry, subject to the decrees of the court, in regard to their rights. The materialmen claimed an equitable lien, which should be discharged from the funds. Judge Rose held that, because of the character of the buildings, no lien attached for material. Referring to the contention that the materialmen had an equity in the fund superior to that of the trustee, he said:

"Most men feel that one who has contributed to the creation of anything of value stands in a peculiar relation to it. He has a special claim to be paid out of it. The mechanic and other lien laws of so many jurisdictions are the expression of that conviction. The courts, however, have not seen their way clear to make it a generally applicable principle of equitable jurisprudence. It has had its part in shaping many a rule administered in chancery, but complete recognition has been withheld from it. The difficulty, in many, if not in most, cases, the impossibility, of accurately and justly defining its limits have amply justified the hesitation of the courts. If mechanic's lien laws prove the strength of its appeal to an instinctive sense of natural justice, they demonstrate that it is usually impossible to apply it beyond the limits to which the statutes go."

As said by the learned judge, the effort to create the equitable lien upon property, howsoever strong, the desire to protect meritorious claims, is difficult, if not impossible, to fix within safe limitations, having regard to the rights of others than the beneficiaries. The equitable lien theory in respect to claims of laborers and materialmen has not been recognized by the courts of this state—they are protected by statutory liens.

[7] Passing, however, these contentions, the National Surety Company insists that, if not entitled to have its petition granted upon the claim for subrogation, it has contract rights, or rights based upon the contract made between the highway commission and the T. H. Gill Company, which entitles it to have the retained percentages applied to

the amount of the debts for material and labor, for which it is liable, and that this claim is sustained by the provisions in the application made by T. H. Gill Company to the National Surety Company to sign the bond to the state highway commissioners, to wit:

"(4) That the surety, or sureties, executing any such bond, or bonds shall have the right and \* \* \* are hereby authorized, but not required (a) if any such bond be given in connection with a contract \* \* \* to take possession of the work under such contract, or of any breach thereof, or of such bond, or bonds, and at the expense of the indemnitors, to complete, or to contract for the completion of the same, or to consent to reletting or completion thereof by the owner.

"(5) If any such bonds be given in connection with a contract, to assign, transfer and set over, and the indemnitors do hereby assign, transfer and set over to the surety or sureties, executing said bond or bonds, such assignment to become effective as of the date of said bond or bonds, but only in the event of any such abandonment, forfeiture or breach thereof.

"(c) Any and all percentages of the contract price retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach or that thereafter may become due."

The application to the National Surety Company to sign the bond on account of the contract with the highway commission of Lenoir county contains the same provisions as in the other application, and in addition thereto it is provided:

"(5) This assignment shall be in full force and effect upon and as of the date hereof, should the undersigned fail or be unable to complete the said work, in accordance with the terms of the contract, covered by said bond, or in the event of any default on the undersigned's part under the said contract or in the payment of the premiums.

"(6) That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the company all the deferred payments and retained percentages that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract \* \* \* hereby agreeing that such money and the proceeds of such payment and properties shall be the property of the company and to be by it credited upon any loss, costs, damage, charge and expense sustained by or under said bond."

An examination of the decisions relied upon by the surety company to sustain its claim to the retained percentages upon these provisions discloses that in the majority of them the surety, upon the failure of the principal in the bond to complete the contract, or its abandonment, completed that work under the terms of the original contract. *Bank v. City Trust Safe Deposit Co.* (C. C. A..9th Cir.) 114 Fed. 529; *Cox v. New England Equitable Ins. Co.*, 247 Fed. (C. C. A. 8th Cir.) 955, 160 C. C. A. 655; *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 1037; *Wells v. City of Philadelphia*, 270 Pa. 42, 112 Atl. 867; *Labbe v. Bernard*, 196 Mass. 551, 82 N. E. 688, 14 L. R. A. (N. S.) 457; *Prairie State Bank v. U. S.*, 164 U. S. 237, 17 Sup. Ct. 142, 41 L. Ed. 412.

In this case the receiver, with the approval of the surety, completed the work in accordance with the terms and provisions of the contract; no claim is made against the surety on account of his conduct or administration of his trust. The only breach of the bond, accrued and

was complete before the appointment of the receiver, and this is confined to the failure of the T. H. Gill Company to pay the intervening creditors, holding claims for material furnished and labor performed in the construction of the highway.

As we have seen, the materialmen and laborers had no lien either on the property or the retained percentages, therefore the highway commission was under no obligation to hold them for, or apply to, the payment of their claims—they were, as between the commission and T. H. Gill Company, upon the completion of the work, due T. H. Gill Company. The surety company, for the purpose of this discussion, concedes its liability for the amount due them, as found by the special master.

The question, therefore, to be decided is—What, if any, rights have the surety company in or to the retained percentages due T. H. Gill Company from the highway commission to have the retained percentages applied to the exoneration of its liability on the bond, superior to the rights of the receiver, representing general creditors? It may be conceded, from any viewpoint, when the debts are paid by the surety company, it will be entitled to share in the assets in the hands of the receiver, as a general creditor. It would also seem that the surety company has, in no event, any claim upon the retained percentage, due the receiver on account of work performed by him as receiver in the completion of the contract.

For the present, the consideration of the provisions of the application for the bond as an equitable assignment of the fund will be put aside. We are thus brought to a consideration of the question in the light of the decision in *Prairie State National Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and other cases decided upon the authority of that case. There, Sundberg contracted with the government for the construction of a custom house at Galveston. Pursuant to the provisions of the contract, the government retained from the monthly payments, as the work progressed, the per cent. as provided in the contract. Hitchcock became surety on the bond of Sundberg. There was no provision in the bond obligating the contractor to pay for labor and material. The condition was simply for "the faithful performance of this contract and the agreements and covenants made therein."

In consideration of advancements made by the bank Sundberg gave to one of its officers an order, or power of attorney, authorizing him to collect from the government the final payment due under the contract. The Secretary of the Treasury declined to recognize the order or power of attorney.

Hitchcock, the surety, asserted a claim to the fund, for that Sundberg defaulted on his contract and he, or his surety, without knowledge of the claim of the bank, completed the contract with the consent of the contractors. "The question to be determined," as stated by Mr. Justice White, was "which of the two contestants [the bank or Hitchcock, the surety] possesses a superior right to the fund."

After deciding that the assignment to the bank was void at law under the provisions of the statute prohibiting the assignment of a claim of that character against the government, he says that the bank claims an

equitable lien originating in the attempted transfer, or assignment, and that Hitchcock claimed an equity to the fund, which arose at the time he entered into the contract of suretyship, and was therefore prior in point of time and paramount to that of the bank. The learned Justice says:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties—is amply sustained by authority."

Thus in *Calvert v. London Dock Company*, 2 Keen, 638 (1838) S. C. 7 L. J. N. S. 90, 48 Eng. Rep. Reprint, 774, it is held:

"When a contractor had undertaken to perform certain work, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth, upon the completion of the whole work, it was held that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done, having been made to the contractor, without the consent of the sureties before the completion of the whole work."

Mr. Justice White cites a number of English and American cases, sustaining the decision. He quotes with approval, the language of Mr. Justice Scott in *Finney v. Condon* (1877) 86 Ill. 78:

"The law upon this subject seems to be, the reserved per cent. to be withheld until the completion of the work to be done is as much for the indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed. And there is great justness in the rule adopted. Equitably, therefore, the sureties in such cases are entitled to have the sum agreed upon held as a fund out of which they may be indemnified, and if the principal releases it without their consent it discharges them from their undertaking."

In *Henningsen v. U. S. Fidelity Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, plaintiff contracted with the government to construct a public building, executing a bond with the defendant company, surety, conditioned for the faithful performance of the contract and "to promptly make full payments to all persons supplying labor and materials in the prosecution of the work."

The buildings were constructed in accordance with the contract, but the contractors failed to pay the claims for labor and material. Pending work on the buildings, the contractor assigned the payment then due, or to become due, to secure payment of a loan. The question to be decided was whether the claim of the surety company for the amount for which it admitted liability to the materialmen and laborers on the fund was superior to the claim of the bank under the assignment. The briefs (208 U. S. 406, 407, 28 Sup. Ct. 389, 390, 52 L. Ed. 547) disclose that the same contentions were made by the bank as by the receiver here—that the contract had been fully performed; the laborers had no lien upon the fund; that the government was under no obligation to pay them; that there was no right of the laborers to which the surety could be subrogated, and no equitable lien, nor any attempt to assign to the surety. The surety company, in its brief, cited authorities

to sustain its claim to the fund. Mr. Justice Brewer, in disposing of the contentions, says:

"Henningsen \* \* \* entered into a contract \* \* \* to construct buildings. The guaranty company was surety on that contract. Its stipulation was not merely that the contractor should construct the buildings, but that he should pay promptly and in full all persons supplying labor and material in the prosecution of the work contracted for. He did not make this payment and the guaranty company, as surety, was compelled to and did make the payment. Is its equity superior to that of one who simply loaned money to the contractor to be by him used as he saw fit, either in the performance of its building contract or in any other way? We think it is."

Citing *Prairie State Bank v. U. S.*, supra, he said: "It seems unnecessary to again review the authorities."

In *Cox v. New England Equitable Ins. Co.* (C. C. A. 8th Cir.) 247 Fed. 955, 160 C. C. A. 655, the contractor completed the contract, leaving claims for material and labor unpaid. The government, without knowledge of this, paid the contract price to the contractor, who paid it to a bank on an indebtedness. The trustee in bankruptcy of the contractor recovered the money from the bank as a voidable preference. The court held that the surety was entitled to so much of the fund as was necessary to reimburse it for the amount paid to laborers and materialmen. *Hardaway & Prowell v. National Surety Co.* (C. C. A. 6th Cir.) 150 Fed. 465, 80 C. C. A. 283; *Title Guaranty & Surety Co. v. Dutcher* (D. C.) 203 Fed. 167.

The latest case from the federal courts is *American Surety Company v. Finletter*, supra. As we have seen, the court rejected the theory that the laborers had a lien to which the surety company was subrogated, saying:

"But the surety company did not confine its argument to the question of subrogation, whether within or without the terms of the quoted provision in the contractor's application for bond, but maintained on authority of *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, that, as a surety—which had paid all laborers and materialmen and had thus released the contractor from his obligations to them and had also satisfied the purpose of the city in requiring an obligation to see that laborers and supplymen were paid—it has an equity in reserved percentages superior to that of general creditors."

The learned Circuit Judge, after discussing the question whether the agreement by the contractor, at the time he applied to the surety company, operated as an equitable assignment, says:

"We are inclined rather to the views of the same court expressed in *Ingersoll v. Coram*, 211 U. S. 835, 29 Sup. Ct. 92, 53 L. Ed. 208, accepting the rule stated in *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, to the effect that an express executory contract in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property or fund therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated. [Citing a number of cases.] Applying this rule to cases where a contractor, seeking surety, pledges deferred payments—moneys certain to be due and clearly indicated—as an inducement for the bond, the courts have very generally recognized such a pledge as a valid consideration moving to the surety, first, to induce it to enter into the bond, and second, at a reduced premium because of the reduced risk."

The fund was awarded to the company. The equity for subrogation was rejected.

In *Town of Gastonia v. Engineering Co.*, 131 N. C. 359, 42 S. E. 857, Clark, J., said:

"The American Surety Company having become surety to the engineering company for the faithful performance of said contract, upon any default of its principal, by which it became liable on said bond, if it did not become subrogated to the rights of its principal in this fund, it is at least entitled to have it applied to the payment of these claims for materials, in exoneration of its liability therefor."

In *St. Peter's Catholic Church v. Vannote*, *supra*, the surety completed the contract and claimed the retained percentage. The Vice Chancellor said:

"The twenty per cent. was retained as indemnity against failure by the contractors to entirely execute the contract. As against the sureties, the owner was bound to so retain it [the contract so providing]; else he would have, *pro tanto*, discharged the sureties from their obligations to answer the default of the contractors."

So in *Wells v. City of Philadelphia*, *supra*, it is said:

"As to any money retained, the surety then stands to that fund in the same position as the owner of the property to which the contract relates. The surety's relation, through compulsion (default), dates even with the owner's relation. From this fund and the unpaid contract price it is entitled to sufficient to save itself from loss on its suretyship engagement; nor can the contractor, by assignment or otherwise, deprive it of this right."

The authorities cited sustain the right of the surety to have the retained percentages, provided for in the contract, applied to the exoneration of loss sustained by breach of the condition of the bond.

Difficulty is encountered in resting the claim upon the doctrine of subrogation, or finding, in the language used in making the application for the bond, an equitable assignment as defined and limited by authoritative decisions. This is especially true if confined to the rule laid down in *Christmas v. Russell*, 81 U. S. (14 Wall.) 69, 20 L. Ed. 762. It would seem that the better view is that expressed in several of the best-considered cases—that the surety acquires a contractual right, measured by the terms of the contract, between the owner of the property and the contractor, which entitles him to the benefit of such provisions as inure to the protection of the owner, subject of course to his primary right, and reduces the liability of the surety against loss or damage by the default of the contractor. The language quoted by Judge White in the *Prairie State Bank Case* from a number of English and American courts tends strongly to sustain this principle upon which the right of the surety rests.

The question presented here is of more than usual interest to state and county highway commissions with us at this time because of the very large extent to which road building is being prosecuted in this state. Uncertainty in regard to the rights and obligations of all parties to these contracts results frequently in expensive litigation and heavy losses. I have given the subject anxious consideration and the authorities careful examination, reaching the conclusion that the receiver should make settlement with the highway commissions and col-

lect such amounts as may be due on the contracts at the time of his appointment, separating the amount of the retained percentages; that he should retain such percentages until the further order of the court. The amounts due upon the contract, other than the retained percentage, he will administer under the direction of the court having original or primary jurisdiction. This will protect the highway commissions and the National Surety Company. The laborer and materialmen are protected by the bond, and are not interested in the disposition of the funds.

The receiver will settle with the highway commission for the balances due for work performed by him as receiver, and collect such amounts disposing of them under the directions of the court of primary jurisdiction. The costs incurred in the intervention will be paid by the receiver. A decree may be drawn accordingly.

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P. DOUGHERTY CO. v. 2471 TONS OF COAL EX BARGE ANNAPOLIS.

(District Court, D. Massachusetts. February 25, 1922.)

No. 1773.

1. Shipping ⚡45—"Default" in charter party means failure to comply with agreement to complete loading.

"Default," as used in a charter party in the common form, does not mean "fault," but merely failure to comply with the agreement to complete loading in the stipulated time; the only exception being vis major or its equivalent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Default.]

2. Shipping ⚡39—Losses caused by government interference left where they fall.

Generally speaking, losses caused by government interference with the performance of charter parties are left where they fall, and are not to be transferred from one person to another, unless the latter has contracted to take the risk of them, or is otherwise obliged to do so.

3. Shipping ⚡39—Charterer does not warrant that there will be no detention. A charterer does not warrant that there shall be no detention.

4. Shipping ⚡52—Charterer held not liable for detention through government interference.

A charterer of a ship with a cargo of coal held not liable for delay in loading caused by interference of the government, preventing the obtaining of a permit to load, though at the time of the making of the charter party coal was under government control.

5. Shipping ⚡52—Charterer held liable for delay caused by congested condition of port and action of government.

Where government held up loading of coal for some time, and the harbor became congested before the government allowed permits to be issued, a charterer of a ship with a cargo of coal was liable for demurrage after the permits were issued, though the government retained control and determined the order in which the vessels should be loaded.

In Admiralty. Libel by the P. Dougherty Company, owner of the barge Annapolis, against its cargo, to recover freight and demurrage. Decree for libellant.

Blodgett, Jones, Burnham & Bingham and Fred'k W. Eaton, all of Boston, Mass., for libellant.

P. G. Carleton, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel brought by the owners of the barge Annapolis against its cargo to recover freight and demurrage. The freight has been paid, and the only question now before the court is whether demurrage is due. The case was heard on a statement of agreed facts and the oral testimony of the master of the barge. The essential facts are as follows:

The charter party was executed on November 29, 1919; a copy of it is annexed to the libel. By its terms the barge was to proceed to Sewall's Point, Norfolk, Va., and there load a cargo of coal for Boston; the charterer (the Eastern Massachusetts Street Railway Company) was to have five days for loading and discharging cargo, to commence when the master should report the barge ready to receive or discharge. There was the following provision about demurrage:

"For each and every day's detention beyond said time by default of said party of the second part or agent, ten cents (10¢) per ton on bill of lading weight per day and pro rata for portion of a day shall be paid by said party of the second part or agent, to said party of the first part, or agent."

At the time when the charter party was made, and during the period covered by this controversy, because of a strike of the miners in the bituminous coal fields, the United States government, through its Railroad and Fuel Administration and other agencies, had taken control over shipment of coal by water. It exercised absolute control over the delivery and loading of coal at Sewall's Point, and prohibited the loading of coal upon any vessel unless a permit therefor had been issued and was in force.

Prior to the charter party the street railway company had secured the necessary permit for loading the Annapolis. While she was on her way to Sewall's point to load, this permit was revoked. When she arrived there and reported for loading on December 6, 1919, at 9:30 a. m., the charterer had no permit, and it was therefore impossible to load her.

This state of affairs continued—the barge lying at anchor in the harbor ready at all times to load—until December 12, 1919, at 3:45 p. m., when the charterer obtained the necessary permit. On the same day, however, 42 other permits were issued for other vessels. About 30 vessels were in the harbor for loading when the Annapolis arrived, and by the time the permit was obtained 10 more had come in. Docking facilities were too limited to take care of such a large number promptly, and it was not until 10 days later, on December 22, 1919, at 10:30 a. m., that the Annapolis was docked for loading, which was completed that evening at 9:45 p. m. The docking and loading were under the control of the government. The Annapolis was not loaded in turn. About half a dozen vessels arriving after her were loaded before her. The claimant had a cargo of coal waiting to be loaded all the time the barge was in port, but was unable to put it on board for the reasons stated.

The question is whether there was any detention of the barge "by default of the party of the second part"; i. e., the charterer. For convenience of discussion the period may be divided into two parts: First, from the arrival on December 6th until the permit was obtained on December 12th; second, from December 12th until the loading on December 22d. Aside from these delays, the barge was loaded and discharged within the lay days specified by the charter party.

[1] The charter party is in a common form. The provision in question has often been considered by the courts, and the general meaning of it is well settled:

"'Default' does not mean 'fault,' but merely failure to comply with the agreement to complete the loading in the stipulated time. The only exception is *vis major* or its equivalent." *So. Trans. Co. v. Unkel* (D. C.) 238 Fed. 779.

In that case it was held that prevention of loading by severe weather conditions did not excuse the charterer. See, too, *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106; *The Olaf* (D. C.) 248 Fed. 807; *M. O. H. of W. I., Inc., v. C. Hannevig, Inc.* (C. C. A.) 264 Fed. 311.

[2] The real controversy is whether the circumstances stated constitute "*vis major* or its equivalent," and this depends upon the correct interpretation of the charter party. Government control of business is very apt to cause heavy losses to persons engaged in the business controlled. That was so in this instance; there is a large out of pocket loss, which somebody must bear. Generally speaking, losses caused by government interference with the performance of contracts are left where they fall; they are not to be transferred from one person to another, unless the latter has contracted to take the risk of them, or is otherwise obliged to do so. *The Juno*, [1916] L. R. Prob. Div. 169; *Met. Water Board v. Dick*, [1918] App. Cas. 119. If the barge had been prevented from loading by the government after the charter party had been entered into, the charterer would have had no action against her or her owners and, as between the parties, must have borne the resulting loss (*Cunningham v. Dunn* [1878] L. R. 3 C. P. 443); and the same principle would clearly apply relieving the charterer if the specified cargo were a definite object, and it were taken by the government, or if the charterer were prevented from loading cargo by government action taken subsequent to the charter, as was decided in *Reed v. Haskins*, 26 L. J. Q. B. 5. Here all of the commodity constituting the cargo was, as both parties knew, under government control at the time of the charter. Does this circumstance differentiate the case from those referred to and require a construction of the charter party under which the charterer took the risk of being unable to furnish the cargo because of government interference?

[3] No case exactly in point has been called to my attention. It is well settled that the charterer does not warrant that there shall be no detention:

"The term 'default' employed in that relation in the charter parties signifies failure on the part of the charterers to do or perform some duty or act which they have stipulated or are bound in pursuance of their contractual relations to do or perform. The term cannot be so broadly interpreted

as to include all manner of causes of detention or delay, whether arising from act or omission in the discharge of duty on the part of the charterers or not. In other words, the contract is not absolute that there shall be no detention beyond a certain day for any cause, but that there shall be no detention on account of the failure of the charterers to perform their contractual obligations with the vessel or its owners." *Wolverton, J., Washington Marine Co. v. Rainer Mill & Lumber Co.* (D. C.) 198 Fed. 142.

It has been decided in England that the seller for export of an article then under government control does not undertake absolutely to obtain the necessary permit, but only to use reasonable diligence to do so, and is not liable for failure to deliver if, on making proper efforts, it is unable to obtain a permit. *Anglo-Russian Merchant Traders v. Batt & Co.*, [1917] 2 K. B. 679. The obligation of a seller to deliver the goods sold to the buyer is somewhat analogous to that of the charterer to deliver cargo to the vessel.

[4] The basis of liability in the charter party is "default" on the part of the charterer, which means, as the *Washington Marine Co. Case*, *supra*, shows, a failure to fulfil an obligation imposed by the contract. There is nothing in the language of the charter party on which an absolute agreement on the part of the charterer can be found; and while strong reasons can be given for holding that the charterer whose business it is to furnish the cargo—a matter over which the vessel has little or no control—should be held to take the risk of government interference with the loading, and the question is by no means free from doubt, I do not think that the equities in favor of the vessel are so preponderant as to justify implying such an agreement from the circumstances under which the charter party was made. The charterer was bound, as held in the *Anglo-Russian Merchant Traders Case*, *supra*, to use due diligence to obtain the necessary permit. As it appears to have done so—indeed, no contention is made to the contrary—and as when the barge left Boston, there was no reason to anticipate that the permit would be revoked, the charterer is not liable for the detention prior to the issue of the permit.

[5] The remaining question is whether the charterer is liable for the detention between the issue of the permit on December 12th and the loading on December 22d. While the evidence on the point is not very conclusive, I infer, as the defendant contends, that the time when a waiting vessel should be loaded was determined by the government officials. It does not appear that the permits specified the turn in which the vessel should be loaded; apparently all permits ranked equally. The principle on which turns were awarded does not appear; it may have depended on the necessities of the community to which her cargo was destined, and perhaps to some extent on the character and size of the vessel. The charterer had no control over it. If there had been no other vessels waiting, the *Annapolis* could easily have been loaded by 6 p. m. of the day following that on which the permit was issued. Her detention thereafter was due to the congestion of the port, both at the time of her arrival and when the permit was issued. It was therefore the result of two causes: (1) The large number of vessels to be loaded; and (2) the turn among them which she was accorded by the officials in charge.

It is well settled that for delays due to the congested condition of a port charterers are responsible; the risk of that is upon them, not upon the vessel. This is true, even though the cause of it was unforeseen and beyond their control. *W. K. Niver Coal Co. v. Cheronea S. S. Co.*, 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126. The detention of the Annapolis after 6 p. m. on December 13th was therefore "by default," as those words have been construed, on the part of the charterers, for which they are liable. It was not directly and solely due to government intervention and control. It seems to me that the usual rule should be applied and that the charterers are liable for demurrage for this period. In *The Kingsland*, 12 Aspinwall, Mar. Cases, 38, and *Weir v. Richardson*, 3 Com. Cases, 20, there was no congestion in the ports, and the delay was due to no cause but failure of the government agents to act promptly or carefully. Those decisions seem to me distinguishable from the present case. It may be that the English law, as stated in *The Kingsland*, supra, is not in accord with the American law, as laid down in the *W. K. Niver Coal Co. Case*, supra, by which I am, of course, bound.

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Ex parte SZUMRAK.

(District Court, E. D. Michigan, S. D. February 23, 1922.)

No. 7766.

1. Aliens ⇨40—Statute making it an offense to keep or harbor alien pursuant to her importation for immoral purposes held constitutional and valid.

Immigration Act Feb. 20, 1907, § 3, as amended by Act March 26, 1910, § 2, making it unlawful to import any alien for immoral purposes, and a felony to keep or harbor any alien woman for such purposes, "in pursuance of such illegal importation," held within the constitutional power of Congress over immigration, and valid.

2. Aliens ⇨54—Right to deport for keeping for immoral purposes alien woman imported for such purposes not limited to three years after his entry.

Under Immigration Act Feb. 20, 1907, § 3 as amended by Act March 26, 1910, § 2, making it a felony to keep or harbor any alien woman for immoral purposes, pursuant to her illegal importation for such purposes, and further providing that "any alien who shall be convicted under any provision of this section shall at the expiration of his sentence" be deported to the country whence he came, or of which he is a subject or a citizen, the right of deportation is not limited to a time within three years after his entry.

3. Aliens ⇨53—"At," in a deportation statute, construed to mean not exact time sentence expires, but on or after.

The word "at," as used in a statute providing that an alien, convicted of any one of certain offenses, "shall at the expiration of his sentence" be deported, does not mean at the exact time when his sentence expires, but is used in the sense of "on" or "after," and the deportation may be at any time after, but not before, completion of his sentence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, At.]

On petition of August Szumrak for writs of habeas corpus and certiorari. Denied.

Cohane, Rhodes, Garvett & Frankel, of Detroit, Mich., for petitioner.  
Fred L. Eaton, Asst. U. S. Dist. Atty., of Detroit, Mich., for respondent.

TUTTLE, District Judge. This is a petition filed by the above-named petitioner, an alien praying for writs of habeas corpus and certiorari directed to P. L. Prentis, United States immigration inspector in charge at Detroit, in this district, whom the petitioner alleges to be unlawfully detaining him preparatory to deporting him as an undesirable alien. The writs sought having been granted, and the respondent having filed his return thereto, a hearing has been held thereon in open court, and the cause submitted upon briefs which have been carefully considered. The material facts are as follows:

Petitioner, who is an alien, being a citizen of Czecho-Slovakia, entered the United States January 4, 1911. On April 3, 1914, he pleaded guilty in this court to having theretofore and in June, 1913, kept, maintained, supported, and harbored in a house in said city of Detroit a certain alien woman for immoral purposes, in pursuance of the illegal importation by him of said alien woman, contrary to the provisions of section 3 of the Immigration Act then in force. Act Feb. 20, 1907, c. 1134, 34 Stat. 899, as amended by section 2, Act March 26, 1910, c. 128, 36 Stat. 264. Thereupon said alien was sentenced by this court to the Detroit House of Correction for a term of three months. While petitioner was serving this sentence, on April 22, 1914, a warrant was issued by the Department of Labor for his arrest and deportation, on the ground that he was unlawfully within the United States, in that he had been convicted of violating section 3 of the aforesaid Immigration Act. Petitioner then being confined in the Detroit House of Correction, pursuant to the sentence of this court just mentioned, his hearing on the charge alleged in said warrant was held at said House of Correction on April 27, 1914. At the conclusion of said hearing the immigration inspector in charge thereof made a written finding that said alien had entered the United States at the date aforesaid, and was unlawfully within the United States by reason of his conviction of a violation of section 3 of the Immigration Act, and his deportation was therein recommended. Petitioner was left in the custody of the warden of the House of Correction, "to await decision in his case by the Secretary of Labor."

It will be noted that the sentence imposed upon him by this court had not then expired. A warrant of deportation was issued May 6, 1914, but for some unexplained reason petitioner was released from prison at the expiration of his sentence, July 2, 1914, without any effort to detain or deport him. (I take judicial notice of the World War commencing August 2, 1914, and resulting European conditions, which made deportation difficult, if not impossible, for a very long period.) No further action by the government was taken until March 16, 1921, when another warrant for the arrest of petitioner was issued by the Department of Labor, charging that the alien in question, "who landed at an unknown port on or about the 15th of June, 1920, has been found in the United States in violation of the Immigra-

tion Act of February 5, 1917 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 959, 960, 4289 $\frac{1}{4}$ a-4289 $\frac{1}{4}$ u], for the following, among other reasons: That he procured or attempted to procure or import a woman for an immoral purpose." Petitioner was thereupon taken into custody under this warrant, and hearings held thereon on June 14, June 18, and July 1, 1921, at the conclusion of which hearings the immigration inspector in charge made a written finding that said alien "entered the United States at an unknown port on or about June 15, 1920, and that he procured or attempted to procure or import a woman for an immoral purpose." His deportation was recommended, and another warrant of deportation issued, August 26, 1921, directing his deportation on the ground that he had been found in the United States "in violation of the Immigration Act of February 5, 1917, to wit, that he procured or attempted to procure or import a woman for an immoral purpose."

The return of the respondent states that petitioner entered the United States on or about the 4th day of January, 1911; that the latter is an undesirable alien, in that he procured or attempted to procure or import a woman for immoral purposes into the United States, has pleaded guilty to the said offense before this Court, and been sentenced therefor; and that "respondent is holding said petitioner for deportation on a warrant charging that he procured or attempted to procure or import a woman into the United States for immoral purposes, a copy of said warrant being attached hereto." Attached to said return are copies of the two warrants of deportation hereinbefore mentioned. Although the government places particular reliance on the proceedings and warrant of 1914, it does not waive the proceedings and warrant of 1921, and expressly claims the benefit of both proceedings, and the right to deport on either warrant.

While it is apparent from the foregoing that in the 1921 proceedings, following the issuance of the May 6, 1914, warrant of deportation, there has been manifest error and much confusion on the part of certain immigration officials, yet there is nothing about these subsequent proceedings which in any way affects the proceedings had in 1914. There is nothing about the warrant of 1921 and the proceedings in connection therewith which would invalidate the warrant and proceedings of 1914, if said warrant of 1914 is otherwise now valid and enforceable. It is here conceded by both parties that petitioner entered this country January 4, 1911, and that the statute applicable to his rights and liabilities is the Immigration Act of 1907, as amended by the Immigration Act of 1910, hereinbefore mentioned, and not the Immigration Act of 1917. In determining the present validity and force of the warrant of May 6, 1914, I shall ignore, and treat as surplusage, all proceedings taken under the 1921 warrant of arrest and deportation. I shall decide the case upon the construction, scope, and effect of the applicable sections (3, 20, and 21) of the 1907 act as amended by the 1910 act, and a consideration of the actions and proceedings taken thereunder through, and pursuant to, the 1914 warrant of arrest and deportation.

1. Section 3 of the act, before its amendment, provided as follows:

"That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to

import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act."

After the 1910 amendment, this section read as follows:

"That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occur. Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband."

Sections 20 and 21 of the act of 1907, both before and after its amendment in 1910, provided as follows:

"Sec. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other per-

son by whom the alien was unlawfully induced to enter the United States, or, if that cannot be done, then the cost of removal to the port of deportation shall be at the expense of the 'immigrant fund' provided for in section one of this act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came: Provided, that pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

"Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section nineteen of this act: Provided, that when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner."

[1] It is first urged that the conviction of petitioner hereinbefore referred to was void, because the provision of section 3 of the Immigration Act upon which such conviction was based is unconstitutional, and the case of *Keller v. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066, is cited in support of this contention. The provision there held unconstitutional was section 3 of the Immigration Act of 1903 (Act March 3, 1903, c. 1012, 32 Stat. 1214), making it unlawful to harbor an alien woman for an immoral purpose. That provision was declared unconstitutional in the case just cited, on the ground that it did not relate to the regulation of immigration, but pertained merely to the subject of public morals, control over which was not within the power of Congress, but wholly within the police power of the several states. The 1903 statute was afterwards repealed by section 43 of the act of 1907, and the language of said 1907 act, as amended in 1910, was changed, in this particular respect, by inserting the words "in pursuance of such illegal importation." The addition of this language brings the subject-matter of this clause within the power of Congress to regulate immigration, and removes the ground for the constitutional objection to the previous statute. As, therefore, the petitioner was indicted, pleaded guilty, and was sentenced under the second count of an indictment charging him with having kept, maintained, supported, and harbored an alien woman "in pursuance of" her "illegal importation" by him, the contention based upon the alleged unconstitutionality of the act now under consideration must be overruled. *United States v. Lavoie* (D. C.) 182 Fed. 943; *United States v. Krsteff* (D. C.) 185 Fed. 201; *Siniscalchi v. Thomas*, 195

Fed. 701, 115 C. C. A. 501 (C. C. A. 6); *United States v. Tsuji Suekichi*, 199 Fed. 750, 118 C. C. A. 188 (C. C. A. 9).

2. Nor is there any merit in the argument that, because the first count in the indictment just mentioned, which charged the illegal importation referred to, was dismissed by the court, the element of illegal importation was thereby removed from the offense charged in the second count of such indictment. The two counts were entirely separate and distinct, and the effect of the second count was not dependent upon the disposition of the first count.

[2] 3. It is further earnestly urged on behalf of petitioner that his deportation is not legal, because it was not effected within the period of three years after his entry into the United States. The government, on the other hand, contends that there was and is no such limitation upon the time for the deportation of petitioner. The correctness of these contentions must depend upon the proper construction of certain provisions of section 3 of the 1907 Immigration Act, as amended by the 1910 act, hereinbefore quoted.

It will be noted that section 3 of the 1907 statute, before its amendment in 1910, provided that:

"Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act."

That is, under section 3 of the 1907 act the only aliens who were made subject to deportation were alien women or girls who were found to be inmates of houses of prostitution or practicing prostitution in the United States "within three years" after entering the country. Any such alien, however, within such three years was "deemed to be unlawfully within the United States" and required to "be deported as provided by sections twenty and twenty-one of this act." Now, in order to remove this three-year period of limitation upon the time within which such aliens must avoid the prohibited misconduct, and in order also to avoid the three-year period fixed by sections 20 and 21 within which deportation must take place, Congress, in 1910, amended the clause of the section just quoted so as to provide that any such alien—

"who shall be found \* \* \* practicing prostitution after such alien shall have entered the United States \* \* \* shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act."

In other words, in order to remove the time limit, not only for the misconduct, but also for the resulting deportation, Congress merely omitted the words "within three years," and substituted for the words "as provided by sections twenty and twenty-one of this act" the words "in the manner provided by sections twenty and twenty-one of this act." It is clear that such omission and substitution removed all limitation from the time within which such alien might offend and be deported therefor. This language places no limitation upon the period of time within which any such alien may be decreed to be unlawfully within the United States and be deported. It merely directs that such alien

"shall be deported in the manner provided by sections twenty and twenty-one." This indicates the intention of Congress to make such aliens subject to deportation at any time after entry into the United States "in the manner" provided by said sections 20 and 21; that is, in accordance with the method and procedure prescribed therein. *Bugajewitz v. Adams*, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978; *United States v. Weis* (D. C.) 181 Fed. 860; *United States v. Williams* (D. C.) 183 Fed. 904; *Sire v. Berkshire* (D. C.) 185 Fed. 967; *Chomel v. United States*, 192 Fed. 117, 112 C. C. A. 461 (C. C. A. 7), certiorari denied, 223 U. S. 723, 32 Sup. Ct. 524, 56 L. Ed. 630; *Ex parte Garcia* (D. C.) 205 Fed. 53. As was pointed out by the Supreme Court in the case first cited:

"The effect of striking out the three-year clause from section 8 is not changed by the reference to sections 20 and 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided,' but 'in the manner provided,' in sections 20, 21. Those sections provide the means for securing deportation, and it still was proper to point to them for that."

Applying the same construction to another portion of the act, it will be further observed that although in section 3 of the 1907 statute no prohibition nor penalty was provided against receiving, sharing in, or deriving benefit from the earnings of a prostitute, yet in said section as amended in 1910 it is provided that:

"Any alien \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of any prostitute \* \* \* shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this act."

Under this language any such alien is now subject to deportation without any limitation upon the period of time within which such deportation must be made. It is merely provided that he "shall be deported in the manner provided by sections twenty and twenty-one of this act"; that is, his deportation must be effected under and according to the procedure, as distinguished from the time, provided by said sections 20 and 21. *Siniscalchi v. Thomas*, supra; *Oceanic Steam Navigation Co. v. United States*, 232 Fed. 591, 146 C. C. A. 549, Ann. Cas. 1917C, 248 (C. C. A. 2).

As has already been stated, petitioner became subject to deportation under section 3 upon his conviction on the charge of keeping, maintaining, supporting, and harboring an alien for an immoral purpose, in pursuance of her illegal importation by him. Under this section, before its amendment in 1910, petitioner could have been convicted on such charge only in the event that the alien woman involved had been so kept within three years after she had entered the United States. The guilt of any person on trial for violating said section in this respect is not now, and has not been at any time since the 1910 amendment, affected by the length of time that the alien so kept or harbored has remained in this country after entry thereto. It is not necessary, under the present statute, in order to convict a person of such a violation, to show that the keeping of the alien occurred within three years after the entry of the latter into the United States, although the crime of

which petitioner was convicted occurred within such period, in June, 1913. It will also be seen from the language of section 3 as it now stands that the only provision thereof rendering an alien so convicted subject to deportation is the following sentence:

"Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this act."

As the provision just quoted, like the other provisions of said section 3 previously discussed, does not contain any limitation of time within which the offense must be committed or within which the deportation must be effected, and merely prescribes that any alien so convicted shall be returned "in the manner provided" in sections 20 and 21, this sentence must, for the same reasons, be construed like the other provisions of section 3. An alien, like the petitioner, convicted under any provision of said section, is subject to deportation without any limitation of time, but subject to the method and procedure prescribed in sections 20 and 21; that is, "in the manner" provided in those sections. *United States v. Weis*, supra; *Chomel v. United States*, supra; *United States v. Czeslicki* (D. C.) 209 Fed. 496.

[3] 4. Finally, it is contended that, as petitioner was not taken into custody for deportation until seven years after the expiration of his sentence, he is not being held for deportation "at the expiration of his sentence," as required by section 3 of the statute involved, within the meaning of the language just quoted, and that therefore it is now too late for such deportation.

This contention must be based upon the argument that the word "at," in the phrase just quoted, refers to the exact time when the sentence in question expired. With this contention, and with the argument upon which it must be so based, I cannot agree. It is well settled that this word does not always imply such precision. For example, language in a conveyance of deed or will providing conditions for the disposition of property in a certain manner "at the death of" certain persons is not intended to, and does not, by the use of the word "at," require the performance of such conditions at the exact moment of such death, but said word is used in such cases in the sense of "upon" or "after." Numerous instances might be pointed out illustrating the varying shades of meaning which are properly indicated by the word "at." The rule is stated in 5 *Corpus Juris*, on page 1422, supported by numerous authorities, as follows:

"It is a word of great relativity and elasticity of meaning, and is somewhat indefinite, shaping itself easily to varied contexts and circumstances, and taking its color from the circumstances and situation under which it is necessary to apply it to surrounding objects. \* \* \* It has been said that the connection furnishes the best definition."

It seems apparent that the use of this phrase "at the expiration of his sentence," means only that any sentence imposed after the conviction referred to in this section of the statute must be fully served before deportation of the offending alien, and that the term of such sentence cannot be interrupted or disturbed by such deportation.

For the reasons stated, it is my opinion that the petitioner is now subject to deportation. His petition will be denied, and an order to that effect entered.

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CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK v. NEW  
ORLEANS DRAINAGE CO. et al.

(District Court, E. D. Louisiana. January 25, 1922.)

No. 14852.

Corporations §—479—Mortgage trustee cannot acquire bonds secured to detriment of other bondholders.

A bank which, after having accepted the position of trustee in a trust deed securing bonds to be issued by a corporation having neither capital nor assets, organized to exploit a tract of swamp land on which one of the organizers held an option to purchase, became in effect a partner in the scheme by approving, through its president, who knew all the facts, a circular advertising the bonds which contained false and misleading statements, and by lending money to take up the option, which would otherwise have lapsed, taking as security the unsold bonds, some of which it knew had been authorized expressly for a different purpose, and through sale of the collateral becoming owner of such bonds, *held* to have violated its duty as trustee for the other bondholders and entitled to participate in the proceeds of the property when sold on foreclosure of the trust deed only on the basis of the actual cash it had contributed.

In Equity. Suit by the Continental & Commercial Trust & Savings Bank against the New Orleans Drainage Company and others, with Wellington R. Burt and others as interveners. On exceptions to master's report on distribution of fund. Confirmed as to essentials, and decree accordingly.

Mayer, Meyer, Austrian & Platt, of Chicago, Ill., and Milling, Godchaux, Saal & Milling, of New Orleans, La., for complainant.

Carl V. Wisner, of Chicago, Ill., and John D. Miller, of New Orleans, La. (Wisner & Walsh, of Chicago, Ill., of counsel), for interveners.

FOSTER, District Judge. In this case it is difficult to extract the facts from the record, as part of it was destroyed in a fire that consumed the office of the special master appointed in the case. Counsel have attempted to supply the deficiency, but several material documents are missing. However, there is very little, if any, dispute as to the material facts hereinafter stated. Arranging them somewhat chronologically they are these:

In 1908-1909 John Stuart Watson was a depositor in the American Trust & Savings Bank of Chicago, hereafter referred to as the Bank, and personally acquainted with its president, Edwin A. Potter.

In September, 1909, W. R. Reynolds and John Stuart Watson organized a corporation known as Reynolds, Watson & Co., with a capital stock of \$20,000 each owning one-half, with Reynolds as president and Watson as vice president and treasurer. The business of the corporation was dealing in stocks and bonds.

In February, 1910, Watson, acting for Reynolds, Watson & Co.,

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➡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

secured an option on 34,057 acres of land within the corporate limits of New Orleans, La., known as the Michaud tract, for \$410,000 cash, and \$10,000 was paid on account. This land was low and swampy, and could only be made fit for cultivation by drainage through leveeing and pumping.

In March, 1910, Watson took up with Potter the question of floating a bond issue on the Michaud tract, with the Bank as trustee. The details of the proposition were fully discussed, and the Bank agreed to act as trustee.

On March 29, 1910, the New Orleans Drainage Company, hereafter referred to as the Drainage Company, was organized under the laws of Louisiana by Watson, with an authorized capital of \$2,500,000, of which only \$3,000 was subscribed. It does not appear that any stock was paid for.

A deed of trust was then prepared under the supervision of the Bank's trust officer, Mr. Koff, dated May 2, 1910, whereby the Drainage Company mortgaged and hypothecated the Michaud tract to secure an issue of \$2,500,000 of 6 per cent. bonds in denominations of \$500 and \$1,000, maturing on various dates, interest payable semiannually on May and November 1st. This deed was acknowledged before a notary in Chicago, May 12, 1910, and was deposited in New Orleans in the office of a notary, and presumably recorded on June 21, 1910.

The trust deed is expertly drawn, with all the usual clauses touching default, etc., and in substance recites that the Drainage Company then owned the Michaud tract; that the grantor was desirous of issuing at once \$750,000 of bonds, for the purpose of completing payments for the property; that \$500,000 of the bonds were to be issued for the purpose of securing the payments of indebtedness incurred, and to be incurred, for developing and improving the property; that the land, describing it, and the entire system of improvements for reclamation now or hereafter upon the property, giving details, was conveyed to the trustee; that the trustee shall have the right to acquire the bonds secured by the trust deed. Only \$1,250,000 of bonds were issued.

In April, 1910, before the trust deed was executed, Reynolds, Watson & Co. issued a circular offering \$1,250,000 of the bonds for sale. This circular stated \$2,000,000 stock had been issued, that the Drainage Company owned the land, and named the Bank as trustee. The circular contained a letter dated April 4, 1910, addressed to Reynolds, Watson & Co., signed by the Drainage Company, Warren B. Reed, President, giving a glowing account of the project. The letter starts with the sentence, "Referring to your purchase of 1,250,000 of the first mortgage 6 per cent. bonds of the New Orleans Drainage Company," and the whole tenor of the letter would indicate that the work of leveeing and draining the tract was then well under way, and that a large portion would be drained and ready for cultivation in about a year's time. This circular was sent to Potter, president of the Bank, before it was issued, and he and Watson discussed it. Reynolds, Watson & Co. then began to sell bonds, generally at 90, and with a stock premium. No bonds were paid for or delivered for some time.

The option on the property expired May 30, 1910. Bonds did not sell

as rapidly as anticipated, and in May, 1910, Reynolds and Watson began negotiations with Potter to borrow money to close the deal. On May 20, 1910, Watson, as treasurer of Reynolds, Watson & Co., wrote to Potter, as president of the Bank, proposing to borrow \$400,000 to complete the purchase of the land and to pledge all of the bonds to be issued—\$1,250,000, less \$25,000, maturing in 1920—as security. He also stated he had sold \$173,000, par value, of bonds, and expected to sell \$425,000 additional bonds within 30 days. Potter investigated the value of the land and the financial responsibility of the purchasers of the bonds, and agreed to make the loan. It was agreed that, as bonds were paid for, the amount was to be credited on the loan until its liquidation.

The Bank then took charge of completing the deal. Koff came to New Orleans with Watson. The cash was paid to complete the sale to Watson, and Watson executed a deed to the Drainage Company on May 28, 1910. This deed is not in the record. However, the details have been supplied by counsel from the public record. It recites a conveyance from Watson to the Drainage Company for \$410,000 cash and "other valuable consideration," without enumerating the "valuable consideration." The minutes of the Drainage Company are not in the record. There is evidence to the effect that Watson was to receive \$750,000 in bonds and \$2,000,000 in stock for the land.

Koff and Watson returned to Chicago immediately. The note had been executed by Reynolds, Watson & Co., by Reynolds, in Chicago on May 28, 1910. It is not in evidence, but it must be assumed it contained a pledge of the bonds and gave the pledgee the right to purchase them after default on the note. Letters were written by Reed, president of the New Orleans Drainage Company, authorizing the Bank to deliver the entire issue of bonds to Watson. The Bank made a technical delivery, by transferring the bonds from their trust department to their banking department as security to the note, except as to \$25,000 of the bonds delivered to Watson. At this time the Bank had on deposit \$131,970, received in payment of bonds. This was subsequently increased to over \$188,000. These payments were credited on the note.

In September, 1910, Watson received from the Bank \$12,000 of the bonds which he sold, and the proceeds were applied to payment of interest on the coupons maturing November 1, 1910, and to a reduction of the loan. No more bonds were sold. In September, 1910, Watson turned over to the Bank \$1,002,000 stock of the Drainage Company as additional collateral on the note.

Before May, 1911, Watson again applied to the Bank for additional bonds to be sold to take care of the May interest, but was refused delivery. There is evidence tending to show that the parties contemplated setting aside \$150,000 of bonds to take care of interest during the period of development. This is denied by the Bank. The May coupons were not paid. From January, 1911, up to June, 1913, Watson and the Bank officials had many conferences looking to a reorganization of the Drainage Company, and it was sought to interest other persons, but all without result. Nothing was done to improve or develop the land.

In June, 1913, the board of directors of the Bank ordered foreclosure

proceedings. Reynolds, Watson & Co. filed suit in the United States District Court for the Northern District of Illinois to enjoin the Bank. The suit went against them; the bonds were sold under order of court, and were bought in by the Bank for \$250,000, which was less than the debt. The transcript of these proceedings is not in the record. In the meantime the Bank's name had been changed from American Trust & Savings Bank to Continental & Commercial Trust & Savings Bank. On December 2, 1913, the Bank, as trustee, filed its bill to foreclose the mortgage on the land.

The other holders of bonds intervened in the proceedings, contending that the interest of the Bank should be restricted to the actual money advanced by it, and incidental questions were vigorously litigated. However, in course of time a sale was ordered, and on May 19, 1915, the land was sold to Walter J. Engle, acting for the Bank, for \$200,000. Ten per cent. of the price was deposited with the master, final payment of the balance to await a determination of the respective equities of the bondholders. The sale was confirmed on June 11, 1915, and the matter referred to W. Morgan Gurley, Esq., as special master, to determine the distributive share of each bondholder.

After considerable delay, not attributable to anybody in particular, however, the master filed his report on June 27, 1921. The master found in substance that the Bank had entered into a partnership with Reynolds, Watson & Co. to promote the project to reclaim the Michaud tract, and that its pro rata distribution of the amount received from the foreclosure sale should be based on the amount of money it actually contributed to the purchase price. The master also made findings as to interest and attorney's fees. Practically all of the master's report was excepted to by the Bank, and the matter was submitted in December, 1921, on the exceptions.

Quite a number of decisions have been cited by each side, but it is not necessary to review them. It is elemental that a trustee, named in a deed of trust securing a bond issue, represents all the bondholders and is held to the greatest good faith. It may be conceded a trustee may purchase the bonds in the usual course of business, when permitted by the provisions of the trust deed, provided no breach of trust is involved thereby.

In this case the Bank stepped far outside of the character of trustee. With its knowledge and consent, its name and high financial standing was used to induce the public to invest in securities having very little substance. The Bank knowingly permitted the promoters to issue a circular teeming with untruths. The Drainage Company did not own the land. Reynolds, Watson & Co. did not own the bonds. The Drainage Company had absolutely no resources. The land was merely a swamp. No development had been started. No development could ever be started, except with the money obtained from the sale of bonds. As a practical proposition, the Drainage Company could sell no bonds until Reynolds, Watson & Co. had first earned their speculative profit. It was practically impossible for the Drainage Company to sell stock. Four-fifths of its entire authorized capital stock, \$2,000,000, had gone to Reynolds, Watson & Co. The \$500,000 of stock remaining in the treasury was worthless. What the Bank should have done was to let

Reynolds, Watson & Co. work out their own salvation. Had they done so, the intervening bondholders would have had their money returned to them intact. The position assumed by the Bank was entirely inconsistent with its duty as a trustee.

Going further, \$500,000 of bonds, by the express provisions of the trust deed, were to be sold only to raise funds to levee and drain the land and otherwise develop it. Reynolds, Watson & Co. had no right, title, or interest in these bonds. The Bank knew this when it received them in pledge. The Bank also knew that, by receiving these bonds in pledge and retaining them, it defeated the very purpose for which the Drainage Company was organized. This was also inconsistent with its duties as trustee.

With regard to the agreement to release \$150,000 of bonds out of the \$750,000 belonging to Reynolds, Watson & Co., the conflict of testimony must be resolved against the Bank. The Bank knew the Drainage Company would have no money to pay taxes and interest for several years. The \$500,000 of development bonds could not be used for that purpose. Taxes had to be paid in any event, if not by the Drainage Company, which had nothing, then, of course, by the Bank to protect its pledge. It was reasonable and logical, therefore, that the Bank should have so agreed. This is strengthened by the fact that, when the first installment of interest came due in November, 1910, the Bank did release \$12,000 of bonds, which were sold mainly to pay interest. When the Bank refused to release additional bonds to pay the May interest, it precipitated a default and the subsequent foreclosure. This was inconsistent with its duty to the bondholders which it represented.

The Bank knew the facts, and the bond purchasers did not. The intervening bondholders lived hundreds of miles from New Orleans. In the face of the positive statements in the circular that the company owned the land, and Reynolds, Watson & Co. had bought the bonds, thereby indicating the company had ample funds for development, ordinary prudence did not require intending purchasers to make an investigation of the public records in New Orleans. Had they examined the trust deed, they would have found statements confirming the circular. Considering the high standing of the Bank, it is reasonable to conclude that bonds were purchased largely on the faith of the Bank's being trustee.

No charge of actual fraud is made against the Bank. Its action may be attributed to overzealousness to have a transaction with which its name had become linked terminate successfully; but in exacting a pledge of practically all the outstanding bonds in order to amply secure itself, the Bank overlooked its duty to the other bondholders whom it represented in a fiduciary capacity. The Bank should not profit to the prejudice of the interveners.

On the whole case, the conclusion of the master that the Bank should participate in a distribution of the amount realized from the sale of the land only on the basis of the amount it contributed to the purchase price in actual cash was right. The exceptions to that part of the report will be overruled.

In passing on the question of interest the master has filed an elaborate schedule, and seems to have allowed the Bank interest at 5 per cent. per

annum, and allowed the intervening bondholders interest at 6 per cent. per annum, compounded semiannually, up to March 1, 1921. The allowance of 6 per cent. interest to the bondholders, compounded semiannually, would be in accordance with the terms of the mortgage, had there been no default on the principal of the bonds and no foreclosure. The method of computation of interest and the date to which it is allowed are comparatively unimportant, however, as the Bank and the interveners must be treated alike. In equity, the decisions with regard to the date to which interest should be computed vary according to the equities in the cases. The rule in bankruptcy is well settled. Interest is allowed to the date of the sale, regardless of when the creditor is paid. *Sexton v. Dreyfus*, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244. It will be equitable to follow the same rule in this case.

After paying costs and charges admitted due and not objected to, the Bank should recover a distributive share, based on the amount it contributed to the purchase price of the land, with 6 per cent. per annum interest. In addition, the Bank should recover the amount of expenses and taxes it advanced prior to the date of sale, with legal interest, 5 per cent. per annum. The Bank should also participate equally with the other bondholders for the par value of any bonds acquired by it from third persons subsequent to the purchase of the property.

The confirmation of the sale on June 11, 1915 passed the title to the land, the execution and delivery of formal deeds being a mere detail; therefore the Bank is not entitled to recover for any taxes assumed at time of sale or paid subsequently. The intervening bondholders are entitled to participate on the basis of the par value of the bonds held by them with interest at 6 per cent. per annum. All interest to be computed up to June 11, 1915, and no further.

The master allowed the attorneys representing the intervening bondholders a fee of \$1,000, to be charged against the fund. No objection is made as to the amount, but it should be charged against the share of the interveners. To the extent above indicated the master's report will be disapproved, and the exceptions thereto, so far as pertinent, will be sustained. There will be a decree accordingly.

## THE FIRESTONE TIRE & RUBBER CO. et al. v. MARLBORO COTTON MILLS.

(District Court, E. D. South Carolina. January 12, 1922.)

### 1. Judgment $\Leftrightarrow$ 112—Default after proper service is admission of complaint.

A default by defendant, after being properly served, is an admission of the allegations of the complaint which binds him, though such allegations are untrue.

### 2. Corporations $\Leftrightarrow$ 668 (4)—Foreign corporation bound by service on agent under state law.

A foreign corporation entering South Carolina to do business is bound by Code Civ. Proc. S. C. § 184, subd. 1, authorizing service on any agent, especially where the agent, though one of limited authority, forwarded the summons to it.

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**3. Courts ¶509—Federal court cannot open default judgment in state court.**

Even though a default judgment against a foreign corporation, which was duly served, presents a hard case against which equity would relieve, such relief can be obtained only from the state court, since the United States court cannot reopen the judgment in the state court and award a new trial therein, but could only enjoin enforcement of the judgment, which would involve a determination of the merits of the case.

**4. Judgment ¶419—Corporation not served held not entitled to equitable relief.**

Where corporations formed in different states with substantially the same names were engaged in business with close relationships between them, and judgment by default was rendered against one of the corporations for breach of a contract made by the other, which was not served with process, the corporation not served is not entitled to equitable relief against the judgment, since it is void as to such corporation.

**5. Courts ¶508 (3)—United States courts can enjoin a state judgment at law.**

A United States court of equity which has jurisdiction over the parties to a cause has the right to enjoin the enforcement of a final judgment at law in the state court.

**6. Execution ¶358—Supplemental proceeding is quasi equitable.**

In South Carolina, where the Code of Civil Procedure has abolished the distinction between law and equity, but where the court is authorized by section 225 to relieve against a judgment obtained through mistake, etc., or through fraud or duress, the supplemental proceeding provided to subject to a judgment assets which cannot be reached by execution is a quasi equitable proceeding.

**7. Courts ¶508 (3)—Quasi equitable supplemental proceedings in state court not enjoined.**

A United States court sitting in equity will not enjoin supplemental proceedings in the state court to enforce a default judgment, since the state court is a court of concurrent jurisdiction, and the proceeding is of an equitable nature, in which the judgment debtor can present all equitable grounds for relief against the judgment.

In Equity. Suit by the Firestone Tire & Rubber Company and another against the Marlboro Cotton Mills to restrain the enforcement of a default judgment. On complainants' motion for temporary injunction and defendant's motion to dismiss the bill. Both motions refused.

Tillett & Guthrie, of Charlotte, N. C., D. W. Robinson, of Columbia, S. C., and Amos C. Miller, of Chicago, Ill., for plaintiffs.

McColl & Stevenson, of Bennettsville, S. C., for defendant.

SMITH, District Judge. This matter comes up upon an application for a temporary injunction. Due notice of the application was given and counsel for all parties interested have appeared and filed their returns and affidavits, and the motion has been heard upon the pleadings and affidavits in the cause. At the same time was heard a motion by counsel for the defense to dismiss the complainants' bill of complaint. Counsel for all parties interested have been fully heard.

According to the bill of complaint, the complainants are two separate corporations, both having practically the same name. The name of one complainant is "The Firestone Tire & Rubber Company." The name of the other complainant is "Firestone Tire & Rubber Com-

pany." There are two separate corporations of the same name. One is a corporation under the laws of the state of Ohio, with "The" before its name, and the other is a corporation under the laws of the state of West Virginia, without this "The."

The West Virginia corporation was organized some time about August, 1900, and it maintained a plant for the manufacture and sale of tires in the city of Akron in the state of Ohio, and also carried on business in several other of the states of the United States for the sale of tires and accessories thereto.

In the year 1909 the other corporation of the same name was organized under the laws of the state of Ohio, and then purchased and had conveyed to it by the West Virginia corporation all the real estate and personal property of the West Virginia corporation in the state of Ohio devoted to the manufacture of tires and accessories. After this sale the Ohio corporation, whose capital was \$75,000,000, seems to have confined itself largely to the manufacture of tires and accessories. The capital of the West Virginia corporation was only \$50,000, of which the entire capital stock except a few shares were owned by the Ohio corporation.

The West Virginia corporation seems to have confined itself to the selling of tires and accessories, and not to have engaged further in manufacture, and, as it was practically owned by the Ohio corporation, it seems in substance to have been a selling agent used by the Ohio corporation to dispose of its manufactured product, and their relations seem to have been of the closest character.

In November, 1919, the Ohio corporation entered into an agreement with the Marlboro Cotton Mills, the defendant herein, a corporation of South Carolina, for the purchase of a large amount of cord fabric. In August, 1921, the Marlboro Cotton Mills instituted an action in the court of common pleas for the county of Marlboro against the Firestone Tire & Rubber Company for a breach of this contract, praying judgment against the Firestone Tire & Rubber Company in the sum of \$114,795.65. The contract upon its face showed that it was with the Firestone Tire & Rubber Company, Akron, Ohio.

The title of this action in the court of common pleas for Marlboro county is "The Marlboro Cotton Mills, a Corporation, Plaintiff, v. Firestone Tire & Rubber Company, a Corporation, Defendant." In the body of the complaint it is stated that the defendant Firestone Tire & Rubber Company is a corporation organized under the laws of one of the states of the American Union. It is not stated either in the title or in the body of the complaint whether the corporation sued is the corporation organized under the laws of the state of West Virginia, or that organized under the laws of the state of Ohio.

The summons in this action in the county of Marlboro was on the 11th of August, 1921, attempted to be served by delivery thereof to one C. T. Ernest, stated in the affidavit of service to be an agent of the Firestone Tire & Rubber Company, the defendant corporation in the action. Ernest, it appears, was then employed by the Firestone Tire & Rubber Company of West Virginia as a salesman. He was still in their employ, although the term of his employment apparently would

have expired in a day or so. Ernest sent the summons so served upon him by mail to the manager of the Firestone Tire & Rubber Company in Charlotte, N. C., where it was received by some one in the office by the name of L. O. Padgett, who appears to have had charge of that office. Exactly when Padgett received it does not appear, but the bill of complaint alleges it was one week prior to August 22, on which day he wrote in the name of Firestone Tire & Rubber Company to McColl & Stevenson, the attorneys for the Marlboro Cotton Mills, stating that on August 11 they had served a summons on one of the company's traveling salesmen, Mr. C. T. Ernest; that Ernest was not now in the employ of the Firestone Tire & Rubber Company; that any notice against that company should be served on one of its executives, and they would therefore ignore the same.

The bill of complaint alleges that the office in Charlotte was an office of the West Virginia corporation, and that Padgett was an employee of that corporation; yet the letter written by Padgett would appear to be on stationery of, and emanate from, the Ohio corporation. This summons, therefore, was in the hands of the person in charge of the office of the West Virginia corporation in Charlotte, in ample time for it to have appeared and taken any defensive action, if it had realized the necessity for so doing.

Padgett, the person who seems to have been in charge of the office in Charlotte, N. C., was wholly to blame for failing to inform his employer and in undertaking to decide that he would take no notice of this legal summons. Its delivery to and knowledge of by a superior officer or employee of the West Virginia corporation therefore fully appears.

Messrs. McColl & Stevenson seems to have made no answer to the letter of Padgett. Perhaps they were not legally bound to do so; yet in equity their position would have been much better, knowing the amount involved, had they answered, notifying Padgett of the danger, and that he, a mere employee, should notify his employer.

No answer or appearance being served by any one to this suit of the Marlboro Cotton Mills, application for judgment by default was made at the next term of court in October, 1921. No one appearing for the defendants, certain *ex parte* issues were submitted by the presiding judge to a jury, viz.:

First. Was C. T. Ernest, the person served with the summons in this case on August 11, 1921, an agent of the Firestone Tire & Rubber Company, on that date?

Second. Was the Firestone Tire & Rubber Company doing business in South Carolina on or before August 11, 1921?

No person appearing for any defendant, the jury returned a verdict in the affirmative on both issues and against the defendant for \$121,492.05. Thereupon judgment was entered in favor of the plaintiff, the Marlboro Cotton Mills, against the Firestone Tire & Rubber Company, defendant for the amount of that verdict; and on the same date application, without any notice to the defendant, was made to the presiding judge of the court of common pleas at his chambers in Dillon, S. C., under supplementary proceedings, and an order was

made by him on that date, requiring certain persons named to appear before the court and to answer concerning any indebtedness that they might owe to the defendant, the Firestone Tire & Rubber Company, and ordering further that the defendant should appear before that court on the 26th day of October, 1921, and show cause why a receiver should not be appointed of all its property in South Carolina, further providing that all debtors of the defendant and all of its dealers in automobile tires should be enjoined from paying any money or accounts to the Firestone Tire & Rubber Company or any one in its behalf.

Thereupon this bill of complaint was filed on the 24th day of October, 1921, in this court, praying an injunction against the defendant, its agents and attorneys, from proceeding by execution, or procuring or seeking to procure the appointment of a receiver, or by any other means from enforcing the judgment entered up in the court of common pleas for Marlboro county; and the case has been heard upon an application for a temporary injunction to that effect. At the same time it has been heard on the defendant's motion to dismiss the bill.

A mere inspection of the pleadings shows that the pleadings in the state court and the judgment entered thereon are very ambiguous. The defendant is sued simply as the Firestone Tire & Rubber Company and alleged to be a corporation of some state. The contract upon which action is brought in the state court is upon the face of it apparently a contract of the Ohio corporation, not of the West Virginia corporation. According to the bill and affidavits, the person upon whom service was made of the summons so as to secure service upon the defendant corporation was a salesman of the West Virginia corporation. Presumably the judgment that should have been entered in the state court under the pleadings should have been a judgment against the Ohio corporation. No service, however, was made or appears to have been claimed to have been made upon any one upon whom service could be made so as to bind the Ohio corporation.

The subsequent proceedings, in the nature of supplementary proceedings under the Code of Procedure of the state of South Carolina, appear also to be directed against the West Virginia corporation, although not even in these proceedings is there anything set up to show specifically that the West Virginia corporation was in any way claimed to be the corporation bound by the judgment.

This ambiguity in the first instance is the result of the action of the complainants in using the same name and with relations so close that the public generally might well be misled as to the corporations being the same. The letter of Padgett to McColl & Stevenson, although claimed to be a letter by an employee of the West Virginia corporation from an office of that company, bears every earmark of emanating from the Ohio corporation.

In the second instance, it is the fault of the plaintiff, the Marlboro Cotton Mills; for the contract with it was sufficient to show it that the corporation responsible to it was the corporation carrying on business at Akron, Ohio; and there was no reason why the plaintiff should

not have so stated in the title to its complaint, and so alleged in the body of the complaint, and thus distinctly identified the defendant. The great fault, of course, is that of Padgett, the employee of the West Virginia corporation, in undertaking to wholly ignore the summons served upon Ernest, when, upon the face of it, it might bear an interpretation that the judgment sought to be obtained was against that corporation.

The whole proceeding presents upon the face of it such a mingled condition of confusion and uncertainty as might well call upon any court of equity, especially in the recovery of so large a judgment as in this case, to suspend action, and give to the parties affected an opportunity to interpose any meritorious defense they might have.

The grounds for consideration of some kind presented by the complainants are no doubt strong. It seems a startling result that a judgment by default for so large an amount obtained against a corporation through the inexcusable carelessness and conceit of a subordinate employee should be allowed to be enforced so immediately after its entry, when the defendant can show any meritorious defense on the merits for consideration. Whatever legal question might exist as to the sufficiency of a service on a mere salesman to bind a foreign corporation (notwithstanding *Sellers v. Chemical Works*, 76 S. C. 343, 56 S. E. 978), yet, equitably speaking, the object of a service, which is notice, was attained when the summons was delivered to the West Virginia corporation's officer in Charlotte. Too, it would seem equitably that Messrs. McColl & Stevenson, as solicitors of high standing, should have answered the letter from Padgett. They knew they were seeking for their client a judgment for a large amount against a corporation, which can only know and act through its employees. They must have known that corporations are frequently the victims of the folly or indifference of those employees. They must have known the ignorant folly of Padgett's letter and its disastrous consequences to his employer. They cannot be supposed to have desired to procure a judgment for their client save after the defendant had had its fair day in court. It would seem, therefore, from the standpoint of a court of equity they should have answered Padgett's letter, notifying him of the legal effect of a summons, and that he should lay the matter before his employer.

It also seems a most inequitable result, under the circumstances of this case, that a judgment on a contract by one corporation should be allowed to be enforced against the property of a wholly distinct corporation.

There does not appear to have been any fraud in the procuring of the judgment. There is not the slightest evidence of any collusion or fraud on the part of the Marlboro Cotton Mills, and that company and its attorneys evidently believed in good faith that the Marlboro Cotton Mills was entitled to its claim. The complaint in the state court on its face presented a good cause of action. Nor is the judgment, on the face of it, an unconscionable one. The state court evidently required evidence of the amount of damage before the jury returned its verdict. It is true that the proceeding where no one appears to de-

fend is usually a very perfunctory one, and the evidence of a very unscrutinized character. That is too frequently the case in default judgments.

The real complaint of the present complainants is that a "snap" judgment has been recovered against them without an opportunity to interpose their defenses. Their defenses may or may not be ultimately successful. They state it is meritorious, but in any event it is on the face a legal controversy in which each side believes in its merit, and it will take a court and jury to decide upon the evidence. No fraud has been practiced; the usual course of procedure has been followed; only the judgment is a very large one; the complainants believe they have a good defense, and they have been deprived of any opportunity to set up that defense, but how? Not by any fraud or procurement of the other side, but by the inexcusable carelessness and conceit of an employee of the West Virginia corporation, viz. L. O. Padgett. The only thing to be alleged against this is that the action of Messrs. McColl & Stevenson in not replying to Padgett's letter was not what from the viewpoint of a court of equity was to be expected of them.

[1] So, too, as to the ambiguity of the pleadings in the state court and the hardship of the West Virginia corporation being adjudicated liable on the contract of the Ohio corporation. The plaintiff had the right to make the claim that the West Virginia corporation was responsible. If that was denied by an answer, and the case went to trial, and it was decided against the West Virginia corporation, no matter how hard and unjust it may have seemed, that corporation would have to submit. A default is an admission. By a default in a proceeding at law the defendant admits the assertions of the plaintiff. If the West Virginia company was properly served to give jurisdiction, its default was the same as an admission that the contract was one for which it was responsible.

[2] From all the pleadings and affidavits it appears that C. T. Ernest, the person served, was in the employ of the West Virginia corporation when the summons was delivered to him on August 11, 1921. The Code of Procedure of South Carolina provides (section 184, subd. 1) that service of the summons on a foreign corporation can be made by delivering a copy to any agent of the corporation. The Supreme Court of South Carolina has decided that this means any agent, no matter how limited the scope of his agency. *Jenkins v. Bridge Co.*, 73 S. C. 526, 53 S. E. 991; *Sellers v. Chemical Works*, 76 S. C. 343, 56 S. E. 978; *McNeill v. Electric Storage Battery Co.*, 109 S. C. 326, 96 S. E. 134.

It may seem very hard that the service on a mere salesman should be effectual to bind a large corporation, but "*Ita scripta lex est*," and in this case the salesman did his duty, for on the 13th of August he forwarded the summons to his principal.

In *McSwain v. Adams*, 93 S. C. 104, 76 S. E. 117, Ann. Cas. 1914D, 981, the court holds (although not necessary for the decision in that case) that, inasmuch as a foreign corporation (except those engaged in public interstate commerce) can at the mere will of a state be excluded from its territory, if it enters it, it does so accepting all the

laws of the state as a condition of leave to enter, which would include the law providing that service upon any agent of even limited and special scope and authority shall bind the corporation.

In any view, the summons did find its way to the corporation from the employee served, and the great object of notice was accomplished. Further, it appears from the bill of complaint that the West Virginia corporation has property in the state of South Carolina subject under the laws of that state to attachment, and jurisdiction to the extent of that property would thus have been acquired. It is not the case of a corporation which has neither property nor any business nor agency within the jurisdiction. The objection to the lack of jurisdiction of the state court on that ground is more technical than substantial.

In the last analysis, the bill of complaint and affidavits present only what appears to be an exceedingly hard case, due to the almost criminal folly and conceit of the West Virginia corporation's own employee, Padgett.

[3] But, assuming it to be a hard case and one that a court empowered to relieve it would relieve against, no application has been made to the state court for relief. Nothing of all this has been brought to the attention of the state court in which the judgment was recovered, and which would appear to be the court that should naturally be applied to for relief against a judgment recovered under circumstances that would warrant its reopening to allow a meritorious defense to be interposed.

This court cannot reopen a judgment in a state court. It cannot award a new trial in a cause pending therein. The object of the present bill of complaint is not to afford the defendants in the state court an opportunity to interpose their defenses in the cause in that court. That is manifestly impossible for this court to accomplish. The object is nominally to grant an injunction, but practically to have this court declare the judgment in the state court invalid and null, or at least one that a court of equity will not permit to be enforced.

Upon the face of the bill, this court has jurisdiction of the parties and of the cause, as the requisite diverse citizenship exists, and the amount involved in the controversy is in excess of the jurisdictional minimum.

[4] So far as the Ohio corporation is concerned, it does not appear what separate equity it has in this matter. It seems to have no property of its own in the state of South Carolina, apart from the interest it has indirectly as a large stockholder in the West Virginia corporation. That interest is not one which they are authorized in a proceeding of this kind to separately enforce as a stockholder when the West Virginia corporation itself is a party and capable of setting it up, and no fraud or collusion is alleged between the Marlboro Cotton Mills and the West Virginia corporation.

Inasmuch as the claim is that the party served with the summons was not an employee of the Ohio corporation, and that the judgment in this case is null and void as against the Ohio corporation, and that corporation has no property in the state of South Carolina against which this judgment is sought to be enforced by the state court, it

would not appear that the Ohio corporation has any equity for which it can call upon this court to interfere. If any attempt should at any time be made within or without the limits of the state of South Carolina to enforce this judgment as one against that corporation, it can set up its defense and show that no jurisdiction was ever acquired over it by any service upon any one upon whom legal service could be made so as to bind it by a judgment in the courts of this state.

[5] This would leave this cause to be considered from the aspect of a suit between the West Virginia corporation and the Marlboro Cotton Mills. It has unquestionably been held by controlling authority that a United States court of equity, where it has jurisdiction of the parties to the cause, has the right as a court of equity upon grounds of equitable cognizance to enjoin the enforcement of a final judgment at law in the state court, upon the usual principles under which courts of equity will enjoin the enforcement of a judgment. *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Union Ry. Co. v. Illinois Cent. R. Co.*, 207 Fed. 745, 125 C. C. A. 283; *Schultz v. Highland Gold Mines Co.* (C. C.) 158 Fed. 337; *Linton v. Safe Deposit & Title Guaranty Co.* (C. C.) 147 Fed. 824.

If the right is one derived from equitable jurisdiction, it should logically follow that the state courts sitting in equity would have the equal right to enjoin the enforcement of final judgments at law in the federal courts. This would very easily lead to the most unfortunate and embarrassing friction. No federal decision of any controlling character appears to have conceded this necessary sequence. Nor has any federal decision of controlling character held that a federal court sitting in equity has the power on equitable grounds to stay the enforcement of the decree of a court of equity of concurrent jurisdiction for unconscionableness or on any ground on which courts of equity stay the enforcement of judgments at law.

[8] By the Code of Procedure of the state of South Carolina, the distinction in procedure between law and equity has been abolished. Where it is sought to enforce a judgment at law against property which cannot be reached by an execution, the proceeding followed is what is called a proceeding supplementary to execution. That proceeding is in substitution of the old proceeding by bill in equity for the purpose. It is in all substantial respects a proceeding in equity. The jurisdiction exercised by the state court under such proceedings is an equitable one. The proceeding is of course supplementary and limited. It cannot be used in lieu of a proceeding of an original nature in equity to adjudicate the rights of third parties, such as a proceeding to set aside deeds for fraud or reach assets claimed by third parties. Its purpose is to avoid the delay of a discovery, and reach assets admittedly those of the defendant, but which cannot be reached by an execution at law.

Dealing with a similar proceeding, where a bill was filed in the United States Circuit Court to enjoin a void judgment in the state court, the Supreme Court of the United States, in *Mutual Reserve Association v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987, uses the following language:

"It was not in the strictest sense of the term a creditors' bill. It did not purport to be for the benefit of all creditors, but simply a proceeding \* \* \* to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of nulla bona. It is what is known as a supplementary proceeding, one known to the jurisprudence of many states, and one whose validity in those states has been recognized by this court. \* \* \* It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. \* \* \* Being a mere continuation of the action at law, and not removable to the federal court, the latter had no jurisdiction to enjoin the proceedings under it."

Apart from this particular proceeding, the state courts have also full equitable powers. Where a judgment has been obtained through mistake, surprise, inadvertence, or excusable neglect, the court can at any time within a year from its recovery open and set it aside. Code of Procedure of S. C. § 225.

In cases where a judgment may be attacked on other grounds of equitable cognizance, such as fraud, unconscionableness, duress, or lack of jurisdiction, the state courts, as courts of equity, retain their full equitable jurisdiction unaffected by the one-year limitation in section 225 of the Code of Procedure. *Ex parte Carroll*, 17 S. C. 446; *Ex parte Gray*, 48 S. C. 566, 26 S. E. 786.

[7] In the present case this quasi equitable proceeding in the nature of a supplementary proceeding has been instituted in the state court to enforce the judgment recovered by the Marlboro Cotton Mills against the Firestone Tire & Rubber Company. The Firestone Tire & Rubber Company has been ruled in the ordinary course of procedure to show cause why its credits should not be applied to the payment of the judgment and a receiver be appointed of its property in South Carolina for that purpose. The state court is now entertaining that very application. A day has been set in that court for the hearing. There is no reason why either or both of the complainants should not appear before the state court, and there set up their equitable defenses to the enforcement of the judgment. If the judgment, properly construed, is not a judgment against the West Virginia corporation, that corporation can appear, make the question, have the judgment defined as a judgment against the Ohio corporation, and then have the rule discharged, so far as any property of the West Virginia corporation is concerned.

As the evidence shows that the person served was an employee of the West Virginia corporation, the Ohio corporation may ignore the whole proceeding, or, if it sees fit, appear and apply to have the judgment vacated as having been rendered without any such service as would give the court jurisdiction of that corporation.

The state court is in actual consideration of a matter of an equitable nature pending before it, and this court of concurrent jurisdiction is asked by its injunction to terminate the state court's hearing of the matter set for a hearing and practically rule that for reasons, not of paramount federal law, but of equity satisfactory to the chancellor in the federal court, the chancellor in the state court shall be summarily stopped from the consideration of an equitable controversy of which

that court is now seized—at the least, a most delicate and irritating attitude for any court of concurrent jurisdiction to take.

Why is it necessary or competent to apply to this court, a court of concurrent jurisdiction, to set up their equities here and have this court by its injunction stay the state court in medias res?

To determine whether the judgment is unconscionable on the merits would require a trial of the original controversy on a breach of the contract—the very controversy raised by the original complaint in the state court. It would in effect be transferring the action to this court as much as if the original action had been removed. That action could have been removed by the defendant the Firestone Tire & Rubber Company, had it filed its application in the time limited by the statute. That time—if the service of the summons be good—has expired. Yet the effect of this proceeding, as claimed by the complainants, would be to do now what the statute has sought to prevent.

The better rule is that enunciated in the case of *Phelps v. Mutual Reserve Association* by the Circuit Court of Appeals for the Sixth Circuit, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717:

"If the Circuit Court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson circuit court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal, if it exists."

The court then proceeds to entirely approve the language of the court in *Senior v. Pierce* (C. C.) 31 Fed. 625, viz.:

"The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction and take his appeal, if not satisfied, to the final justice of the Supreme Court of the state, or of the United States, as the case may require. \* \* \* But at all events it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

This case in the Circuit Court of Appeals was confirmed and approved by the Supreme Court of the United States in *Mutual Reserve Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

If the principles declared in these cases be still approved law, they would seem to dispose of the instant application.

Inasmuch as it may appear on hearing on the merits after the testimony is taken that, so far as the Ohio corporation is concerned, it may be entitled to a decree enjoining the enforcement of the judgment in the state court against it, and for other reasons, the motion to dismiss the bill at this time should be refused.

It is accordingly ordered, adjudged, and decreed that the motion for a temporary injunction is refused. It is further ordered that the motion to dismiss the bill of complaint be and the same is refused. Provided, however, that inasmuch as an immediate appeal lies from this order, under section 129 of the Judicial Code of the United States (Comp. St. § 1121), the temporary restraining order hereinbefore granted on October 24, 1921, be, and the same is hereby, continued of full

force. If an appeal be taken in due time, the appellant may move that such restraining order be continued subject to the determination of such appeal. If no appeal be taken in 30 days from the date of this order, the defendant herein may move that such temporary restraining order be discharged.

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**CENTRAL METAL PRODUCTS CORPORATION V. O'BRIEN et al.**

(District Court, N. D. Ohio, E. D. January 5, 1922.)

No. 683.

1. Injunction ~~¶~~63—Interference with contract ground for granting.

A party to a lawful executory contract has a property right therein and a legal right to protection on its performance against interference by third persons having no interest therein.

2. Injunction ~~¶~~63—Complainant held entitled to an injunction to restrain unlawful interference with its performance of a contract.

Complainant had a contract with a city for furnishing and installing metal doors, casings, etc., in a hospital under construction, and in doing the work of installation employed union carpenters. Defendants, who were officers of a sheet metal workers' union, claiming that they were entitled to do the work, called strikes of their men on other city work, whereupon their codefendants, the city engineer and director of public welfare, respectively, without authority from the city, refused to permit complainant to proceed with its contract, using the police to prevent its men from working. *Held*, that such facts evidenced a conspiracy between defendants to deprive complainant of his property and to injure its business which entitled it to an injunction.

3. Injunction ~~¶~~63—Interference with performance of contract held unlawful.

That defendants acted on behalf of the members of a labor union of which they were officers for the purpose of enforcing a jurisdictional award by some labor board of a certain class of work to the members of such union, rather than to those of any other union, *held* not to justify them in conspiring with others to prevent, by unlawful means the performance of a contract by defendant.

4. Injunction ~~¶~~101(1)—Suit to enjoin interference with contract of stranger not within Clayton Act.

A suit to enjoin interference by officers or members of a labor union with performance of a contract by one between whom and defendants there exists no relation of employer and employee, or other contractual relation, is not one "concerning terms or conditions of employment," respecting which the federal courts are prohibited from granting injunctions by Clayton Act, § 20 (Comp. St. § 1243d).

In Equity. Suit by the Central Metal Products Corporation against William O'Brien and others. On motion for preliminary injunction. Granted.

Stanley & Horwitz, of Cleveland, Ohio, and Walter Gordon Merritt, of New York City, for plaintiff.

J. Paul Thompson and W. J. Dawley, both of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. This cause has been heard, argued, and submitted on plaintiff's application for a preliminary in-

~~¶~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

junction. The affidavits, exhibits, and the briefs of counsel and authorities therein cited have been fully and carefully examined and considered. Press of business prevents the preparation and filing of an extended opinion at this time, and the urgency of the matter is such that it should be disposed of without delay; hence my conclusion only will be briefly stated.

[1] Plaintiff is, and for a long time past has been, engaged in the business of manufacturing, erecting, and installing metal doors, metal frames, transoms, and sash. It has two factories and places of business, one at Canton, Ohio, and the other at College Point, Long Island. Its method of doing business is to manufacture its product at one or the other of its plants, ship it to the buildings where the same is to be installed, and personally, by means of its agents and other employees, to erect and install it. On June 30, 1921, it duly entered into a contract in writing with the defendant the city of Cleveland, through its duly authorized agents, to furnish, deliver, set up, and install certain interior metal doors, metal sash, metal frames, and casings for the City Hospital of the city of Cleveland, then and since under construction. The amount of this contract aggregates the sum of \$224,000. That this contract was duly and legally entered into, that the city of Cleveland has not any right to cancel or terminate it, and that the plaintiff is free to select and employ any competent labor to perform this work of installation, are matters not in dispute. It follows, therefore, that plaintiff's right to this contract, to perform the same, and to reap the profits resulting to it from such performance, is a right of property standing upon the same legal basis and entitled to the same legal protection as is any person's right to full possession and ownership of his private dwelling.

[2] The defendant William O'Brien is vice president of the Amalgamated Sheet Metal Workers' International Alliance and secretary of Local Union No. 65 of that Alliance; J. T. Nester is business agent of Local No. 65, and the defendants Frank Vancourt, Glenn B. Lockwood, William Kerver, David Kahn, and J. Thompson are members of Local No. 65. The Amalgamated Sheet Metal Workers' International Alliance and Local Union No. 65 are both unincorporated, voluntary associations, and these individuals are made defendants as members of Local No. 65 representing the total membership, which it is alleged exceeds 30 in number and are too numerous to be made defendants. The defendant J. Harold MacDowell is architect of the city of Cleveland, having supervision on behalf of the city over the construction of the said City Hospital, and Dudley Blossom, at the time this bill was filed and the case heard, was director of public welfare of said city, and either had or assumed charge of supervising and directing the construction work on said hospital.

The plaintiff fabricated the material at one of its plants, shipped it to and delivered it upon the City Hospital premises, and began the work of installation some time early in October, 1921. The plaintiff sent its supervisory staff to said hospital and employed union carpenters at the union wage scale and on union terms and conditions, and members of the United Brotherhood of Carpenters and Joiners of America to perform the actual work of erection and installation. William O'Brien

and J. T. Nester, acting on behalf of Local No. 65 and the Amalgamated Sheet Metal Workers' International Alliance, demanded that this work of installation should be done by the members of their sheet metal workers' union. Complainant refused to comply with this request, for reasons immaterial to mention, because entirely within its legal rights. Upon this refusal, said O'Brien and Nester then demanded of the architect and director of public welfare that plaintiff be required to discharge its union carpenters and employ members of its sheet metal workers' union to perform this labor or to break the contract of the city with plaintiff and take over the work and do it itself with employees, members of the sheet metal workers' union. This demand not having been acceded to with sufficient promptness, defendants O'Brien and Nester called a strike by withdrawing union sheet metal workers who were working for other contractors on the City Hospital, about the latter part of October, 1921, and, the officials of the city still not acceding to the demand, later, the latter part of November, a further strike was called by withdrawing sheet metal workers, members of Local No. 65, from working for contractors who were engaged upon the Auditorium Building under construction on behalf of the city. There is evidence tending to show that threats were also made to call strikes of sheet metal workers, members of Local No. 65, on school buildings under construction on behalf of the board of education, and also of having other strikes called by other sympathetic unions on the City Hospital and the City Auditorium, which evidence, however, is denied by defendants, and is, for the purposes of the present hearing, regarded as not proved.

Later, the latter part of November or the early part of December, the defendant J. H. MacDowell, city architect, and Dudley Blossom, director of public welfare, acceded to the demands of the defendants representing Local No. 65. They directed plaintiff to discontinue further erection work, and upon refusal of plaintiff, through its employees, so to do, police officers of the city of Cleveland, acting under some unknown and undisclosed authority, appeared at the City Hospital building and excluded plaintiff's employees from the premises and prevented further performance, under threat of arrest. The architect and director of public welfare, while assuming to act on behalf of the city of Cleveland, do not appear to have been acting under any other authority than such as was assumed or usurped by them. Upon this hearing, affidavits were filed on behalf of the city, and argument was made by an assistant to the director of law in support of the position taken by the architect and director of public welfare. Early in December, after procuring from said architect and director of public welfare written assurances that plaintiff must employ members of the sheet metal workers' union or that its contract would be broken and further work of installation done by the city, said O'Brien and Nester caused the sheet metal workers to return to work on the City Auditorium and for other contractors on the City Hospital, but plaintiff has since been unable, by reason of the conduct complained of, to proceed further with its work, which is now at a standstill.

Such, in brief, are the main outstanding facts. No other conclusion therefrom can be drawn than that the defendants have entered into

a conspiracy to deprive plaintiff of its property and to injure its business. A conspiracy is an agreement of two or more persons to commit an unlawful act, or to commit a lawful act by unlawful means. It is immaterial if the city or its architect and director of public welfare were induced to become members of the conspiracy under coercion or to avoid pecuniary loss or other trouble. See *Aberthaw Construction Co. v. Cameron*, 194 Mass. 209, 80 N. E. 478, 120 Am. St. Rep. 542; *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Co.* (N. J. Ch.) 111 Atl. 376; *Buyer v. Guilan* (2 C. C. A.) 271 Fed. 65.

[3] The conspiracy here was unlawful in its purpose. Its ultimate object was to prevent performance by plaintiff of its contract and to deprive it of its contract, unless it would comply with terms and conditions contrary to its contract rights, such as neither the city nor the other defendants had any right to impose or exact. In making this statement I am not unmindful of the contention of defendants other than those representing the city that they are members of and acting for a labor union, and were seeking only to obtain an advantage for the members of their respective unions, as to which some observations will be here made. The means resorted to to carry out the conspiracy were unlawful. In the first place, the defendants O'Brien and Nester were attempting to induce the city to break its contract with the plaintiff, and it is settled law that one may not induce or persuade, much less coerce, one to break his contract with another. This rule is so fundamental that it has been held that officers and agents of a union may not induce or persuade employees to break a contract of employment. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461. For additional authority, see *Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co.* (D. C.) 268 Fed. 121; *Iron Molders' Union v. Allis-Chalmers Co.* (7 C. C. A.) 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, syllabi 4 and 6.

[4] Defendant's contention that the action herein noted was taken solely in the interests of the union members of the Amalgamated Sheet Metal Workers' International Alliance and its Local Union No. 65, for the purpose of enforcing a jurisdictional award, made by some national board, of this class of work to the sheet metal workers' union, does not justify or protect the defendants. Plaintiff asserts that the bodies joining in, creating, and enforcing the jurisdictional award are a conspiracy or combination in restraint of trade, having for its object the creation of a monopoly in the members of the sheet metal workers' union, in the labor of erecting and installing sheet metal work of this kind and character. I deem it immaterial to consider this last suggestion. The simple fact is that we do not have here a controversy between employers and employees. In no legal sense is this a labor dispute. A labor dispute, as defined in section 20 of the Clayton Act (Comp. St. § 1243d), is one "concerning terms or conditions of employment." In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349, it is held that this labor dispute, in order to be within the privileges accorded employees by the Clayton Act, must be limited to a controversy between an employer and employees. At

page 471 of 254 U. S., at page 178 of 41 Sup. Ct. (65 L. Ed. 349), Mr. Justice Pitney repudiates the view that the words "employers" and "employees," as used in section 20, can be treated as referring to the business class or clan to which the parties litigant respectively belong, and declares that the controversy must be one between some specific employer and persons who stand to that employer as persons who have been in the past, or are in the present, so employed or are seeking employment. It is further held that sympathetic strikes or secondary boycotts as a means of coercing that employer are unlawful, and that an agreement lawful in itself becomes illegal, when means of that character are resorted to, to carry the objects of the agreement into effect. Whatever may have been held in other jurisdictions, the principles of law applicable to this case will be found in *Duplex Printing Press Co. v. Deering*, supra, and *Hitchman Coal & Coke Co. v. Mitchell*, supra. These cases have been cited with approval in *American Steel Foundries v. Tri-City Central Trades Council* (December 5, 1921) 257 U. S. —, 42 Sup. Ct. 72, 66 L. Ed. —, and *Truax v. Corrigan* (December 19, 1921) 257 U. S. —, 42 Sup. Ct. 124, 66 L. Ed. —.

There is no dispute here between any of the labor union defendants and the plaintiff concerning terms or conditions of employment. They are not seeking to compel plaintiff to employ union labor or to conduct its business on union terms and conditions. Plaintiff's employees are members of the United Brotherhood of Carpenters and Joiners of America; having a national membership of 400,000, as compared with a membership of 24,000 of the Amalgamated Sheet Metal Workers' International Alliance. Plaintiff's union employees are satisfied with the terms and conditions of their employment and the rate of pay, which the evidence shows are the same conditions and wage scale as have been adopted by Local No. 65. If plaintiff accedes to the defendants' demand and employs members of the sheet metal workers' union, then the members of the carpenters' and joiners' union might with equal legal right indulge in the same conduct as is here alleged against defendants. If they did so, their legal standing would be precisely the same. It results that all the cases cited on behalf of defendants, even if not in conflict with the decisions of the United States Supreme Court and the greater weight of authority, have no application whatever to the controversy before the court.

The union defendants have a right to obtain business in the way of employment and wages which plaintiff has the power to dispose of, on the same terms and none other, as the plaintiff would have the right to obtain a contract which a competitor was seeking to obtain. In no event does that right include the right to induce or persuade another to break an existing contract, much less to do so by coercion, or by the calling of sympathetic strikes and the institution of secondary boycotts. If plaintiff were employing nonunion laborers and undertaking to perform this contract on an open shop basis, the better considered cases all hold that defendants might not resort to the means to which they are now resorting, to prevent the performance by plaintiff of its contract. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; *Aberthaw Construction Co. v. Cameron*, 194 Mass. 209,

80 N. E. 478, 120 Am. St. Rep. 542; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778; *Pickett v. Walsh*, 192 Mass. 572, par. 5 of head notes, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *Buyer v. Guillan* (2 C. C. A.) 271 Fed. 65; *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Co.* (N. J. Ch.) 111 Atl. 376.

The remedy at law by an action for breach of contract against the city is not adequate. In the first place, it does not appear that the city, through any properly and lawfully constituted authority, is a party to the conspiracy, and no one except the city council could properly commit a legal breach of plaintiff's contract. In the second place, the injury to plaintiff's business, good will, and trade could not be measured or included in determining the damages in an action at law. For this and other reasons, it is settled law that injunction is the proper remedy. See *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Co.* (N. J. Ch.) 111 Atl. 376; *Aberthaw Construction Co. v. Cameron*, 194 Mass. 209, 80 N. E. 478, 120 Am. St. Rep. 542.

A preliminary injunction will be granted as prayed for in paragraph 1, except as to the last sentence thereof, which does not appear at this time to be justified upon the present state of the record. Bond in the penalty of \$2,000 will be required, conditioned to pay such costs and damages, if any, as the defendants or any one of them may sustain, or as may be awarded against plaintiff in the event this injunction shall be held to have been improvidently awarded.

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## AMERICAN BRAKE SHOE & FOUNDRY CO. v. PERE MARQUETTE R. CO.

Petition of PERE MARQUETTE RY. CO.

(District Court, E. D. Michigan, S. D. March 8, 1922.)

No. 5467.

1. Courts  $\S$  508(3)—Charge of error in state judgment does not authorize relief in receivership proceedings.

Under Judicial Code,  $\S$  66 (Comp. St.  $\S$  1048), permitting suit against a receiver appointed by a United States court as to the business carried on by him, subject to the general equity jurisdiction of the appointing court, the power of the appointing court is limited to the mode of enforcing the collection of a judgment against the receiver, so far as necessary to conserve the receivership property and to adjust the equities of the parties, and a petition alleging that a judgment rendered by a state court in an action for the receiver's negligence was erroneous does not authorize the United States court to enjoin its enforcement against the property in the hands of the purchaser.

2. Judgment  $\S$  828(3)—Of state court against receiver on conflicting evidence is res judicata.

A judgment by a state court against a receiver appointed by a United States court, based on negligence by the receiver, where the evidence was conflicting, is res judicata between the judgment plaintiff and the purchaser of the receivership property subject to claims against the receiver.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. Judgment  $\Leftarrow$  828(4)—Petition held not to show state judgment against receiver was obtained by fraud.

A petition alleging that a judgment against a federal receiver was procured only by plaintiff's testimony that the receiver's employees did not sound the whistle until they were at the crossing, which was contradicted by the employees and a disinterested witness, and that the judgment was affirmed by the state Supreme Court on the ground it could not disturb a verdict based on conflicting evidence, does not show that the judgment was obtained by fraud.

In Equity. Suit by the American Brake Shoe & Foundry Company against the Pere Marquette Railroad Company. On petition by the Pere Marquette Railway Company, as purchaser of the assets of defendant at the master's sale, to restrain Frank Koznicki from collecting a judgment obtained by him against petitioner in a state court. Petition denied.

Parker, Shields & Seaton, of Detroit, Mich., for petitioner.

Smurthwaite & Campbell, of Manistee, Mich., for respondent.

TUTTLE, District Judge. This in an intervening petition of the Pere Marquette Railway Company, the purchaser of the assets of the Pere Marquette Railroad Company at the master's sale herein, seeking to restrain the above-named respondent from collecting a certain judgment obtained by respondent against petitioner in a Michigan state court. The matter has already been before the court on a petition by this petitioner to compel said respondent to litigate in this court the controversy which has resulted in said judgment. This court denied the former petition, and remanded the proceedings to the state court mentioned; in the course of its opinion (263 Fed. 237), using the following language:

"I am of the opinion that petitioner has misconceived the nature and extent of the power and duty of this court in the premises. Section 66 of the Judicial Code (section 1048, West's United States Compiled Statutes of 1916) provides as follows: 'Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.'

"Petitioner, of course, under the circumstances of the present case, is liable, or otherwise interested, in this matter only because it has succeeded to the rights and obligations of the receivers heretofore appointed by this court and now occupies their former position with respect to liabilities arising out of their acts in carrying on the business connected with their duties as such receivers; and the terms of the statute just quoted are now as fully applicable to said petitioner as they would have been to the receivers whom they have succeeded, if the latter had not been discharged, and they, instead of petitioner, had been sued in respect of the alleged negligence of their servants in the suit which is the subject of this controversy. This suit was properly brought in the state court, and the latter has full jurisdiction to determine all of the issues involved therein without interference by this court. [Citing numerous cases.]

"Petitioner has apparently relied on the clause in the statute just quoted to the effect that—'such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as

the same may be necessary to the ends of justice.' It is, however, well settled that this portion of the statute does not limit or affect the meaning or application of the preceding clause of the statute, but is intended merely to reserve to the court, appointing a receiver whose act may result in a claim against the property or the purchaser thereof, jurisdiction over the mode of enforcing collection of such claim when judicially determined and liquidated, so far as may be necessary to properly protect and conserve the receivership property and to adjust the equities and rights of all parties having claims against such property or otherwise interested therein."

The present petition shows that at the trial in the state court the respondent obtained a verdict of \$2,250 against the petitioner, judgment on which verdict was affirmed by the Supreme Court of Michigan. Petitioner alleges that said respondent obtained such verdict "by swearing that the locomotive whistle aforesaid was blown while the engine was on the crossing," while two employees of the aforesaid receiver of the railroad company and a "local farmer" testified that such whistle was blown at a whistling post 40 rods distant from such crossing; that the Michigan Supreme Court "held that a question of fact was involved, and for this reason refused to disturb the verdict"; that "by setting up the claim that the locomotive whistle was sounded at the crossing plaintiff created a question of fact, and a jury of his fellow residents of Manistee county found a verdict in his favor"; and that the claim in question thus reduced to judgment "is a fraud on your petitioner." The allegations just quoted and referred to are the only statements in the petition purporting to support the charge that the judgment mentioned is fraudulent, or to show that the enforcement of such judgment would prejudice the rights of any party or person interested in this cause.

Petitioner prays that the matter be referred to a special master for a report on the merits of the claim involved, that respondent be enjoined from collecting the said judgment in the state court, and that this court find that said claim is "without merit and not a proper charge against the receivership assets purchased by petitioner."

[1] Petitioner relies upon the case of *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205, and upon the language hereinbefore quoted from the former opinion of this court herein. In the case just cited, the Supreme Court merely pointed out and applied the familiar rule:

"It has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision [section 265 of the Judicial Code] does not prevent the federal court \* \* \* from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience."

That case involved only the application of the rule to the particular facts and circumstances in that case. After finding and stating that the defendant in error therein had wrongfully and in violation of its agreement with plaintiff in error obtained the judgment involved in that case, that such judgment was obtained in an action to which plaintiff in error was not a party and wherein it could not be heard, and that

defendant in error was financially irresponsible. The court reached the conclusion that—

"In these circumstances, that company [plaintiff in error] is entitled in equity and good conscience \* \* \* to a decree holding him [defendant in error] to his agreement and depriving him of his present inequitable advantage, and to that end enjoining him from collecting the judgment."

There is nothing in that case which would warrant the relief prayed in the present petition. Nor do the allegations of the present petition present a case entitling petitioner to any relief under the provisions of the former opinion of this court herein, to which reference has been made. It was there distinctly held by this court that—

"This suit was properly brought in the state court, and the latter has full jurisdiction to determine all of the issues involved therein."

[2, 3] One of the issues in that suit was the question relative to the blowing of the whistle hereinbefore referred to. The state court heard the conflicting testimony upon this issue and determined it in favor of the respondent, and the Supreme Court has affirmed that decision. The judgment, therefore, of such court, is *res adjudicata* here. The facts stated in the petition, even if proved, are insufficient to show that the judgment was procured by fraud. They do not even present a case of alleged perjury (assuming that such a charge would be available as a ground for the relief prayed here). The petition is in all essential respects merely an appeal to this court to review alleged error on the part of a state court, whose jurisdiction over the subject-matter and the parties is not challenged. The course thus urged upon this court should not, and will not, be pursued.

For the reasons stated, the petition must be denied. An order to that effect will be entered.

**INTERNATIONAL FLATSTUB CHECK BOOK CO., Incorporated, v. YOUNG & SELDEN CO. OF BALTIMORE CITY.**

(District Court, D. Maryland. March 14, 1922.)

No. 249.

1. Patents  $\hookrightarrow$  236—Infringement not avoided by putting hinge of check book at top, instead of left side, unless left side hinge is element of patent.

Infringement of a patent for a check book with flat-lying stubs cannot be evaded by placing a flexible web hinge at the top, instead of the left side, unless the claim of the patent is so worded as to make the left-hand opening an element of the thing patented.

2. Patents  $\hookrightarrow$  328—1,307,708, for check book, held anticipated.

The Smith patent, No. 1,307,708, for a check book with flat-lying stubs, *held* not limited to one in which the flexible web hinge is at the left side, but *held* anticipated.

3. Patents  $\hookrightarrow$  112(3)—Presumption of novelty lessened when anticipating patent not cited.

The presumption of novelty arising from favorable action of the Patent Office is lessened when a patent relied on as an anticipation was not cited against it by the examiner and apparently escaped his attention.

$\hookrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the International Flatstub Check Book Company, Incorporated, against the Young & Selden Company of Baltimore City. Bill dismissed.

John Watson, Jr., of Baltimore, Md., and Pollard & Smith, of Richmond, Va., for complainant.

Stewart & Pearre, Edwin F. Samuels, and John E. Cross, all of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff is the owner of letters patent, No. 1,307,708, issued on June 24, 1919, upon the application of one Henry Smith. In the more common forms of check books heretofore in use, when opened, the stubs are more or less bowed, and are not altogether easy to write upon, and for that reason are poorly adapted for the record of elaborate memoranda. Flat-lying stubs would be more convenient, and some attempt to devise books which should have them had been made before the patent in suit was applied for. For some reason or other, none of them seem to have commanded much popular favor. The Smith book, because it was better designed, accomplished its purpose more completely, was generally more satisfactory, or for some other reason went at once into extensive use. In a very short time after it came upon the market, a number of the largest manufacturing stationers in the country took license under it.

In the year 1921 the patented check books made by these licensees contained an aggregate of over 63,000,000 checks. The public paid some \$270,000 for them, and plaintiff's royalty, at 10 per cent. upon the selling price, brought it in about \$27,000. The defendant readily appreciated the merits or the salability of the new book, and sought to obtain a license to make and sell it in Baltimore and its vicinity. A local competitor had, however, been still more prompt, and in consequence defendant's application was perforce declined. Then, in a short space, the book said to infringe made its appearance.

[1, 2] In the plaintiff's device, the essential feature is a flexible web hinge, which so unites the book with the cover that the latter can be thrown back without in any wise effecting the position of stubs or checks; they remaining as flat as they were when the book is closed. It is admitted that the only real difference between the book of the plaintiff and that of the defendant is that, while in the former the hinge connecting back and cover is at the left hand of stubs and checks, in the defendant's it is at the top. Books which open away from the reader, as well as those which open towards his left hand, have been well known for decades, if not for centuries. The defendant cannot escape infringement by so obvious an evasion, unless the claim of the patent in controversy is so worded as to make the left-hand opening an element of the thing patented. All that the claim says on that subject is that the web shall be secured to the respective ends of the back and the cover—

"to form a hinge, whereby the cover may be folded over upon the pad, and may be swung free of the stubs, to allow the stubs to be folded upwardly for easy inspection."

There is in this nothing to require that the web hinge shall be secured to the left rather than to the top edge of a back, or to the right rather than to the lower edge of the cover. Unquestionably the drawing shows a book in which the hinge is attached to the left end of the back, and therefore necessarily to the right end of the cover, and certain desirable incidental results from so doing are pointed out in the specifications, in which it is said:

"That the filled-in stubs will not interfere with the filling in of the successive stub as the checks are used, the cover being swung open conveniently toward the left out of the way, thus enabling the stubs to be swung upwardly. This provides a convenient and practical arrangement. Should it be desired to keep the place marked where the stubs are being filled in, the cover can be swung over the sheets with the used stubs turned up, thereby holding the turned-up stubs in place, and covering the checks and stubs which are being used, or which are to be filled in. It is therefore advantageous to hinge the cover to that end of the back adjacent which the stubs are located; the stubs swinging upwardly while the cover swings open to the left."

The last sentence quoted tells the whole story. It is advantageous to hinge the cover to the left edge of the back, and that is patentee's preferred form, as it doubtless would be the defendant's, if defendant were free to use it. But, after all, it is only the preferred form, and there is nothing in either the specifications or the claim which limits the patentee to such a detail of construction.

The question, therefore, is not of infringement, but of validity; for, if it be conceded that the prior art precluded the patentee from a claim which would permit a web hinge to be fastened to the top of the back, the conclusion would be almost inevitable that the patentee had invented nothing, for it is scarcely conceivable that invention could have been found in putting a hinge on one end rather than on another. The patentee was not the first to use a web hinge. There had been flat stub check books before his day. One Powers had, a score of years ago, patented a book in which the cover was attached to the back at the top, and there was firmly united to the stubs, but so arranged as to swing free of the checks. The construction was a trifle awkward, and looks as if it would have proven rather insecure in actual use, if anybody had actually used it, as perhaps no one ever did.

A still closer anticipation is shown by the patent to Lowenbach, No. 519,769, May 15, 1894. The only discoverable difference between the book there described and that of the patent in suit is that in the former the pad of checks and stubs was fastened to a tongue, which, in its turn, was inserted in a pocket in the back. In that way, when one pad was used up, another could be put into its place and the binding be made to serve indefinitely. That arrangement may or may not be desirable, but certainly there would be no invention in replacing it, as the patent in suit does, by attaching the pad to the back in a way which had been in common use from time immemorial.

[3] An examination of the file wrapper of the Smith patent shows that the one to Lowenbach was not cited against it by the examiner, and doubtless in some way escaped his attention, thereby lessening the

weight of the presumption of novelty arising from the favorable action of the Patent Office.

It follows that the patent in suit must be held invalid, and the bill dismissed.

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**UNITED STATES ex rel. LE GRAZIE v. WALLIS, Commissioner of Immigration, and four other similar cases.**

**In re RADZIEJEWSKI.**

(District Court, S. D. New York. May 10, 1921.)

**War 33.—War-time regulations requiring passports continued in force.**

Act May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7628e et seq.), authorized the President, when the United States is at war, if the public safety requires, to impose restrictions on the departure of persons from and their entry into the United States, and provided, *inter alia*, that, on proclamation of the President, "it shall, until otherwise ordered by the President or Congress," be unlawful for any alien to depart from or enter the United States, except under such regulations and subject to such limitations as the President shall prescribe. Diplomatic and Consular Appropriation Act March 2, 1921, § 1, provides that the provisions of Act May 22, 1918, in so far as they relate to requiring passports and visés from aliens seeking to come to the United States, shall continue in force until otherwise provided by law. *Held*, that the effect was to remove such provisions from the class of so-called "war legislation," and that they were not terminated by the Joint Resolution of March 3, 1921, providing that any act or provision by its terms in force only during the existence of a state of war should be construed as if the war terminated on the date the resolution became effective.

**Habeas Corpus.** Separate Petition for writs by Pasquale Le Grazie, as next friend, etc., by Juda Feld and others, by Sam Woniski, as next friend of Israel Woniski and as next friend of Moses Tanenbaum, and by Vincenzo Giovanniello, each against Frederick A. Wallis. Commissioner of Immigration at New York. In the matter of Ben Radziejewski. Writs denied.

Order affirmed 278 Fed. 840.

Benjamin I. Taylor, of New York City, for relators Le Grazie, Ciasca, and Frugis.

Leo Wolfson, of New York City, for relators Feld.

Kevin Frankel, of New York City, for relators Woniski and Tanenbaum.

Solomon Brinn, of New York City, for relator Giovanniello.

Samuel Hershenstein, of New York City (Howard E. Reinheimer, of New York City, of counsel), for Ben Radziejewski.

Francis G. Caffey, U. S. Atty., of New York City (Keith Lorenz, Asst. U. S. Atty., of New York City, of counsel), for respondent.

**MACK, Circuit Judge.** "An act making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1922,"

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being Public Act No. 357, Sixty-Sixth Congress, approved March 2, 1921 (41 Stat. 1205, 1217), provides as follows:

**"Expenses, Passport Control Act.**

"For expenses of regulating entry into the United States in accordance with the provisions of the act approved May 22, 1918, and of this act, to be immediately available, \$600,000: Provided, that the provisions of the act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law."

"Joint resolution declaring that certain acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired," being Public Resolution No. 64, Sixty-Sixth Congress, approved March 3, 1921 (41 Stat. 1359), provides:

"And any act of Congress, or any provision of any such act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding, excepting, however, from the operation and effect of this resolution" certain acts not now in question.

An act approved May 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7628e et seq.), entitled "An act to prevent, at any time of war, departure from and entry into the United States, contrary to public safety," provides:

"When the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof. It shall, *until otherwise ordered by the President or Congress*, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."

The question presented on these writs of habeas corpus is whether the repeal of the war-time act of May 22, 1918, by virtue of Public Resolution of March 3, 1921, is effective as to all of the provisions of that act, notwithstanding the act approved March 2, 1921, above set forth.

The effect of the act of March 2, 1921, was to extend the passport and visé provisions of the act of May 22, 1918, beyond the period set forth in that act, namely, when the United States is at war, and to that extent to repeal this time limitation upon the passport and visé provisions of that act. Text, context, and the legislative history of this proviso clearly support this construction. 60 Congressional Record, February 24, 1921, pages 4018 to 4022, inclusive. See also Opinion of Attorney General to Secretary of State, March 30, 1921.

These provisions were not, therefore, by their terms "in force only during the existence of a state of war." and are therefore not repealed by the joint resolution of March 3, 1921.

The writs will be dismissed.

**UNITED STATES ex rel. FELD et al. v. WALLIS, Commissioner, et al.**

(Circuit Court of Appeals, Second Circuit. November 24, 1921.)

No. 79.

Appeal from the District Court of the United States for the Southern District of New York.

Petitions for writs of habeas corpus by Juda Feld and others against Frederick A. Wallis, Commissioner of Immigration at New York. Writs denied, and petitioners appeal. Affirmed, on opinion of District Court in 278 Fed. 838.

Leo Wolfson, of New York City (Samuel Hershenstein, of New York City, of counsel), for appellants.

James C. Thomas Jr., Asst. U. S. Atty., and William Hayward, both of New York City, for appellee.

Before HOUGH and MAYER, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

PER CURIAM. Order affirmed in open court, on opinion of MACK, Circuit Judge.

**TOOP et al. v. ULYSSES LAND CO. et al.**

(District Court, D. Nebraska, Lincoln Division. June 18, 1918.)

No. 26.

**Allens §9—Nonresident aliens cannot inherit land from citizen under Nebraska statute.**

Comp. St. Neb. 1911, c. 73, § 70, providing that nonresident aliens may not take or hold title to real estate by descent or devise, except that the widow and heirs of aliens who have heretofore acquired lands under the laws of the state may hold the same by devise or descent for 10 years, at the end of which time the lands shall escheat, unless they have been sold or the alien heirs have become residents of the state, is not in conflict with article 1, § 25, of the state Constitution, providing that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property" since the prohibition is directed only against nonresident aliens, and under such statute lands of a citizen, dying intestate do not descend to his heirs who are nonresident aliens.

At Law. Action by William Toop and others against the Ulysses Land Company and others. Judgment for defendants.

Appeal dismissed for want of jurisdiction by Supreme Court, 237 U. S. 580, 35 Sup. Ct. 739, 59 L. Ed. 1127.

Bulkley, More & Tallmadge, of Chicago, Ill., and Crane & Boucher, of Omaha, Neb., for plaintiffs.

Hall & Bishop, of Lincoln, Neb., for defendants.

THOMAS C. MUNGER, District Judge. The question presented in this case is whether, under the laws of Nebraska, the lands (not within the corporate limits of a city or town) of a citizen who died intestate, July, 1898, descended to nonresident aliens, subjects of the kingdom of Great Britain, who would have been heirs but for such alienage. It is unnecessary to consider the provisions of the treaty be-

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tween the United States and Great Britain, because it was not ratified until the year following the death of the intestate, and had no retroactive effect. At the time of intestate's death, a statute of Nebraska provided as follows:

"Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated, to enforce forfeitures of all such lands as provided by this act." Section 70, c. 73, Comp. Stats.

It is contended that this statute should be construed so that it would read as if the words "or citizens" were inserted in the exception, making the excepting clause to read:

"Except that the widows and heirs of aliens *or citizens* who have heretofore acquired lands in this state," etc.

The statute as it exists is not open to such an interpolation. In *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, an almost identical statute was under consideration. The court said:

"It is urged that the act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1 to the alien heirs of citizens, as well as to the heirs of aliens. In other words, we are asked to so construe the exception as to give the nonresident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale, or acquire an actual residence in the state. This would involve the insertion of the words 'and the alien heirs of citizens' after the words 'except that the heirs of aliens.' By such a construction we would make the Legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. But here the Legislature has expressly declared that the heirs of certain aliens shall take and hold land for limited periods subject to the privilege of avoiding their escheat to the state by a sale of them, or by acquiring an actual residence in the state, within said periods. But the act of 1887 nowhere declares, nor is there anything on its face to indicate that the Legislature intended thereby to declare, that the nonresident alien kindred of citizens should so take and hold lands for certain periods."

It is claimed that this construction of the statute makes it in violation of section 25 of article 1 of the Constitution of Nebraska, which reads as follows:

"No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property."

This contention is based upon the premise that this statute, so construed, grants to an alien (whether resident or nonresident) the right to have his title to lands, theretofore acquired, to descend or to be devised, to either resident or nonresident aliens, while citizens' lands can only be so transmitted to resident aliens. This is a misconception of

the statute. There is no prohibition of the right of resident aliens to acquire lands mentioned in this statute, but there is a grant of the right of acquisition to nonresident aliens from aliens. In other words, there is a prohibition directed against nonresident aliens, with an exception in favor of nonresident heirs or devisees of aliens then owning lands. A resident alien may acquire title to property in Nebraska by inheritance or devise from a citizen because there is no statute denying such right. A resident alien may also acquire title to such property by inheritance or devise from aliens who owned the same before the passage of this act, because there is no statute denying such right. The statute in question, in its beginning words, is plainly leveled only against nonresident aliens. Hence the exception, being something carved out of the grant, only applies to nonresident aliens. This is demonstrated by the following provision, which refers to the right of such nonresident heirs or devisees to become residents of the state and thereby to continue to hold such lands, a provision that is needless, if the statute refers to resident aliens. As thus construed, the statute makes no discrimination between the rights of resident aliens and of citizens to the possession, enjoyment, or descent of property, and the resident alien may either acquire or transmit title to lands on the same terms as a citizen.

As the plaintiffs are nonresident alien heirs of a citizen, the statute, forbade their inheritance of the lands in controversy, and judgment will be entered for the defendants.

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### AMERICAN BRAKE SHOE & FOUNDRY CO. v. NEW YORK RYS. CO.

(District Court, S. D. New York. January 16, 1922.)

1. Courts ⇨359—Local law controls construction of leases in federal court.  
A case in the federal court, though in equity, should be determined by the local law, so far as it concerns the construction of leases.
2. Receivers ⇨91—Not instructed to disaffirm lease, because not as profitable as it might be, where there will be no loss to corpus from carrying it out.  
While a landlord's receiver will ordinarily be instructed to disaffirm a lease, if loss will be caused to the estate by carrying out its affirmative covenants such instructions will not be given, where a positive loss or encroachment on the corpus or capital of the estate will not be sustained, merely because the lease, though originally a good enough bargain, could now be more profitable.
3. Receivers ⇨91—Time for adoption of leases may be extended without notice.  
The court, appointing a receiver as an incident of the administration, may extend the receiver's time to adopt or disaffirm leases without notice to the lessees or lessors.
4. Receivers ⇨112—Proper to apply for instructions as to disaffirmance of covenants of lease.  
It was proper for a receiver to seek instructions as to whether he should disaffirm the affirmative covenants of a lease whereby the income of the estate would be enhanced.

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In Equity. Receivership suit by the American Brake Shoe & Foundry Company against the New York Railways Company. On petition by the receiver for instructions. Order in accordance with the opinion.

Petition of receiver for instructions in respect of the renewal of certain leases. The subject-matter was referred to a special master, who has advised that the receiver may notify the lessee of his disaffirmance of agreements for renewal and of any covenants of the lessor to furnish heat, electric current, etc., subsequent to April 30, 1920, and of his intention to retake possession of the premises, after the lapse of such time as may be reasonable to enable the lessee to remove therefrom.

Winthrop & Stimson, of New York City (Allen T. Klots, of New York City, of counsel), for receiver.

Watson, Harrington & Sheppard, of New York City (Archibald R. Watson, John H. Harrington, and Ralph O. Willguss, all of New York City, of counsel), for Frank A. Munsey Co.

MAYER, Circuit Judge. [1] So far as concerns the construction of the leases, the case, though in equity, should be determined by local law. In *Orr v. Doubleday, Page & Co.*, 223 N. Y. 334, 119 N. E. 552, 1 A. L. R. 338, the Court of Appeals adopted a principle not in accord with some authorities; but Judge Collin's opinion is convincing, and announced a doctrine which, it seems to me, is sound both as matter of law and wise from a business standpoint and is applicable to this case.

In the case at bar, there was a present demise, the legal consequences of which are not affected by the executory covenants as to furnishing heat, electric current, etc. These, in certain circumstances, the receiver might refuse to carry out, and yet the lessee would be entitled to the possession of the premises. There may well be, as suggested on the argument, a difference in the position of a receiver as lessee and as landlord.

[2] The theory of an equity receivership, such as this, is that the court is preserving the property. Hence, if rent cannot be paid by the receiver, or, in the light of financial conditions, has become burdensome, and it appears that loss may or will ensue, the lease may be disaffirmed. So, too, if the receiver, as landlord, will cause loss to the estate by carrying out the affirmative covenants of the lease, it would ordinarily be the duty of the court to instruct him to disaffirm.

But a court of equity should not instruct a receiver to disaffirm a lease as landlord merely because the corporation lessor made what, at this moment, might be a bad bargain, although a good enough bargain originally. It is the duty of the receiver to make every proper effort to increase the assets of an estate, but not at the expense of fundamental principles of fair dealing. When a lessee under a lease takes possession, the lease presupposes continuance, even in the face of a receivership of the landlord, so long as the landlord's receivership estate is not burdened or put to loss, and by "burdened" is not meant that the lease could be more profitable, but that it entails a positive loss or encroachment on the corpus or capital of the estate.

[3] The real question, therefore, is whether the receiver should be

instructed to refuse to carry out the executory covenants as to heat, electric current, etc. In the first place, I hold with the master that the receiver has not affirmed the lease, either in toto or its affirmative obligations. Secondly, the lessee was not entitled to notice as to extensions of time to adopt or not adopt leases, etc. The power to extend such time exists, without notice to lessors or lessees of the corporation in receivership, and is exercised as an incident of administration.

In the case at bar there is no evidence that the lease is a burden in the sense defined supra; i. e., that in carrying out its affirmative obligations the estate suffers an actual loss as distinguished from the obtaining of a more profitable rental. Yet it is possible, although not probable (owing to the course of costs), that the affirmative obligations may hereafter impose a burden, and the estate should be safeguarded accordingly. The receiver is instructed, therefore, not to commence any proceeding to evict or eject the tenant, but his time to affirm or disaffirm the affirmative covenants as to heat, electric current, etc., is extended to July 1, 1922, with leave then to apply for a further extension, if so advised. The probability is that by July 1st the cost of carrying out the affirmative obligations will have diminished, rather than increased, and that by that time the question will have become academic. If, however, some situation should arise which in the discretion of the receiver should require him to move, then his application for instructions shall be made on five days' notice to the lessee.

[4]. It is hardly necessary to state that it is understood that the receiver, in seeking instructions, has pursued the proper course, and that he would not have been justified in failing to advance argument looking to the enhancement of the income of the estate.

Nothing here decided has any relation to the provisions of any foreclosure decree, if and when made.

Submit order on five days' notice.

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In re SMITH et al.

In re GILMORE.

(District Court, D. Massachusetts. March 6, 1922.)

No. 28458.

1. Bankruptcy  $\Leftrightarrow$  140(3)—Brokers are fiduciaries as to check delivered for purchase of particular stock, never consummated.

Where a customer delivered to brokers, who later became bankrupt, his check for the purchase of designated stock at a specified price, and the transaction was not consummated, because the stock could not be obtained for that price, the brokers held the check in a fiduciary capacity, and had no contractual claim against the customer for which it could be held as security.

2. Bankruptcy  $\Leftrightarrow$  140(3)—Claimant of trust in deposit held protected by collateral securing note paid by the deposit.

Where the bankrupts had deposited in their general account a check of claimant, which they held as fiduciaries and after the bankruptcy the bank applied the deposit to notes which were secured by collateral suffi-

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cient to reduce their face value far below the amount of the deposit, the claimant is entitled, as against the trustees, to be put in the same position as if the collateral had been applied to the notes, so as to leave the funds held in trust for claimant in the deposit.

**3. Bankruptcy § 140(3)—Possibility of other trust claims against fund does not authorize denial of claim.**

A claim to a portion of the bank deposit in the name of the bankrupt as a trust fund for plaintiff will not be denied, because of the possibility of other similar claims against the fund, where there is no showing there are such claims.

**In Bankruptcy.** In the matter of the estate of Ernest F. Smith and others, bankrupts. On claim of Folliard F. Gilmore. **Allowed.**

Henry P. Brown, of Boston, Mass., for claimant.

Francis T. Leahy, of Boston, Mass., for trustee.

**MORTON, District Judge.** The claimant turned over to Smith & Co. two checks, aggregating \$800, with instructions that they were to purchase on his account certain stocks at stated prices. The stocks never were purchased, for the reason that they could not be obtained at the prices named. For some time after receiving the order Smith & Co. retained the checks. About a week before the failure, however, the checks were deposited in their general bank account in the National Shawmut Bank. At that time Smith & Co. were deeply insolvent, and must have known it. If the checks were, as the agreement and the retention of them up to that time would indicate, understood to be a special fund, the use of them was fraudulent.

The bank account remained at about \$20,000 until the bankruptcy. Then the bank applied it on a note which it held against Smith & Co., leaving insufficient to pay this claim. The note, however, was secured by collateral; and if the collateral had been first applied on it, there would have been left in the deposit account many times enough to pay this claim. On these facts the learned referee was of opinion that the claimant was merely a general creditor and dismissed the petition.

[1] The Massachusetts law is much less favorable to special interests and claims in stock brokerage failures than that which is recognized in most of the states and by the United States Supreme Court. But even under the Massachusetts law it seems to me that on the facts stated a fiduciary relation was created with respect to the fund in question. It was not a payment in advance on account of goods purchased, as the learned referee states. Smith & Co. did not agree to sell the stocks to the claimant, but only to buy them for him if possible. The checks were put into their hands for that special purpose. At that time it was uncertain whether the purchase could be carried out; as things turned, it could not be, and it never was. Smith & Co. never became entitled to the deposit, and never had any contractual claim upon the claimant for which this deposit might be retained by them as security. The principles of law involved are very similar to those considered in *Re Gay & Sturgis* (D. C.) 251 Fed. 420, where the authorities are referred to.

[2, 3] As between the claimant and the trustees, it is clear that he is entitled to be put in the same position as if the bank had applied the collateral on the note before setting off the deposit into which the plaintiff's money had gone, and to follow his funds. It is suggested by the trustees that there may be other persons similarly defrauded, who also have special claims against the same fund to an amount more than the fund, and that therefore it is unsafe to allow this claim. It does not appear, however, that there are any other claimants. On the facts as they now appear, the claimant is entitled to a decree.

The order of the referee is vacated, and a decree may be entered, allowing the claim.

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GROSS v. FRANK.

(District Court, D. Maryland. March 9, 1922.)

No. 252.

1. Patents  $\Leftrightarrow$ 328—1,380,058, claim 3, for automobile lamp, held void for want of invention.

The Gross patent, No. 1,380,058, claim 3, for a parking lamp for automobiles, held invalid for want of invention; there being no real combination, though the inventor brought together a number of devices old in the art producing a different lamp from any theretofore made.

2. Patents  $\Leftrightarrow$ 26(1)—Real combination of old things essential to invention.

While a high order of invention may be shown in combining old things, so as to produce new results, there must be a real combination of them.

In Equity. Suit by Angus R. Gross against Joseph Frank. Bill dismissed.

Alexander & Dowell, of Washington, D. C., and Leo Fesenmeier, of Baltimore, Md., for complainant.

Alexander S. Steuart, of Washington, D. C., and Chapin A. Ferguson, of Baltimore, Md., for defendant.

ROSE, District Judge. [1] There is in suit the third claim of patent No. 1,380,058, issued May 31, 1921, to the plaintiff, Angus R. Gross. The usual defenses of invalidity and infringement are set up.

The invention is a parking lamp for automobiles. It is smaller, neater in appearance, and more firmly attachable to a machine, than those which had been theretofore used. So soon as it was put upon the market, there was a large demand for it. The defendant bought some of plaintiff's lamps, borrowed some of the parts of them from plaintiff, and proceeded to design and manufacture a lamp obviously modeled upon that of plaintiff's. He, of course, made some changes which he hoped were sufficient to escape infringement, and so far as two out of three of plaintiff's patent claims are concerned he admittedly succeeded.

There is only one claim in suit, the third. It is quite long, having something like a dozen elements, most of them being concerned with rather minute matters of mechanical detail. There is no reason to

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suppose that any one before plaintiff had ever made just such a lamp as this claim describes, but there is great difficulty in finding out in what plaintiff's invention consists. He wanted to make a lamp of small size, which would do the work as well as the larger lamps which had been theretofore used. This part of his purpose he accomplished by using multifaceted lenses, but the use of such lenses for such purposes had long been known. He wished to make it possible easily to open his lamp and replace an electric bulb, which was defective or worn out, and he provided means for doing so that had often been theretofore used for analogous purposes. He desired to secure the lamp to the fender, so that it could not be readily jostled off. This he did by the use of appliances long known in the art.

[2] There is no question that a high order of invention may be shown in combining old things, so as to produce new results; but there must be a real combination of them. A man with defective vision, who also had flat feet, might walk all the better if he put on a new pair of bifocal glasses, and if he used a better designed shoe; but that scarcely would be a real combination of the shoes and the glasses. The plaintiff does not really combine, in any true sense, his multifaceted lenses with his means of attaching the lamp to the fender, or with the arrangement he provides for the opening of his lamp, so as to permit the replacement of a bulb within it. He has unquestionably shown mechanical skill in making a useful and attractive lamp. The fact that it at once commanded a large sale is strongly persuasive that it was really both new and useful. If there is invention in what plaintiff did, he has never pointed out and distinctly claimed the particular improvement or combination which he claims as his.

It is with some regret that I am compelled to hold the claim in suit invalid, and to dismiss the bill, as it would seem to be clear enough that, if plaintiff has invented anything, defendant has used it.

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WINTERBOTTOM V. CASEY.

(District Court, E. D. Michigan, S. D. March 6, 1922.)

No. 425.

Patents  $\Leftarrow$  288—Allegation defendant maintained field office does not show established place of business.

In a bill for infringement of a patent, an allegation that defendant had a field office within the district, and therein constructed certain tunnels by a method infringing plaintiff's patent does not show that defendant has a regular and established place of business within the district, which is necessary to give the court jurisdiction, under Judicial Code, § 48 (Comp. St. § 1030).

In Equity. Suit by Joseph Winterbottom against John F. Casey, doing business under the trade-name of the John F. Casey Company. On motion to dismiss the bill for want of jurisdiction. Motion granted, unless plaintiff files an amended bill.

$\Leftarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Monaghan, Crowley, Reilley & Kellogg, of Detroit, Mich., for plaintiff.

Whittemore, Hulbert, Whittemore & Belknap, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This is a motion to dismiss the bill of complaint herein for alleged lack of jurisdiction by this court over the defendant, in that the bill does not show either that the defendant is an inhabitant of this district or that he has in such district "a regular and established place of business."

The bill alleges that it is brought by plaintiff, a resident of Detroit, against the defendant, "having his principal office in the city of Pittsburgh, Pa., and a field office within the Southern Division of the Eastern District of Michigan, to wit, in the city of Detroit"; that plaintiff owns a patent upon certain methods of building sewers and tunnels, which are used by plaintiff as a contractor engaged in the business of building sewers and tunnels; that the defendant has infringed said patent within this district, by using the aforesaid patented methods of building sewers and tunnels at various places in Detroit, particularly at or upon the line of the so-called Seven-Mile road in said city. The bill contains other allegations, but no statement, averring or making it to appear that defendant is an inhabitant of, or has "a regular and established place of business" within, this district. The mere allegation in the bill that defendant has "a field office" in this district certainly falls far short of being an averment or showing that defendant has "a regular and established place of business" in such district, at least where, as in this case, the bill does not state the nature or extent of the business transacted by defendant here.

Section 48 of the Judicial Code (36 Stat. 1100 [Comp. St. § 1030]) provides as follows:

"In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

It not appearing, then, that the defendant is an inhabitant of this district, or that it has a regular and established place of business in this district, the motion to dismiss must be granted, unless within 10 days from this date the plaintiff files an amended bill, in which event such amended bill will stand, and be treated, as an original bill, without prejudice to the right of defendant to proceed accordingly. An order will be entered to that effect.

BAILEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1922.)

No. 3552.

1. Internal revenue ~~§~~47—Indictment for resisting officers held to state of offense.

An indictment charging that defendants resisted certain internal revenue officers in the execution of their duties, "and did then and there use deadly weapons" in resisting them, followed by a description of the manner in which the offense was committed, states an offense under Penal Code, § 65 (Comp. St. § 10233).

2. Criminal law ~~§~~1167(1)—Conviction not reversed, unless duplicity of indictment prejudiced accused.

Even if an indictment for resisting internal revenue officers were duplicitous for charging simple resistance and resistance by the use of deadly weapons, a conviction thereunder will not be reversed, unless it is further made to appear that the substantial rights of accused were prejudiced by the overruling of their motion to require an election by the prosecution and of their demurrer to the indictment.

3. Criminal law ~~§~~1167(1)—Duplicity held not to have prejudiced accused, tried on only one charge.

Defendants, accused of resisting internal revenue officers, were not prejudiced by the duplicity, if any, in the indictment as charging simple resistance and resistance with a deadly weapon, where the case was tried on the theory that indictment charged only resistance with a deadly weapon, and the jury were instructed to acquit, unless they found beyond a reasonable doubt that defendants used the deadly weapons in resisting the officers.

4. Internal revenue ~~§~~39, 40—Assault on officers with deadly weapons to prevent performance of duties is offense, even if not resistance.

The use by accused of deadly weapons to prevent officers of the internal revenue from performing their duties is an offense, even though it does not comply with the technical definition of resistance, so that error in the definition of resistance was not prejudicial, where the jury were required to find the assault with deadly weapons to prevent performance of the duties.

5. Criminal law ~~§~~1059(2)—General exception to charge will not be considered on review.

Where defendants took no exception to any particular part of the charge, but after it was given objected and excepted to each and all of the foregoing instructions, the exception was in effect a general exception, which will not be considered by the reviewing court.

6. Criminal law ~~§~~863(1)—Recalling jury for further instruction is within court's discretion.

Even if a requested instruction was one which should have been given, if it had been requested at the proper time, it was within the court's discretion whether to grant the request of accused to recall the jury after they had retired and give them such charge.

7. Criminal law ~~§~~863(1)—Refusal of request to recall jury for further instructions held proper.

In a prosecution for resisting revenue officers by the use of deadly weapons, where the court had fully instructed the jury as to the intent of defendants, which it must find before it could convict, a request by accused, after the jury had retired, to recall them, to give them a charge that they must acquit, if the assault was for some purpose other than as stated by the court in its general charge, was properly refused.

**8. Criminal law** ⚡1159(2)—Appellate court cannot determine weight of evidence.

The Circuit Court of Appeals cannot, on writ of error after the conviction of a crime, determine the weight of the evidence, but must affirm the conviction, if there is any substantial evidence.

**9. Internal revenue** ⚡47—Whether assault of revenue officers was to prevent performance of duties or to resent insult held jury question.

Where there was evidence that the accused assaulted internal revenue officers with deadly and dangerous weapons when they were in the execution of their duty, it was a question for the jury whether the assault was to prevent the performance of the duty, or for revenge for some real or fancied affront previously given by one of officers to the mother of accused.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Bev Bailey and another were convicted of resisting internal revenue officers by the use of deadly weapons, and they bring error. Affirmed.

G. Murray Smith, of Richmond, Ky. (A. R. Burnam, Jr., of Richmond, Ky., on the brief), for plaintiffs in error.

Sawyer A. Smith, U. S. Atty., of Covington, Ky. (H. Clay Kauffman, of Lancaster, Ky., on the brief), for the United States.

Before DENISON and DONAHUE, Circuit Judges, and SATER, District Judge.

DONAHUE, Circuit Judge. At a special session of the United States District Court for the Eastern District of Kentucky, held January 16, 1919, an indictment containing one count was returned against Bev Bailey, J. C. Bailey, and Dick Smith, charging them with resisting internal revenue officers in violation of section 65 of the Penal Code (Comp. St. § 10233). To this indictment Bev Bailey and J. C. Bailey filed the following motion:

"Come the defendants and move the court to require the district attorney to elect which of the causes of action set forth in the indictment, and which of the offenses denounced therein, he will prosecute against these defendants."

This motion was overruled by the court, and exceptions noted. Thereupon the same defendant filed a demurrer, which reads as follows:

"Come the defendants and demur generally to the indictment herein, because same does not state facts sufficient to constitute an offense against the United States."

This demurrer was also overruled by the court and exceptions noted. Thereupon trial was had resulting in a verdict of guilty. A motion for a new trial was overruled, and each of these defendants was sentenced to imprisonment for three years.

It is contended on behalf of the plaintiffs in error that error to their prejudice intervened in the trial of this cause in the following particulars: First. The court erred in overruling the demurrer to the indictment. Second. The court erred in overruling their motion for a directed verdict of not guilty. Third. The court erred in the instructions given to the jury, and in failing to give the instructions requested.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] While the demurrer challenges the validity of this indictment solely and specifically upon the ground that the facts stated are not sufficient to constitute an offense against the United States, nevertheless it is now insisted that this demurrer should have been sustained for the reason that the indictment charges two offenses in a single count. This indictment does state facts sufficient to constitute an offense against the United States; therefore the demurrer based upon that ground was properly overruled. The question of duplicity, however, is presented by the motion to elect.

Section 65 of the Penal Code provides that:

"Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer of the customs or of the internal revenue, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches and seizures, in the execution of his duty \* \* \* shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duty, shall be imprisoned not more than ten years."

While this statute may be said to define two offenses, nevertheless it is the contention of the government that it really defines two grades of the same offense: First, a mere resistance of the officers or the persons named in the statute without deadly weapons, which is punishable by fine of not more than \$2,000 and imprisonment not more than one year; and second, resistance of such officers or persons with the use of deadly or dangerous weapons, the punishment for which is imprisonment for not more than ten years.

The first part of the indictment, omitting the formal part and names, reads as follows:

"Did willfully, unlawfully, knowingly, and feloniously, forcibly assault, resist, oppose, prevent, impede, and interfere with certain officers of internal revenue and their deputies, and certain persons assisting them in the execution of their duties, and certain persons authorized to make searches and seizures in the execution of their duties, and did then and there use certain deadly and dangerous weapons in resisting said persons authorized to make searches and seizures as aforesaid, in the execution of their duties."

This is followed by a description of the manner in which this offense was committed in the following language:

"By then and there forcibly assaulting, resisting, opposing, preventing, impeding, and interfering with one U. G. McFarland, who was then and there deputy collector of internal revenue, and H. M. Samuels, who was then and there a deputy collector of internal revenue, and J. C. Drewry, who was then and there a deputy collector of internal revenue, and C. L. Winfrey, deputy collector of internal revenue, and J. E. Bash, who was then and there a person assisting the said U. G. McFarland, H. M. Samuels, J. C. Drewry, and C. L. Winfrey in the execution of their duties."

The further recitals of the indictment are as follows:

"And by then and there using deadly and dangerous weapons, to wit, pistols, revolvers, and guns in resisting the said U. G. McFarland, J. C. Drewry, H. M. Samuels, and J. E. Bash, for the purpose of preventing them searching for and seizing certain illicit distilleries in Knox county, Kentucky, in the execution of their duty as such officers and deputies and persons aforesaid,

and with the intent of them, the said Dick Smith, Bev Bailey, and J. C. Bailey, then and there to commit bodily injuries upon the said U. G. McFarland, J. O. Drewry, H. M. Samuels, C. L. Winfrey, and J. E. Bash, and with the further intent to deter and prevent them from discharging their duty as aforesaid."

It is claimed on behalf of the plaintiffs in error that the first two paragraphs of the indictment, as above separately copied, charge fully and completely the offense of resisting, without the use of deadly weapons, revenue officers or persons authorized to make searches and seizures; that the last paragraph of this indictment, as above copied, charges as a separate and distinct offense the use of deadly or dangerous weapons in resisting such revenue officers or persons in the discharge of their duties, and that therefore this indictment charges two separate and distinct offenses in a single count.

It is insisted, however, upon the part of the government that the first paragraph of this indictment, as above copied, clearly and specifically charges these defendants with the use of "certain deadly and dangerous weapons in resisting internal revenue officers"; that the second and third paragraphs describe the offense with more particularity, the second paragraph giving the names and official character of the officers assaulted, resisted, opposed, and interfered with in the execution of their official duties; the third paragraph, designating more definitely than the first, the deadly and dangerous weapons used and averring the intent and purpose of the defendants in making the assault, resistance, opposition, and interference charged in the first paragraph; that the second and third paragraphs are not separate and distinct from each other, but connected by the conjunction "and," and should be read "by then and there forcibly assaulting, \* \* \* and by then and there using deadly and dangerous weapons. \* \* \*" Our attention is also called to the further fact that this last paragraph does not designate the official position of the persons named therein who were assaulted and resisted, but merely states that pistols, revolvers, and guns were used in resisting these men as "such officers," so that it must be read in connection with the first and second paragraphs, in order to ascertain their official position, and whether or not these persons were such officers as are named in the statute; that it does not appear in the third paragraph that these defendants are directly charged with actual assault or resistance, other than the mere interference that arises from the statement, "by then and there using deadly and dangerous weapons, to wit, pistols, revolvers, and guns, in resisting" certain persons named and later designated "as such officers"; and that the balance of this paragraph is confined solely to the charge of the intent and purpose of the accused in the commission of the acts charged.

It is the further claim of the government that the third paragraph of this indictment, read separate and apart from the first and second paragraph, does not state sufficient facts to charge any offense against the United States, and that, even if the first and second paragraphs, standing alone, state facts sufficient to constitute an offense under this statute, the offense therein charged is the graver one denounced by the statute, to wit, the use of deadly and dangerous weapons in assaulting, opposing, resisting, and interfering with persons authorized to make

searches and seizures in the discharge of their duties, for which offense the defendants were placed upon trial and that the averments of the third paragraph may in that event be totally disregarded as mere surplusage. The trial court was of the opinion that this charged but one offense, to wit, the resisting of revenue officers by the use of deadly and dangerous weapons, and overruled the motion to require the district attorney to elect.

[2] If, however, it were conceded that this indictment is subject to the construction contended for by plaintiffs in error, it must further be made to appear that the substantial rights of the accused were prejudiced by the overruling of this motion to require the district attorney to elect, or by the overruling of this demurrer, if the demurrer presented this question. *Connors v. U. S.*, 158 U. S. 408-411, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[3] While the language of this indictment is not so clear and explicit as might be desired, nevertheless it is admitted by plaintiffs in error, or rather it is contended by plaintiffs in error that it does charge this graver offense. The trial was conducted solely upon the theory that it charged only this one offense. The court in its charge to the jury carefully defined the elements constituting this one offense, to wit, resisting with deadly and dangerous weapons persons authorized to make searches and seizures in the performance of their duties as such officers, and carefully instructed the jury that, unless it found the defendants guilty beyond a reasonable doubt of resisting the officers and persons authorized to make searches and seizures, named in the indictment, that in so resisting they used deadly, dangerous weapons, and that they used these weapons with intent to commit bodily harm upon such officers, or with the intent to deter and prevent the officers from the performance of their duties, then it should return a verdict of not guilty. It is apparent, therefore, that these defendants were not placed upon trial for two offenses charged in a single count of an indictment, and that, even if their motion to elect were well taken, they obtained the full benefit of that motion by the conduct of the trial and the charge of the court, and that their rights were as fully protected and safeguarded as if the motion had in fact been sustained.

[4] The charge as a whole fairly states the law of this case. In the brief for plaintiffs in error there is considerable criticism of that part of the charge relating to the definition of the word "resist." The defendants in this case, however, are not charged merely with "resisting" an officer, but with forcibly assaulting, resisting, opposing, preventing, impeding, and interfering with certain officers of the internal revenue and their deputies. An assault with deadly and dangerous weapons, the purpose of which is to prevent, hinder, or interfere with an officer in the discharge of his duty, may or may not amount to a resistance, within the definition of that word as insisted upon by counsel for plaintiffs in error; nevertheless it constitutes an offense under this statute.

[5] Defendants, however, took no exceptions to any particular part of the charge, but, on the contrary, after the charge was given, objected and excepted "to each and all of the foregoing instructions." This, in effect, is a general exception to the charge, which will not be considered

by a reviewing court. *Erber v. U. S.*, 234 Fed. 221-225, 148 C. C. A. 123; *U. S. v. Fidelity Co.*, 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696.

[8, 7] After the jury had retired, counsel for defendant requested the court to recall the jury and further instruct it in reference to the purposes of the assault. The granting or refusing of this request to charge after the jury had retired, even though the request itself was proper to have been given in charge before the jury retired, was wholly within the discretion of the court. The court having already fully instructed the jury as to what it must find as to the purpose and intent of the defendants before it could return a verdict of guilty, it would hardly seem necessary to recall the jury to instruct it further that it should acquit, if it found that such assault or resistance was for some purpose or intent other than as stated by the court in its general charge. This request was properly refused.

[8] It is further contended that, if this indictment charges only the graver offense denounced by the statute, then there is no evidence sufficient to sustain conviction of that offense. This court, of course, cannot determine the weight of the evidence. If there is any substantial evidence, the conviction must be affirmed.

[9] There is evidence in this record of an assault with deadly and dangerous weapons in a menacing manner upon these officers when they were in the execution of their duty. It was for the jury to say whether the purpose of this assault was to prevent the officers from performing their duty to make search and seizure, or for the purpose of revenge on one of these for some real or fancied affront, previously given by one of these officers to the mother of the accused.

For the reasons above stated, the judgment of the District Court is affirmed.

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#### UNION GAS & OIL CO. et al. v. ADKINS et al.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1922.)

No. 3613.

1. Mines and minerals  $\S$  73½—Lease for "as long as gas and oil is found in paying quantities" construed.

The provision that a lease extends "as long as gas and oil is found in paying quantities" means, not merely that those minerals shall be found in paying quantities, but also that either oil or gas shall be actually discovered and produced in paying quantities within the term named in the lease, and if neither oil nor gas is being produced at the end of the term of years named in the lease the lease ends.

2. Mines and minerals  $\S$  73½—Lessee's determination as to paying quantities of oil is not conclusive.

In an oil and gas lease, where the lessor, in return for the burden of the oil well on his premises and the cloud on his title, receives only a percentage of the oil actually produced on the land, the determination of the lessee as to whether oil is being produced in paying quantities is not conclusive, but that question is to be determined as a question of fact, though the lessee's determination might be conclusive in the case of a gas well, where he paid a stipulated rental for each well, regardless of the production.

3. Mines and minerals  $\S$ 73½—Inadequacy of shipping facilities considered, in determining whether oil is produced in paying quantities, as affecting term of lease.

The courts, in determining whether oil is produced in paying quantities within the meaning of an oil lease can consider the fact that the well is in "wildcat" territory, where the facilities for shipment may not be fully developed, but can also consider that the parties had that fact in mind in fixing the term for the production of oil on the premises, and intended to require furnishing facilities for shipment within such term.

4. Mines and minerals  $\S$ 75—Possibility of paying production by central pumping plant held not to extend lease.

Where, at the expiration of the term of years of an oil lease, only one test well had been sunk, in which oil had been found, but which had not produced any oil, except for about a day and a half of pumping, evidence that the oil could be pumped in paying quantities by connecting that well, with other similar wells in the neighborhood, to a central pumping plant, does not show that the oil was being produced in paying quantities, so as to extend the term of the lease.

5. Evidence  $\S$ 568(4)—Opinions of witnesses as to oil production before test well was shot disregarded.

In determining whether oil was being produced in paying quantities at the expiration of the term of years fixed by oil lease, opinions of witnesses, given before the test well was shot, as to the quantity of oil it would produce, are disregarded, since the object of requiring the test well and the production of oil was to eliminate the necessity of relying on opinions as to production.

6. Mines and minerals  $\S$ 78(7)—Evidence held not to show production of oil in paying quantities.

Evidence that at expiration of term of years prescribed in an oil lease one test well had been sunk, from which oil had been pumped for about a day and a half, without any accurate measurement of the quantity produced, and which well had then been closed and the rig removed, so that no oil was being produced therefrom, *held* to show that oil was not being produced in paying quantities, so as to entitle lessors to a cancellation of the lease.

7. Mines and minerals  $\S$ 78(7)—Evidence held to show abandonment of lease.

Evidence *held* to show abandonment of lease by lessee.

Appeal from the District Court of the United States for the Eastern District of Kentucky at Catlettsburg; Andrew M. J. Cochran, Judge.

Suit by Virgil V. Adkins and others against the Union Gas & Oil Company and another to cancel an oil and gas lease. Decree for complainants, and defendants appeal. Affirmed.

Homer E. Holt, of Huntington, W. Va. (Holt, Duncan & Holt, of Huntington, W. Va., on the brief), for appellants.

S. S. Willis, of Ashland, Ky. (Hager & Stewart, of Ashland, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is an appeal from the decree of the District Court of the United States for the Eastern District of Kentucky, in an action in equity brought in that court by Virgil V. Adkins et al. against the Union Gas & Oil Company and A. C. Albin, to cancel an oil and gas lease bearing date of June 1, 1916, given by Cynthia A. Rice and her husband, Nelson T. Rice, to A. C. Albin, and afterwards

➡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

assigned by him to the Union Gas & Oil Company, and to quiet title in plaintiffs to 150 acres of land, more or less, situate on Big Blaine creek, in Lawrence county, Ky. At the time of the execution of this lease Cynthia A. Rice and her husband were and still are the owners of the fee in this land. Virgil B. Adkins, John W. M. Stewart, and John E. Buckingham claim an interest in this real estate under a lease for oil and gas given by Cynthia A. Rice and her husband to Virgil V. Adkins on the 2d day of September, 1919.

The Albin lease, which was delivered in escrow, and under which appellants claim the right to drill for and produce oil from these premises, provided, among other things, that the term of the lease should be for "three years or as long as gas or oil is found in paying quantities on said premises." The lease further provided that, "in case no paying well is drilled on said premises within three years from date, this grant shall be null and void"; also that, "should the second party not begin drilling a test well on said land within two years from this date, then it is understood and agreed that this lease shall be marked 'canceled' and returned to the first party."

The drilling of the test well was not commenced within two years, but for a valuable consideration the lessors extended the period until December 1, 1918. In July and August of 1918, a test well was driven to the depth of 833 feet. It is the claim of the appellees that this well did not produce oil in paying quantities, and that the appellants abandoned the premises and the well drilled thereon, and made no further efforts to find oil or gas in paying quantities within the three-year term of the lease. The Union Gas & Oil Company, assignee of the Albin lease, denies that it abandoned this property, and contends that oil was found in paying quantities in the test well drilled in July and August of 1918. Upon these issues the District Court found upon the evidence for the plaintiffs, and entered a decree canceling this Albin lease, and quieting the title of the plaintiffs appellees to the premises described in the petition.

This record therefore presents but two questions. First. Was oil being found on these premises in paying quantities within the three-year term named in the lease? Second. Did the assignee of the lessee abandon the premises after the drilling of the test well?

[1] The provision "as long as oil and gas is found in paying quantities on the premises" is a familiar term in oil and gas leases, and has been judicially construed to mean, not merely that oil or gas shall be found in paying quantities, but also that either oil or gas shall be actually discovered and produced in paying quantities within the term named in the lease. *Murdock-West Co. v. Logan*, 69 Ohio St. 514, 69 N. E. 984; *Detlor et al. v. Holland*, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; *Gas Co. v. Tiffin*, 59 Ohio St. 420, 54 N. E. 77; *Cassell v. Crothers*, 193 Pa. 359, 44 Atl. 446. It necessarily follows that, if neither oil nor gas is being produced at the end of the term of years named in the lease, the lease ends and determines at the expiration of that time. If oil or gas is then being produced in paying quantities, the term of the lease is extended during the time production in paying quantities is continued.

[2] It is contended on the part of the appellant that the question of whether oil or gas is produced in paying quantities is one solely for the determination of the lessee. There is some force in this contention in so far as it applies to gas wells, where the contract provides that the lessor shall receive a fixed annual rental for each gas well, and the lessee is ready and willing to pay that rental. In such case the landowner receives the same revenue from the operation of his land as he would receive if the gas well were in fact a paying one to the lessee. But no such rule can obtain in reference to an oil well, where the lease provides that the sole profit arising to the owner of the land from such operation shall consist of a part of the oil produced and marketed from the premises. The right to operate for oil is a burden upon the land and materially interferes with the owner's use of the same for agricultural purposes. It may also injuriously affect the market value of the property. Therefore whether oil is found in paying quantities is a question of fact, to be determined from all the evidence in the case with reference to the rights of the lessor as well as the lessee, and not a question for the sole and arbitrary determination of the lessee. The fact, however, that the lessee has spent a large amount of money in the test well, and, with knowledge of the quantity of the oil it will produce, is still willing to go forward with reasonably prompt development of the land, will necessarily have great weight with the court in determining this question; but it cannot be accepted as conclusive of that fact.

In this case it is admitted that the defendant did not go forward with the prompt development of this lease by drilling other wells thereon, but after pumping the well for a day, or a day and a half, after it had been shot, and without actually storing and accurately measuring the oil produced from this well by pumping, removed the drilling rig and water tank to another lease, and attempted no further development of this lease for about 17 months thereafter. Nor did it during this time give any further attention to this well either by pumping or otherwise. This failure to develop this lease in accordance with the implied covenants thereof is explained upon the theory that there was then no pipe line connection to this field, and for that reason the oil could not be marketed.

[3] While the provisions in a lease "as long as oil is found in paying quantities" should be construed to mean, not only the discovery of oil, but also the production of it in paying quantities, nevertheless, in the application of this provision of an oil lease of land in what is substantially "wildcat" territory, a court should give due consideration to the inability of the producer to market oil in the usual and ordinary way, until a pipe line is connected with the territory. However, that condition is presumed to be within the contemplation of the parties at the time the lease is made. The term named therein is usually fixed at such a period of years as will enable the lessee to test and develop the territory, so as to procure the laying of a pipe line within the term of the lease. Nevertheless a court of equity would hesitate to decree the cancellation of a lease, where it is clear from the evidence that oil is found in paying quantities in "wildcat" territory, known to the par-

ties to be such at the time of the execution of the lease, and the failure to procure the laying of a pipe line within the term named in the lease, is in no wise chargeable to the delay or default of the lessee in the development of the territory to such an extent as would justify a pipe line company in making this expenditure.

[4] It is the claim of the appellee that this well will produce oil in paying quantities, if it is connected with other wells having like production, to a central pumping power; but that claim can avail nothing, in view of the fact that at the end of the term no oil was being produced in any quantity. It also further appears that appellant has not drilled other wells upon these premises, with which this well can be connected for pumping purposes in order to obtain a paying production. The provision in this lease is that oil shall be found in paying quantities on these premises, not on some other premises, and therefore the economy in operation that may be possible by pumping it in connection with wells on other premises is not controlling in the determination of that question. That is made clear by the further provision of the lease that "in case no paying well is drilled on said premises within three years from date, this grant shall be null and void." Therefore the question of whether oil has been found in paying quantities upon these premises must be determined from the actual conditions that existed upon the leased premises, and not on other premises, at the expiration of the three-year term.

[5] There is considerable evidence in this record tending to show that, when this test well was drilled and before it was shot, it indicated, in the opinion of witnesses, that it would produce from one to two barrels a day. This evidence must be wholly disregarded. This test well was to be drilled for the specific purpose of determining to a certainty just what amount of oil it would produce. The mere drilling of the well was not the test contemplated by the contracting parties. In addition to that it is necessary, where the showing of oil is so slight as to make it questionable whether it is in paying quantities or not, to make an actual test by pumping, storing, and measuring for a time sufficient to determine definitely the real capacity of the well, so that the answer to that question will no longer depend upon opinion or conjecture.

[6] There is no satisfactory evidence in this record tending to prove the actual production of this well during the time it was pumped. It does not appear that the oil was pumped into a tank or other receptacle, so that the quantity thereof could be actually measured. A number of witnesses, who were present during part of the time that this well was being pumped, testified that they saw no oil whatever pumped therefrom, but only water. Mr. Pruitt, the president of the Union Gas & Oil Company, stated in his affidavit that—

"We pumped it one day, and then pumped it the next morning. \* \* \* This morning showed that the well would pump at least two barrels per day, and I believe that pumping it awhile would increase that somewhat."

It is not clear, from his affidavit, whether he was actually present at the time this well was pumped; but, whether he was present or not, it is evident that his statement in reference to the production of oil from

this well is a mere estimate, and not an actual measurement of the quantity produced. Nor is it clear upon what theory he bases his belief that pumping it for awhile would increase that production, especially in view of his evidence on cross-examination to the effect that other wells in that field decreased instead of increased their production in a few weeks after pumping commenced. It is clear, therefore, from all of the testimony in this case, that this test well on the Rice farm was not pumped for a sufficient length of time to determine with any degree of certainty the amount of oil it would produce after it had settled down to its normal capacity, nor is there any evidence in this record from which a court can find that oil was found on these premises in paying quantities within the three years, or was being found in paying quantities at the end of the three-year term named in the lease, even though the failure to produce and market the same, in order to furnish a revenue to the lessor in payment for the burden upon her land, were excused upon the theory that through no fault of the lessee there was, at that time, no pipe line connecting this field with a market.

[7] The court having reached this conclusion, the question of abandonment is not important to the determination of this case. However, there is some evidence tending to establish abandonment by the lessee. The removal of the rig and water tank to another lease, in connection with the failure to develop within a reasonable time by drilling other wells upon this property, tend strongly to prove that the lessee had abandoned this lease, and that if it had any intention whatever of returning thereto it was merely the intention of connecting this well to a central power operating wells on adjoining leases. It also appears from the evidence in this case that a number of wells were drilled by appellant on adjoining leases, that these wells produced more oil than the well on the Rice lease, and that these wells were pumped, at least occasionally, and the oil stored in tanks until pipe line connections could be made.

There is also evidence in this record to the effect that it is necessary to pump wells in this field occasionally in order to protect them from the injurious effect of water, whether salt or fresh water, and that water left standing in a small well in this territory for a period of six months would ruin it. This evidence, taken in connection with the fact that this well was not pumped, except immediately after it had been shot, for a period of about 17 months, would seem to be conclusive of the fact that appellant had abandoned this lease entirely. At least the failure to protect the well and the failure to further develop the lease, or to produce any oil whatever therefrom, within the three-year term, considered together, would not seem to permit of any other logical conclusion.

For the reasons above stated, the judgment of the District Court is affirmed.

**KRAMER et al. v. HARSCH.**

(Circuit Court of Appeals, Third Circuit. February 23, 1922.)

No. 2788.

1. Sales  $\S$ 81(1)—Statement seller could deliver within stated time is not agreement to do so.

Statement of seller of sugar that he could deliver within seven days is not equivalent to a statement that he would make such delivery, and does not establish a promise to do so.

2. Evidence  $\S$ 441(1), 461(1)—Evidence of parol agreement inadmissible to vary written contract or show parties' intent.

In the absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict the terms of a written instrument by showing the intent of the parties or their real agreement to be different from that expressed in the writing.

3. Evidence  $\S$ 397(2)—Oral negotiations are merged in written contract.

The execution of a written contract supersedes and merges all oral negotiations concerning its terms, and the whole engagement of the parties is presumed to have been reduced to writing.

4. Evidence  $\S$ 442(6)—Written contract of sale held to exclude oral evidence of agreement for delivery.

Where a complete contract for the sale of sugar was contained in telegrams and letters exchanged between the parties after the seller had refused to accept an order by telephone and none of the correspondence specified a time for delivery, oral evidence that the seller agreed to deliver within seven days is inadmissible.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by A. K. Harsch against Max Kramer and another, partners trading as the Kramer-Horn Company. Judgment for plaintiff, and defendants bring error. Reversed, and new trial granted.

J. D. Wetmore, of New York City, and Stonecipher & Ralston, of Pittsburgh, Pa. (Frank W. Stonecipher, of Pittsburgh, Pa., of counsel), for plaintiffs in error.

Charles A. O'Brien and Thomas H. Hasson, both of Pittsburgh, Pa., for defendant in error.

Before WOOLLEY and DAVIS, Circuit Judges, and THOMPSON, District Judge.

DAVIS, Circuit Judge. A. K. Harsch, plaintiff below, brought suit in the common pleas court of Allegheny county against Kramer and Horn, who removed the case to the District Court.

The evidence disclosed the following facts: On or about July 1, 1920, plaintiff, a resident of Pittsburgh, wrote to the Harlem Sugar Company of New York for quotations on sugar. The letter was referred to defendants, who telegraphed plaintiff that they could "ship immediately three cars of seven hundred bags each car at twenty-four seventy-five, f. o. b. New York. Letter credit terms." On receiving this telegram plaintiff called by phone the defendants, who told her that, if she desired to place an order, it must be by letter or telegram. Thereupon plaintiff wrote the defendants that she would purchase three

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cars, and, instead of letter of credit for entire amount, she would pay 15 per cent. on signing contract and balance on draft with bill of lading attached. Defendants telegraphed that this arrangement would be satisfactory, and on July 6, 1920, plaintiff telegraphed:

"Wire received. Will accept three cars. Will mail check immediately."

On the following day defendants wrote plaintiff stating that on receipt of her check for 15 per cent. of the purchase price they would book her for "two thousand one hundred (2,100) bags of American refined fine granulated sugar, prompt shipment, at \$24.75 per hundred pound bags, f. o. b. New York, net cash upon presentation of sight draft with bill of lading attached." Plaintiff sent check for \$2,677.50, which was 15 per cent. of the purchase price of one car. This car was shipped and paid for. Plaintiff was unable to raise 15 per cent., or \$5,355, on the other two cars. Accordingly they changed the terms, and it was agreed that plaintiff should deposit \$4,000, or \$2,000 on each of the remaining two cars, but she was unable to do this, and later sought to have the terms of a contract of sight draft with bill of lading attached, which she had with the city of Pittsburgh, substituted, but the defendants would not agree to this.

On July 19, 1920, she wired defendants, "Outside of present order can you furnish me sugar at twenty-three fifty." A telephone conversation took place between them that day, and exactly what was said is in dispute. The following day she telegraphed the defendants \$3,000, and three days later she sent check for \$1,000. On receipt of the \$3,000 defendants shipped two cars of sugar, and upon her statement over the phone on July 23, 1920, that the \$1,000 check had actually been mailed, they sent another car. Defendants allege the \$4,000 applied to the purchase price of the two cars on the original contract, and that they shipped another car on the new contract because she was badly in need of sugar and promised to pay for it on arrival.

The sugar did not arrive in Pittsburgh until August 5, 1920. The city of Pittsburgh had at this time canceled its contract with the plaintiff, who on the following day refused to take any of the sugar, and defendants sold it in the open market. Plaintiff demanded the return of the \$3,000 telegraphed on July 20th, she having already stopped payment on the \$1,000 check mailed on July 23d. The defendants refused to return it, and the plaintiff issued a foreign attachment against the money due them from the H. J. Heinz Company, which purchased the sugar.

In her statement of claim the plaintiff alleged that on July 9, 1920, she entered into an oral contract with the defendants for three carloads of sugar to be shipped promptly and delivered in Pittsburgh within seven days from the date of the contract, and that they failed to make delivery within the seven days and caused the loss of which she complains.

The defendants absolutely denied the making of an oral contract, and set out the foregoing letters and telegrams which they contend constitute the written contract. They alleged performance of the contract and set up a counterclaim for damages for plaintiff's refusal to accept and pay for the sugar.

There are quite a number of assignments of error, but all of them may be reduced to the one question of whether or not the contract was a written contract and should have been so determined by the court. If it should not have been so held as a matter of law, it was properly left to the jury to determine whether or not it was oral or partly oral and partly written.

After the plaintiff's inquiry was referred, by the Harlem Sugar Company, to the defendants, who wired plaintiff on July 2, 1920, that they could "ship immediately three cars of seven hundred bags each car at twenty-four seventy-five, f. o. b. New York," a conversation over the telephone took place in which the plaintiff alleges that the defendants said:

"They could make deliveries to me in Pittsburgh within seven days."

She further testified that the defendants in that same conversation said:

"If I wanted any sugar to put it in writing, a letter or telegram, preferably a telegram; that they would take no orders over the telephone. I told them I would, and I immediately wired them."

Again, referring to that conversation over the telephone, plaintiff testified that defendants said to her:

"They accepted no order by telephone; I would have to send them a letter."

Pursuant to that statement of the defendants, plaintiff on the next day, July 3, 1920, wrote the following letter to the defendants:

"Your wire received this a. m. In answer will purchase three cars Am. refined you quoted, being too late to make any arrangements to-day, will advise you Tuesday a. m. Further, instead of letter of credit, for entire amount will pay, say, about 15 per cent. of the purchase, on signing of contract or confirmation of order; balance you to draw on me with bill of lading attached. Would really like to know something more about you, or to whom I am intrusting my money. I deposit in Seaboard National Bank, N. Y. Would your bank give reference to Seaboard National. Will be pleased to do business with you in the future if business relations are satisfactory. Thanking you most kindly, I am," etc.

We are of opinion that these letters and telegrams constitute the contract as to the three cars. It was modified, however, in one particular—\$2,000 was to be deposited instead of \$2,677.50, or 15 per cent. But this change was made by telegram in accordance with the original demand of defendants.

[1] The only evidence in the case in support of the allegation in the statement that there was an oral contract for the delivery of the sugar within seven days is the testimony of the plaintiff that the defendants stated at the first telephone conversation, before the contract was made, that "they could make deliveries to me in Pittsburgh within seven days." This was repeated by Mr. Kramer, she testified, on July 10, 1920, when he was in Pittsburgh.

It will be noted that the plaintiff does not anywhere say that defendants agreed to deliver sugar in Pittsburgh within seven days. All that the defendants said, according to her testimony, was that they *could*, not that they *would*, make deliveries in Pittsburgh within seven days.

There is a vast difference between *could* and *would*, and there is no testimony that they said they *would*. If the defendants did say that they *could* make deliveries within seven days, these words are insufficient to constitute an oral contract under the evidence in this case.

[2] If, however, the defendants had *said* that they *would* make delivery of the sugar in Pittsburgh within seven days, in the face of the letters and telegrams, both before and after the time the oral contract is alleged to have been made, this testimony would have been incompetent and inadmissible. In the absence of fraud, accident, or mistake, none of which is charged here, parol evidence is not admissible to vary, add to, modify, or contradict the terms or provisions of the written instrument by showing the intentions of the parties or their real agreement with reference to the subject-matter to have been different from what is expressed in the writing. *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896; *Richards v. Shipley*, 257 Pa. 134, 101 Atl. 456; *Williams v. Notopolos*, 259 Pa. 469, 103 Atl. 290; 22 *Corpus Juris*, 1098.

[3] The execution of a contract in writing supersedes and merges all oral negotiations or stipulations concerning its terms with reference to the subject-matter. The whole engagement of the parties and the extent of their undertaking is presumed to have been reduced to writing. *Insurance Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Ryan v. Ohmer*, 244 Fed. 31, 156 C. C. A. 459. The letters and telegrams fully set forth the contract between the parties and the extent of their undertaking. It was to avoid just such a situation as has arisen that the defendants insisted that plaintiff make her order by letter or telegram.

[4] This written contract was definite and complete, and the evidence shows that from beginning to end the parties were acting under its terms, and not those of the alleged oral contract. The conversations over the telephone, whatever they might have been, were merged in the letters and telegrams constituting the contract, and it was error to submit to the jury the question of whether the contract was written, oral, or partly written and partly oral. This question should have been decided by the court as a matter of law. Plaintiff says that the vital part of the transaction was the time within which delivery could be made. In view of that statement, it is significant that there is not a hint about it in any letter or telegram. Before the price of sugar went down and the plaintiff refused to take and pay for the sugar, every letter and telegram is as silent as the tomb as to the time within which delivery was to be made. We are constrained to hold that substantial error was committed in the trial.

The judgment of the District Court will therefore be reversed, and a new trial granted.

**GILLETTE SAFETY RAZOR CO. v. DAVIS, Director General of Railroads.**

(Circuit Court of Appeals, First Circuit. February 21, 1922.)

No. 1531.

1. Carriers  $\Rightarrow$  159(1)—Limitation in bill of lading of time for giving notice, filing claim, and commencing suit for loss or damage, held bar to recovery, except for negligence through delay, or in loading or unloading, or in transit.

Act March 4, 1915, c. 176, § 1 (Comp. St. § 8604a), requires a carrier to issue bills of lading, makes it liable to the lawful holder thereof for any loss, damage, or injury to the property caused by it or by any common carrier to which the property may be delivered, and makes it unlawful to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than 90 days, and for the filing of claims of a shorter period than 4 months, and for the institution of suits than 2 years, "provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." *Held* that, where a bill of lading contained limitations on the time for giving notice, filing of claim, and commencement of suit, all valid under the statute, a failure to act within the time so limited is a bar to recovery against the carrier except for negligence, either through delay, or in loading or unloading, or in transit.

2. Carriers  $\Rightarrow$  132—Burden of proving negligence in loss of goods rests on plaintiff.

Where liability of a carrier for loss of goods depends on its negligence, the burden of proving negligence rests on plaintiff, and while nondelivery, without excuse, is at common law regarded as making a prima facie case of negligence, where it appears that the goods were stolen, and the circumstances attending the theft as shown do not authorize an inference of lack of reasonable precaution, plaintiff must go forward with the evidence.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action at law by the Gillette Safety Razor Company against James C. Davis, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Affirmed.

Eugene M. Schwarzenberg, of Boston, Mass., for plaintiff in error.

Austin M. Pinkham and Pinkham & West, all of Boston, Mass., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error prosecuted by the Gillette Safety Razor Company from a judgment in the District Court for Massachusetts in favor of the defendant, James C. Davis, Director General of Railroads. The transactions out of which the suit arises took place between the plaintiff and the American Railway Express Company at a time when the latter was under federal control.

The plaintiff's declaration contains five counts in contract and five in tort for negligence. In the counts in contract the plaintiff alleges that the defendant is a carrier of merchandise for hire; that on the 11th day of March, 1919, it received merchandise from the plaintiff to the

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value of \$——, which it agreed to deliver the plaintiff or its agents at New York, N. Y., and for which it was paid compensation; but that the defendant failed to deliver said merchandise to the plaintiff in New York, N. Y., wherefore the defendant owes the plaintiff the value of said merchandise, with interest thereon from March 13, 1919, to date of demand. In the counts in tort it is alleged:

"That the defendant is a carrier transferring merchandise for hire, and that on the 11th day of March, 1919, it delivered to the defendant merchandise of the value of \$——; that the defendant carelessly and negligently handled said merchandise, so that the same was stolen, wherefore the defendant owes the plaintiff the value of said stolen merchandise, with interest thereon."

The defendant pleaded the general issue. And in a further plea it was stated that if the defendant received any merchandise for transportation as set forth in the plaintiff's declaration the same was received subject to the terms and conditions of the regular form of the American Railway Express Company's receipt, which terms and conditions were a part of the company's rules and regulations applicable to and governing its schedules of rates and charges all duly filed with the Interstate Commerce Commission and then in full force and effect, and further subject to contracts in writing containing or making reference to said terms and conditions, which were accepted and agreed to by the plaintiff; that among the terms and conditions of the company's regular form of express receipt was the following:

"7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

And the defendant further alleged that the plaintiff—

"did not comply with the conditions precedent to recovery, and did not make claim in writing within four months as required by said contracts, terms and conditions, rules, and regulations, and that therefore the defendant is not liable."

The case was tried by the court upon an agreed statement of facts, no other evidence being taken, with the right in the court to draw inferences therefrom and make findings thereon.

In the District Court it was found:

"That the goods in question, for the loss of which this action is brought, were received by the defendant for transportation from Boston to New York under a bill of lading which in legal effect embodied the terms and provisions of the established form. The goods reached the defendant's receiving platform in New York, from which they would, in the ordinary course of business, have been loaded on trucks for delivery to the consignee, but they were stolen from the platform before being placed upon the trucks."

It also found that at the time of the theft the goods were not being loaded or unloaded, and that the theft was not due to negligence on the part of the defendant.

It also appeared that the goods were received by the defendant for transportation to New York March 11, 1919, and that a reasonable time for their delivery to the plaintiff in New York was not later than March 15, and that the 4 months allowed under the agreement contained in section 7 of the bill of lading and the Act of March 4, 1915 (38 Stat. 1196, c. 176, § 1 [Comp. St. §§ 8592, 8604a]), within which the plaintiff should have given notice of claim to the defendant, expired July 15, 1919, without the plaintiff having given such notice.

In the argument of the cause the plaintiff took two positions: (1) That the loss or damage occurred while the merchandise was being unloaded, and that, if so, under the terms of section 7 of the bill of lading and the proviso of the Act of March 4, 1915, the plaintiff was entitled to recover in contract without showing that the unloading was carelessly or negligently done and without proof of notice; and (2) that it is entitled to recover on the counts in tort for negligence, though no notice was given, it appearing that the defendant had received the goods for transportation and had failed to deliver them; that failure to deliver was not only presumptive evidence of negligence, but, in view of the state of the evidence, was conclusive proof of it.

[1] The provisos of the Act of March 4, 1915, authorizing the provisions of section 7 of the bill of lading, read as follows:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded; or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." Comp. St. § 8604a.

In the provisions of the act preceding the provisos a carrier, on receiving property for interstate transportation, is required to issue a receipt or bill of lading therefor and is made—

"liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier \* \* \* to which such property may be delivered," etc.

Reading the second above quoted proviso in connection with the language contained in the preceding provisions of the act, it is apparent that its true reading is:

"That if the loss, damage or injury complained of was due to delay [in the delivery of such property] or [it was] damage[d] while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only. *Southern Railway Co. v. Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 60 L. Ed. 836.

At common law a carrier was liable for—

"any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy." *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 153 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257).

Under section 7 of the bill of lading, as authorized by the Act of March 4, 1915, the carrier is liable for any loss or damage resulting from human agency, or some cause not an act of God or the public enemy, in case the consignee has given notice in writing of a claim of loss within four months after delivery of the property, or, in case of failure to make delivery, has given such notice within four months after a reasonable time for delivery has elapsed. And if the consignee has failed to give the requisite notice, the carrier is liable for negligent delay, if any, in delivering the property, or negligence while loading or unloading it or in transit, resulting in the consignee's loss.

[2] The plaintiff, however, claims that, inasmuch as it appears that the goods in question were intrusted to the defendant for transportation and that they were never delivered to the plaintiff, it is to be presumed from the fact of nondelivery that the plaintiff's loss was due to the defendant's negligence in unloading the goods or while they were in transit. But the answer to this contention is that while it was the duty of the defendant to have delivered the goods upon demand and its failure to do so, without excuse, is at common law regarded as making a prima facie case of negligence, the fact of nondelivery does not suffice to show neglect where it appears that the goods were stolen and the circumstances attending the theft, if shown, do not authorize an inference of lack of reasonable precaution. Under such circumstances the plaintiff, being the party asserting negligence, has the burden of establishing it and must go forward with the evidence. The burden does not shift. *Southern Railway Co. v. Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 473 (60 L. Ed. 836).

In that case the court, in dealing with a similar question, said:

"It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability 'as warehouseman only.' The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence. \* \* \* In the present case, it is undisputed that the loss was due to fire which destroyed the company's warehouse with its contents including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company."

See *Washburn-Crosby Co. v. Johnston & Co.*, 125 Fed. 273, 60 C. C. A. 187; *Cau v. Texas & Pacific Railway*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; 10 *Corpus Juris*, p. 377.

Here the circumstances attending the theft, to the extent that they were shown, did not authorize an inference of fault on the part of the

defendant and, the plaintiff having failed to introduce evidence from which such inference could be drawn, the court below did not err in holding that the defendant was without fault.

The judgment of the District Court is affirmed, with costs in this court to the defendant in error.

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**COMPANIA DE NAVEGACION INTERIOR, S. A., v. BOSTON-VIRGINIA TRANSP. CO. et al.**

(Circuit Court of Appeals, Fifth Circuit. February 16, 1922.)

No. 3721.

1. Collision ~~¶~~ 71(2)—Tug held in fault for collision between tow and anchored steamship.

A collision between a steamship anchored for loading near the edge of the channel of a river, leaving ample room in the channel for the passage of other vessels and 60 to 80 feet of shallow water between its stern and the bank, and a barge in tow of a tug, which attempted to pass between the steamship and the bank, *held* due solely to the fault of the tug.

2. Collision ~~¶~~ 123—Vessel clearly in fault has burden of establishing fault of other vessel by clear evidence.

Where one of two vessels in collision was clearly in fault, she has the burden of establishing the fault of the other by clear evidence.

3. Collision ~~¶~~ 129—Owner of injured vessel entitled to recover all expense necessary to restore her to former condition.

The owner of a vessel injured in collision through fault of another vessel *held* entitled to recover all expense necessarily incurred in restoring her to her former condition, including cost of survey, towing to dry dock, and dry docking.

Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Jr., Judge.

Suits in admiralty by the Boston-Virginia Transportation Company and the Freeport & Tampico Fuel Oil Corporation against the Compania De Navegacion Interior, S. A. From the decrees, both parties appeal. Reversed on appeal of the Boston-Virginia Transportation Company, and affirmed on other appeals.

John Charles Harris, of Houston, Tex., for appellant and cross-appellee.

E. D. Cavin and Ballinger Mills, both of Galveston, Tex., and T. Catesby Jones, of New York City, for appellees and cross-appellants.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. [1] A collision occurred, about 8 o'clock at night, between the steamship L. V. Stoddard and certain barges then being towed by the steam tug Tomboyache, while the steamship was lying at anchor in the Panuco river a short distance below Tampico, Mexico, taking on a cargo of crude oil from barges alongside. The river at this point is between 1,000 and 1,200 feet wide, and the fairway from 700 to 800 feet wide. The steamship had been anchored by

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~~¶~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

a pilot near the left edge of the channel, and had swung towards the left bank, and was held athwart that part of the river by reason of being slightly aground in soft mud. In that position her stern was between 60 and 80 feet from the left bank of the river. The water along the bank was shallow. Ahead of the steamship the channel was unobstructed and sufficiently wide and deep for safe navigation. The place at which the steamship was taking cargo was a loading place for vessels.

The steam tug Tomboyache was proceeding down stream with three oil-laden barges, which she was pushing ahead end on end, and attempted to pass between the steamship and the left bank of the river, when one of the barges collided with and twisted and bent the ship's rudder and rudder plate. The Tomboyache was under contract with the Freeport & Tampico Fuel Oil Corporation to tow oil barges, and it was the intention to deliver one of the barges then in tow to the Stoddard. The oil contained in it completed her cargo. The two other barges contained oil for other vessels nearby.

The lights of the Stoddard were burning, and were seen by the master of the tug from the time he turned a bend in the river about three-eighths of a mile above where the Stoddard lay. There was ample space in the channel for vessels to pass. The tug carried a powerful searchlight which was being played on the Stoddard and the space between her and the left bank of the river after the tug passed the bend in the river.

Two original libels in personam were filed against appellant, the owner of the tug, one by the Boston-Virginia Transportation Company, the owner of the steamship L. V. Stoddard, and the other by her charterer, the Freeport & Tampico Fuel Oil Corporation; the owner seeking to recover for the damage to the steamship, and the charterer seeking to recover for the loss to it of her use. The owner of the tug brought the charterer in to defend the suit brought by the owner of the steamship. The defenses set up by the owner of the tug were that the steamship was at fault, in that it obstructed the fairway, and that the charterer of the Stoddard, over the protest of the owner of the tug, insisted upon delivering one of the barges to the Stoddard immediately, refused to wait until daylight, and agreed that the charterer would be responsible for any and all damage which might be done to the steamship, the oil barges or the tug. By agreement, the cases were consolidated.

The Stoddard was examined at Tampico, and it was considered safe for her to proceed to New Orleans, which she proceeded to do, and remained there for ten days. A survey was had, repairs made, and she was placed upon the dry dock.

The master of the tug testified that the alleged agreement of indemnity was made in the pilot house in the presence of his son and the engineer of the tug. The representative of the charterer, while admitting the presence of the others in the pilot house, flatly contradicted this evidence for appellant. Neither of the other parties present at the time were called as witnesses. Several witnesses for appellees testified that after the collision an attempt was made to force the barges

by the Stoddard, and the master of the tug, who was the only witness for appellant, made no denial.

The court below rendered a decree in favor of the owner of the Stoddard for repairs and certain items of expense incurred, but refused to allow anything for the cost of dry-docking the steamship, amounting to \$619.80; for the cost of towing to the dry dock at New Orleans, amounting to \$55; for the cost of survey, amounting to \$250.-72; or for the cost of the survey report, amounting to \$50. A decree was also rendered in favor of the charterer, awarding to it \$360 per day for seven days as damages for the loss of the use of the Stoddard.

[2] It is contended by the owner of the tug that the Stoddard was at fault in anchoring and in remaining in such a position as to obstruct navigation, and that therefore her owner cannot recover, or in the alternative that the damages should be divided. But the evidence fails to show negligence upon the part of the Stoddard which in any degree contributed to the collision. There was ample space in the channel for other vessels to pass. On the other hand, the negligence of the tug was clearly established, and that negligence was the proximate cause of the collision. It was negligent to undertake to pass between the steamship and the bank of the river. When it became apparent to the Tomboyache that the Stoddard was aground, either one of two courses could have been adopted to prevent the collision: The tug could have been brought to a standstill, or it could have remained in the channel. Under these circumstances, the burden was upon the owner of the tug to make the fault of the anchored vessel clearly appear. *The Clarita and The Clara*, 23 Wall. 1, 23 L. Ed. 146; *The Virginia Ehrman*, 97 U. S. 309, 24 L. Ed. 890; *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; *Eagle Oil Transport Co. v. Bowers Southern Dredging Co.*, 255 Fed. 52, 166 C. C. A. 380; *The Europe*, 190 Fed. 475, 111 C. C. A. 307.

The vessels held at fault in the cases cited by appellant were anchored in the fairway in such manner as to obstruct the passage of other vessels. In this case the anchored vessel was only slightly, if at all, in the channel, and was not interfering with the passage of other vessels in the remotest degree. Of course, any agreement between the charterer and the owner of the tug could not affect the case of the owner of the Stoddard.

We are of opinion that appellant failed to show by a preponderance of evidence that the assistant manager of the charterer of the Stoddard agreed that his company would be responsible for any damage. It would have been a most unusual agreement. The testimony of the alleged parties to it was in direct conflict, and the appellant failed to corroborate the testimony of the master of the tug by that of his son and the engineer.

[3] The owner of the Stoddard has filed cross-assignments of error, based upon the refusal of the court to allow for the costs of the survey and report, and of the towage and dry-docking at New Orleans. We think these items should have been allowed. They were the direct result of the collision, and appear to have been incurred in putting the ship back into her former condition. In *The Baltimore*, 8 Wall. 377,

19 L. Ed. 463, the Supreme Court, in laying down the rule to be followed in such cases, said:

"*Restitutio in integrum* is the leading maxim in such cases, and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnification is not limited by any contract, but is coextensive with the amount of the damage."

The charterer by cross-assignments contends that the allowance to it for the loss of the use of the vessel for only seven days was inadequate, and should have been made to cover a period of ten days. While the testimony shows that the Stoddard remained in New Orleans ten days, it does not appear that she was undergoing repairs on account of the injuries received in the collision for more than seven days.

The decree is affirmed on the original appeal and on the cross-appeal of the Freeport & Tampico Fuel Oil Company, and reversed on the cross-appeal of the Boston-Virginia Transportation Company, and remanded for further proceedings not inconsistent with this opinion.

Affirmed in part.

Reversed in part.

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FONTENOT, Collector of Internal Revenue, et al. v. ACCARDO,  
with four other similar cases.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1922.)

Nos. 3669-3671, 3715, 3720.

1. Taxation ⇌ Penalties ⇌ "Tax" and "penalty" distinguished.

A "tax" is a pecuniary burden laid upon individuals or property for the purpose of supporting the government, while a "penalty" is in the nature of a punishment and is collectible usually by fine or by suit, and yet the latter may be termed a duty or tax, and still be a penalty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Penalty; Tax—Taxation.]

2. Internal revenue ⇌ 45—"Tax" provisions in National Prohibition Act are "penalties" whose enforcement may be enjoined.

The so-called taxes or penalties prescribed by the National Prohibition Act, tit. 2, § 35, on account of the sale or manufacture of intoxicants, are merely additional penalties for violation of a criminal statute, and a suit to enjoin collection of such penalties does not fall within Rev. St. § 3224 (Comp. St. § 5947), declaring that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

3. Internal revenue ⇌ 45—Provisions as to distraint under revenue law do not apply to penal provisions of National Prohibition Act.

The provisions of internal revenue laws relative to assessment and summary collection by distraint of internal revenue taxes are not applicable to the assessment and collection of the taxes prescribed by the National Prohibition Act, tit. 2, § 35, as additional penalties for violation.

⇌ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeals from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Bills in equity by Tom Accardo, by William Struve, and by Sam M. Carlisi, against Rufus W. Fontenot, Collector of Internal Revenue, and another, and by William H. Kenny and by Frank Albano against Joseph H. Hynson, Collector of Internal Revenue, and another, to restrain the collection of certain taxes and penalties assessed by the Commissioner of Internal Revenue under the National Prohibition Act. From decrees in favor of plaintiffs (269 Fed. 447), defendants appeal. Affirmed.

No. 3669:

Henry Mooney, U. S. Atty., and Wm. J. O'Hara, Asst. U. S. Atty., both of New Orleans, La., for appellants.

Hugh M. Wilkinson and Arthur J. Peters, both of New Orleans, La., for appellee.

No. 3670:

Henry Mooney, U. S. Atty., and Wm. J. O'Hara, Asst. U. S. Atty., both of New Orleans, La., for appellants.

Hugh M. Wilkinson, of New Orleans, La., for appellee.

No. 3671:

Henry Mooney, U. S. Atty., and Wm. J. O'Hara, Asst. U. S. Atty., both of New Orleans, La., for appellants.

John R. Upton, of New Orleans, La., for appellee.

No. 3715:

Louis H. Burns, U. S. Atty., of New Orleans, La., for appellants.

Edward Dinkelspiel, of New Orleans, La., for appellee.

No. 3720:

Louis H. Burns, U. S. Atty., of New Orleans, La., for appellant.

Henry L. Landfried, of New Orleans, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellees, by separate bills of complaint, sought and obtained temporary injunctions against appellants, the former and the present collector of internal revenue, respectively, restraining them from proceeding to collect by distraint proceedings certain assessments made against appellees in pursuance of section 35 of the National Prohibition Act, 41 Stat. 305. The cases present the same questions of law and fact, and may be disposed of in one opinion.

The bills in the first three cases aver that the assessments were based upon illegal sales of liquor, while the bill filed by Kenny alleges that the assessment was based upon the illegal manufacture of liquor. The bill filed by the appellee Albano is meager in its allegations, but enough appears to show that the assessment was based upon either the illegal manufacture or the illegal sale of liquor. In all of the cases identical motions were made to dismiss, on the ground that the court was without jurisdiction, because of section 3224 of the Revised Statutes (Comp. St. § 5947), which provides:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The court held that the assessments were assessments, not of taxes, but of penalties, and that suits for the purpose of restraining the collection of penalties were not prohibited by section 3224. The opinion of the District Judge appears in 269 Fed. 447.

The correctness of these rulings depends upon the proper construction of section 35 of the National Prohibition Act, hereinafter, for brevity's sake, designated as the act, which is as follows:

"All provisions of law, that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws. The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

None of the bills averred a tender of the so-called "tax," as distinguished from the additional "penalty," and it may be assumed that the bills should have been dismissed if any part of an assessment authorized by the above-quoted section is in reality an assessment of a tax.

The act was passed to meet a situation which was about to arise by reason of the complete change in policy due to the adoption of the Eighteenth Amendment. Theretofore, and while the government derived a large part of its revenue from taxes imposed upon the manufacture and sale of liquor, Congress from time to time had enacted many laws for the purpose of protecting that revenue. A complete and effective, though complicated, plan had been perfected for the assessment and collection of taxes derived by the government from the liquor business, among which were provisions which authorized the Commissioner of Internal Revenue to make assessments and the collectors of internal revenue of the various districts to proceed after notice to collect taxes by summary distraint proceedings, not only out of the property immediately used in connection with that business, but out of any property real or personal possessed by persons engaged therein.

The act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute. It is not a revenue measure. Whatever charges still remain upon prohibited beverage liquors are imposed for the purpose of preventing the manufacture and sale thereof. Many provisions of the old laws which had proved useful in protecting revenue can be used effectively in preventing violations of the prohibitory act, and hence we find that section 35 repeals the revenue laws only in so far as they are inconsistent with the provisions of the act; but

the purpose of the old provisions changed upon their adoption by the new act, so that laws originally intended to protect revenue by the change became laws in aid of prohibition.

The act is itself a complete piece of legislation. In broad and comprehensive terms, title 2 deals exhaustively with the subjects of the manufacture, sale, and transportation of liquors for beverage purposes. By specific provisions it provides its own punishments, forfeitures, and penalties. It makes violations of its requirements crimes, and makes punishable by fine and imprisonment every act that was so punishable under the revenue laws. It subjects to forfeiture or destruction all property forfeitable under the revenue laws, including liquor illegally possessed and apparatus designed for use in the manufacture thereof. It provides for the forfeiture of vehicles used in the transportation of liquor.

It provides in section 35 for assessments on account of the illegal manufacture or sale of liquor. If this section authorizes a tax assessment, the collection of the tax may not be enjoined; but if it authorizes a penalty assessment, section 3224 is inapplicable and injunction may issue upon proper showing for relief.

[1] A "tax" had been defined by the Supreme Court, in *New Jersey v. Anderson*, 203 U. S. 492, 27 Sup. Ct. 140, 51 L. Ed. 284, to be "a pecuniary burden laid upon individuals or property for the purpose of supporting the government," and in *Houck v. Little River District*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, to be "an enforced contribution for the payment of public expenses." A "penalty," on the other hand, is in the nature of a punishment (*Helwig v. United States*, 188 U. S. 605, 611, 613, 23 Sup. Ct. 427, 47 L. Ed. 614), and is collectible usually by fine or by suit. It may be termed a duty or tax and yet be a penalty. Its name does not determine its nature.

There are important differences between the revenue laws and the act concerning the illegal manufacture and sale of liquor. Different punishments are imposed. Under Revised Statutes, § 3242 (Comp. St. § 5965), the minimum punishment imposed for each offense upon every person who carried on the business of a retail liquor dealer without having paid his license tax was a fine of not less than \$1,000 nor more than \$5,000, and in addition imprisonment for not less than six months nor more than two years. Under section 29 of the act one who manufactures or sells liquor is punishable for the first offense by a fine of not more than \$1,000, or by imprisonment not exceeding six months. In *United States v. Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. —, decided June 1, 1921, the Supreme Court said:

"In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty."

There is a vital difference also in the method of enforcing the collection of assessments. Distrain proceedings were not authorized under the revenue laws until notice had been given to the person claimed to be liable, and an opportunity afforded to pay the tax. The moderate penalty of 5 per cent. could be assessed only upon failure to pay the tax within 10 days after notice. Under section 35 of the act no notice

is required to be given or opportunity afforded to pay the so-called tax before the assessment of a penalty in a considerable amount is authorized.

While under the revenue laws one claimed to be liable had no means of preventing the government from collecting a tax imposed upon him, yet it was provided by section 3226 that he could recover back by suit a tax illegally assessed and collected. But it is not contemplated by any provision of law that one who is forced to pay an illegal penalty can recover it back by suit. Nor is it the law that a penalty as such is collectible by distraint proceedings. Section 3213 (Comp. St. § 5937) makes it the duty of collectors to sue for the collection of penalties and forfeitures, and opportunity is thus afforded for a hearing and defense.

The fact that section 35 of the act does not provide for notice is persuasive that it was intended to assess penalties, to be enforced in the usual way by fine or by suit. If it had been intended to assess taxes, no doubt a requirement of notice before distraint, levy, and sale would have been provided in order to give opportunity to be heard. In *Central of Ga. Ry. Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, it was held that a system of taxation by statute in Georgia, as construed by the highest court of that state, which did not allow the taxpayer an opportunity to be heard as to the valuation of his property, though not returned by him, except upon allegations of fraud or corruption, did not afford due process of law: and it is stated in the opinion that—

"Somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

It was held by the Supreme Court in *United States v. Yuginovich*, supra, that Congress has the power to tax liquors, notwithstanding their production is prohibited and punished, and that in the passage of the act it manifested "the intention to tax liquors illegally as well as those legally produced." The opinion in that case was dealing with an indictment charging violations of sections 3257, 3279, 3281, and 3282 of the Revised Statutes (Comp. St. §§ 5993, 6019, 6021, 6022), and the court held that the prosecution would not lie, because the sections named had been supplanted by the Eighteenth Amendment and the provisions of the act.

It will be noted that section 35 of the act authorizes an assessment not upon liquor, but upon the illegal manufacture or sale of liquor. That is made clear by the provision that payment of the tax or penalty shall not be made in advance, and when made shall give no right to engage in the manufacture or sale of liquor. A license to engage in the business of a manufacturer of liquor, or in that of a retail liquor dealer, cannot any longer be obtained. The act so declares, and a license for such a business would be inconsistent with the whole purpose of the Eighteenth Amendment. A license tax is something which one who engages in a lawful business or occupation may be obliged to pay. When the occupation is made unlawful, the license tax

thereon is no longer collectible, but is repealed. The act does not anywhere levy any taxes, and its whole purpose is inconsistent with the theory that it was intended to continue license taxes upon manufacturers or retail liquor dealers. Section 35 is consistent with the general purpose of the act to prohibit, to punish, to forfeit, and to assess penalties. We do not think, therefore, that the assessments here involved were tax assessments.

There is much conflict in the decisions upon the effect of the act on the revenue laws. It has been held that it operated to supersede the sections of the Revised Statutes mentioned below in the following cases: *U. S. v. Yuginovich*, U. S. Supreme Court, June 1, 1921, *supra* (sections 3257, 3279, 3281, 3282); *U. S. v. Yuginni* (D. C.) 266 Fed. 746 (same sections); *U. S. v. Windham* (D. C.) 264 Fed. 376 (sections 3258, 3279, 3281, 3296); *U. S. v. Statoff* (D. C.) 268 Fed. 417 (sections 3258, 3282); *U. S. v. One Haynes Automobile* (D. C.) 268 Fed. 1003 (section 3450); *Reed v. Thurmond* (C. C. A.) 269 Fed. 252 (section 3296); *Ketchum v. U. S.* (C. C. A.) 270 Fed. 416 (sections 3257, 3258, 3260, 3279, 3342); *U. S. v. One Haynes Automobile* (C. C. A.) 274 Fed. 926 (section 3450).

On the other hand, it has been held that the sections named below were not superseded by the act in the following cases: *U. S. v. Sohm* (D. C.) 265 Fed. 910 (sections 3258, 3260, 3282); *U. S. v. Turner* (D. C.) 266 Fed. 248 (section 3296); *U. S. v. Sacein Rouhana Farhat* (D. C.) 269 Fed. 33 (sections 3258, 3260, 3279); *U. S. v. One Essex Automobile* (D. C.) 266 Fed. 138 (section 3450); *U. S. v. One Essex Automobile* (D. C.) 276 Fed. 28 (section 3450); *The Tuscan* (D. C.) 276 Fed. 55 (section 3450); *Reo Atlanta Co. v. Stern*, 279 Fed. 422, decided by Judge Sibley, January 16, 1922 (section 3450).

The only sections involved in the foregoing decisions which it plausibly can be argued were not covered by the decision of the Supreme Court in the *Yuginovich* Case are sections 3296 and 3450.

It has been held, in cases similar to these, that injunctions will lie, in *Thome v. Lynch* (D. C.) 269 Fed. 995; and in *Kausch v. Moore* (D. C.) 268 Fed. 668. On the other hand, it has been held that injunctions will not lie, in *Ketterer v. Lederer* (D. C.) 269 Fed. 153; in *Lipke v. Lederer* (D. C.) 274 Fed. 493; and in *Pumilli v. Riordan* (D. C.) 275 Fed. 846. *Regal Drug Corporation v. Wardell* (C. C. A.) 273 Fed. 182, is not considered in point. The complainant had a permit to sell industrial liquors, and attempted to enjoin the taxes assessed thereon as well as the penalties prescribed by the act.

[2, 3] We are of opinion that the assessments involved in these cases were assessments of penalties and are not collectible by distraint proceedings. Of course, the collection of penalties can be enforced by the methods and proceedings authorized by law.

The decrees are affirmed.

**HINES, Director General of Railroads, et al. v. BUTLER et al.**

(Circuit Court of Appeals, Fourth Circuit. November 1, 1921.)

No. 1871.

1. **Shipping** ¶11—Regulations for protection of life and property apply more strongly to boats which is where it can be inspected every day.

Where a steamship running between Baltimore and Norfolk was practically a ferryboat, and was in one of such ports every day, being absent only at night, and hence was where it could be daily under inspection of the owner, all regulations intended for the protection of human life and property apply more strongly thereto than to a boat whose stay in port is only such as may be after the termination of a voyage of more or less duration.

2. **Shipping** ¶208—Owner not immune from liability for fire, where facts showed conditions long existing and which should have been provided against.

Where there was such an entire absence of due preparedness and precautions to meet contingencies of fire on board a steamship, as well as such a total breakdown of discipline as to show that they were the inevitable and natural results of conditions long existing, which it was the duty of the owner to take proper measures to provide against, the owner was not exempt from liability under Rev. St. § 4282 (Comp. St. § 8020), exempting the owner of any vessel from liability for fire, unless caused by his design or neglect.

3. **Shipping** ¶208—Owner entitled to limit liability for damage to property from fire caused by his neglect, where without privity.

Although an owner of a steamship is liable for damages from fire under Rev. St. § 4282 (Comp. St. § 8020), because of his negligence, he is entitled to limit his liability for the destruction of goods or merchandise to the amount of the value of the vessel and her freight then pending, under section 4283 (section 8021), where the loss and damage occurred without his privity or knowledge.

4. **Shipping** ¶207—Owner not entitled to limit liability for damage to passengers from fire.

Act Feb. 28, 1871, passed to provide for the better security of life on board steam vessels, and embracing Rev. St. § 4493 (Comp. St. § 8239), making vessels and their owners liable for the full amount of damage sustained by any passenger from fire happening through any neglect or failure to comply with the provisions of that title, etc., makes exceptions in favor of passengers to the general rule of limitation of liability contained in sections 4282 and 4283 (Comp. St. §§ 8020, 8021), and the owner is not entitled to a limitation of liability for damages sustained by passengers from fire, when due to his negligence.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for limitation of liability by Walker D. Hines, Director General of Railroads, and another, against John H. Butler and others. From an adverse decree (264 Fed. 986), plaintiffs appeal. Affirmed.

Certiorari denied 257 U. S. —, 42 Sup. Ct. 185, 66 L. Ed. —. See, also, 266 Fed. 437.

¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

L. Vernon Miller and George Weems Williams, both of Baltimore, Md. (Marbury, Gosnell & Williams, of Baltimore, Md., on the brief), for appellants.

George Forbes, George Washington Williams, J. Purdon Wright, and John Henry Skeen, all of Baltimore, Md. (John Phelps, John H. Richardson, Louis S. Ashman, Frank, Emory & Beeuwkes, William D. Roycroft, Eugene O'Dunne, Stewart & Pearre, Milton Roberts, and James U. Dennis, all of Baltimore, Md., and J. Winston Read, of Newport News, Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This is an appeal from a decree in admiralty of the District Court of Maryland, filed August 11, 1920. There is a large mass of testimony, but the general facts of the case are fully set out in the opinion of the learned District Judge, filed April 2, 1920.

From the testimony and the opinion of the court it appears that the steamship Virginia belonging to the Baltimore Steam Packet Company, which company was owned by the Seaboard Air Line Railway Company, was taken over by the government of the United States when it took over the rest of the property of the Seaboard Air Line Railway Company for operation under the war emergency statutes, and the steamships of the company were operated by the official Director General of Railroads, as was the railroad property.

The steamship Virginia formed one of a line which plied on regular trips between Baltimore and Norfolk, Va., carrying both passengers and freight. On the 23d of May, 1919, in the afternoon or evening, a fire broke out on the Virginia, then on her way to Norfolk, which resulted in her practical destruction. Most, if not all, of her freight was consumed; her passengers were forced hastily to abandon the ship, and some of them were drowned, although most were saved, and, of those who were saved, some of the survivors suffered injuries, more or less serious. They were able to rescue from the steamer only the clothes they had on, and whatever they could, under the sudden alarm, carry away in their hands.

At the time of the loss of the steamer by fire, the weather was fair and the sea was calm. Had it been otherwise, there would have been in all probability much greater loss of life. From the testimony it appears that there was an entire lack of fire apparatus in proper condition to fight the fire, and also great lack of discipline and proper conduct on the part of the crew. None of the fire apparatus could be used. There does not appear to have been any one who knew how to do this, or put it in use, and there was, generally speaking, a total lack of discipline and method in attempting to make use of any appliances that should have been in order, and in attempting to remove with safety and in order the passengers when it was necessary to leave the ship.

It is not putting it too strongly to say that it appears from the testimony and the findings of the learned District Judge that there was

presented a most disgraceful condition in the necessary arrangements to protect the ship and passengers in case of fire, and the necessary discipline and order which should exist for the removal of passengers from a ship threatened with destruction by fire. The conclusions of fact of the learned District Judge on this point are entirely supported by the testimony.

In the court below, libels were filed against the Director General of Railroads in personam by the owners of the cargo destroyed, for the value of their property, and by passengers, both for the value of their baggage lost, as well as for injuries inflicted on the passengers who escaped and for the deaths of such as lost their lives. Thereupon, on behalf of the Director General of Railroads, application was made for a limitation of liability under sections 4282 and 4283 of the United States Revised Statutes (Comp. St. §§ 8020, 8021). Upon the hearing below, the learned District Judge held that the evidence showed such neglect on the part of the owner of the vessel that he was not entitled to freedom from liability as provided in section 4282; but that the Director General of Railroads was entitled to limit his liability to the value of the vessel and her freight then pending under the provisions of section 4283, as against any property, goods, or merchandise shipped on the boat and destroyed in the fire. In other words, it was held by the District Court that the Director General of Railroads was not entitled to exemption from all liability under section 4282, because the testimony established that the fire was caused by the neglect of the owner. It was further held that, as against merchandise shipped for transportation, the Director General was entitled to limit his liability under the provisions of section 4283, because the loss and damage occurred without the privity or knowledge of the owner.

With regard to the claims of passengers for loss of baggage, for personal injuries, and for death, the District Court held that it appeared from the testimony that there appeared to have been a violation of the provisions of the statute in that the Director General of Railroads, the petitioner, had not seen to it that the rules and regulations of the act of February, 1871 (16 Stat. 440), providing for the better security of life on board of vessels propelled in whole or in part by steam, were not violated, and that under the provisions of section 4493 of the United States Revised Statutes (Comp. St. § 8269) the petitioner was not entitled to limit his liability, but was liable to the full extent for the full amount of the value of the baggage and to the extent of the injury to the passengers. From this decision this appeal has been taken.

While the argument *post hoc propter hoc* does not apply for the establishment of the fact of negligence, yet it is manifest from the testimony that so appalling an absence of all ready preparation to meet a fire such as this was should rationally lead to the inference that there was precedent negligence on the part of some one and some failure to observe the regulations prescribed to prevent such an occurrence.

[1] In the present case, the Virginia was operated as one of a line which may be termed as analogous to a ferry line. It plied between Baltimore and Norfolk on regular trips, apparently, from the testimony, leaving Baltimore one night for Norfolk, and leaving Norfolk the next night to return to Baltimore. It was not the case of a sailing vessel or ocean steamship, which leaves for a voyage of more or less duration, and as to which the owner cannot do more than see, at the time it leaves the wharf for its voyage of uncertain duration, that it is staunch, seaworthy, and properly equipped. In the case of the Virginia, as in the case of any other ferryboat over waters of some length, the vessel was at a known point. It was in port every day, being absent only at night. If Baltimore was the home port, it was in Baltimore every other day; but, as Norfolk was equally a port in which refitting or inspection can be done, it was practically in a place where it could be daily under inspection of the owner.

It was a boat used for the purpose of transporting passengers between these two points, and supposedly passengers upon every trip, and necessarily all of the regulations intended for the protection of human life and human property would apply more strongly to a boat of this character than to a boat whose stay in port is only as may be after the termination of a voyage of more or less duration. The position of a ferryboat daily carrying numbers of passengers is quite different from that of a mere cargo steamer, going to different ports as business may call it.

[2] It is evident, from the facts found by the court below, that there was such an entire absence of due preparedness and precautions, with apparatus ready to be put into use to meet contingencies of fire, as well as such a total breakdown of discipline at the critical moment, as to show that they were the inevitable and natural results of conditions which had long existed, and which it was the duty of the owner of the vessel to take proper measures to provide against. It equally follows, from the testimony and the findings of the learned judge below, that the failure to take such necessary and proper precautions to ascertain the existence of what was necessary in common prudence to protect from such a casualty, and to see that provision was made against it, was negligence on the part of the owner, and that, that being the case, the petitioner is not entitled to exemption from liability as provided under the terms of section 4282. The evidence also established, as found by the judge below, that there was neglect or failure to comply with the provisions of title 52 of the United States Revised Statutes, and that the spread of the fire and the consequent loss and injury happened through such neglect or failure.

[3] Without again repeating the decisions referred to by the District Judge, we agree with him that, although the liability exists under section 4282, yet the owner is entitled to limit that liability, so far as the destruction of any goods or merchandise shipped on such vessel is concerned, under the provisions of section 4283, to the amount of the value of the vessel and her freight then pending.

[4] With regard to the claims of the passengers for injuries to person, and death injuries, and the loss of baggage, a different ques-

tion is presented. The exemption from liability and the limitation of liability given in sections 4282 and 4283, United States Revised Statutes, are taken from the statute passed in 1851 (Comp. St. §§ 8020-8027); and, as has been often held, that statute, which was passed for the purpose of encouraging the building-up of the American marine, is to be liberally construed.

In 1871, 20 years later, the act was passed to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes. The very evident purpose of this act was to provide for the better security of passengers. It is admitted that the provisions of section 4282 apply only to goods and merchandise shipped for transportation and do not apply to passengers and their baggage. The last act of 1871 was expressly to apply to this purpose, and that contains the section now known as section 4493, Revised Statutes.

It is difficult to resist the conclusion and the reasoning of the Circuit Court of Appeals of the Ninth Judicial Circuit in the case of *The Annie Faxon*, 75 Fed. 312, 21 C. C. A. 366. Interpreting the provisions of the act of 1851 with those of the act of 1871, or sections 4282, 4283, and 4493, together, the construction would appear to be that as they are statutes upon the same subject, that the earlier one creates a general rule of limitation of liability as then existing and the later statute proceeds to make exceptions for the better security and in favor of passengers. The earlier act applies to all vessels; the later act applies only as to affording better security of life on board of steam vessels, where the risk of fire may be greater.

Without repeating here the different decisions referred to and analyzed by the learned District Judge, it is sufficient to say that we concur in his conclusions, and find nothing in any decision of the Supreme Court that would require a contrary holding. Nor do we find any ground for reversing the conclusion of the court below that the death of the passenger Caroline R. Taggart was due to the results of the fire.

The decision below is accordingly affirmed.

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BRIDGEPORT BRASS CO. v. FORD MOTOR CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1922.)

No. 8598.

Patents  $\Rightarrow$  328—1,125,229, for filler tube cap for automobile radiators, held void for lack of invention.

The Webster patent, No. 1,125,229, for filler tube cap for automobile radiators, assuming that the patentee, and not defendant, was the originator of the device, held void for lack of invention, as being merely for the reproduction in sheet brass of caps theretofore made in brass by casting without material change.

Appeal from the District Court of the United States for the Eastern District of Michigan; Andrew M. J. Cochrane, Judge.

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$\Rightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes  
278 F.—56

Suit in equity by the Bridgeport Brass Company against the Ford Motor Company. Decree for defendant, and complainant appeals. Affirmed.

Henry E. Rockwell, of New Haven, Conn. (Stuart C. Barnes, of Detroit, Mich., on the brief), for appellant.

Homer C. Underwood and Otto F. Barthel, both of Detroit, Mich. (Barthel, Flanders & Barthel, of Detroit, Mich., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of patent No. 1,125,229, January 19, 1915, to William R. Webster, assignor to plaintiff, on filler tube cap for automobile radiators. This appeal is from a decree finding the patent invalid and dismissing the bill.

The alleged invention grew out of an order given by defendant to plaintiff for a large quantity of the filler caps which have been used on Ford automobiles for several years past. The defenses, so far as need be stated, are that defendant, and not Webster, designed the cap, and that there is otherwise lack of invention. The District Court found both of these issues for defendant. The patent contains four claims; the second and fourth being principally relied upon. The fourth claim, which is the most detailed, is as follows:

"As an article of manufacture, a filler tube cap comprising a cylindrical side wall, a dome-shaped top, and hollow wings struck up from the downwardly slanting portion of the dome remote from the center thereof, and having substantially upright outer walls or edges adjacent the periphery of the cap, and upper edges or walls inclined downwardly toward the summit of the dome, substantially as described."

This claim, in connection with the specification, clearly contemplates a cap formed from sheet metal. The other claims so specify in terms. The outstanding facts are these:

For three years or more before the order in question defendant's filler cap was a solid sand casting of the size and general form of the sheet-metal cap in controversy. It had a cylindrical side wall, a dome-shaped top, four equidistant gripping wings projecting upwardly from the top of the dome, extending to a point remote from the center thereof; their outer upright edges extending substantially to the periphery of the cap. In 1910 plaintiff, which was then manufacturing certain other automobile parts for defendant, designed a proposed filler cap having a flatly arched top overhanging the cylindrical portion, and solicited from defendant an order therefor, which was refused. In 1911 plaintiff made another proposed design of cap for defendant—this one having an octagonal-shaped top. Defendant rejected this design also, refusing to accept anything not having the gripping wings of its device then in use. On April 30, 1912, plaintiff, through its traveling salesman, took from defendant a written order for 19,000 caps, referred to as "brass stamping, sheet brass No. 14," and otherwise detailed. The caps made and delivered under this order form the subject-matter of the alleged invention.

• The patentee (Webster), who was plaintiff's vice president and general superintendent of its plant, testified that he designed the cap in question. His testimony is unconvincing and unsatisfactory. It is established, and seems now to be conceded, that plaintiff made no drawings, nor even so much as a sketch of the cap, although careful drawings had been made of both the 1910 and 1911 (rejected) designs. The only substantial explanation of this failure to make drawings or a sketch, attempted in plaintiff's brief, is that the cap was already patented. In fact, patent was not applied for until nearly a year later, and did not issue until January 19, 1915. Plaintiff's mechanical superintendent, who made the sheet-metal cap, says that he was furnished no drawings, but thinks he was given a blueprint of defendant's drawing. He also says that Webster gave him one of defendant's cast caps and told him to reproduce it in sheet metal. There is no satisfactory evidence to the contrary. The statement of plaintiff's mechanical superintendent is persuasively supported by the express reference in defendant's written order in question to "symbol T 1103B," which plainly means defendant's filler cap drawing so marked. This drawing, as produced upon the trial, is marked "radiator filling flange cap \* \* \* sheet brass—dead soft," etc., and is substantially, if not precisely, the design of the cap in suit. This drawing was originally made, as shown by notation thereon, March 13, 1909, and was revised on April 13, April 22, and July 20, 1909, and on April 4, 1912, and September 21, 1914 (the last date being after the order in question), and therefore the drawing alone does not necessarily prove that on April 30, 1912, it represented the sheet-metal design now shown.

But there is other testimony supporting what seems the inherent probability that the drawing referred to in the order given by defendant to plaintiff was of a cap of that character. The record is convincing that, when defendant adopted this filler cap for its model "T" car in 1907, it had designed and manufactured about 75 stamped metal caps, and put them experimentally upon a few of its cars; that they were not satisfactory, for the reason that they leaked to some extent; and that for this reason the cast cap was soon after adopted. The drawing (T-1103) for a "yellow brass-casting" cap is produced, and shows the making of the original drawing December 15, 1907, and revisions on August 8, August 10, and December 7, 1908; the last revision being on March 17, 1909. This drawing differs but slightly from the design of the brass-casting cap furnished plaintiff by defendant as model for the sheet-metal cap; the difference being in the detailed form of the gripping wings which extend from the dome. The nature of the revision of August 10, 1908, is shown in "drafting room record of changes" of that date (which we are satisfied relates to the filler cap), as follows: "Changed from brass stamping to brass casting and revised." The nature of the revision of July 20, 1909, of the drawing "T 1103 B" is shown by the "drafting room record of changes" as follows: "Removed note—use after first 2,500 cars"—which notation was upon the drawing, which, as already said, now shows the sheet-metal cap, and is in harmony with the change of August 10, 1908, relating to drawing "T-1103" showing the "yellow brass casting."

Moreover, defendant produced four samples of sheet-metal filler caps, which are testified, by witnesses having apparent means of knowledge, to be samples of defendant's original sheet-metal caps, referred to as antedating the brass casting cap. One of these caps in particular (Exhibit 17A) is identified as taken at the time of giving of testimony herein from an old "pump radiator," which was at an early period (apparently about 1907 or 1908) superseded by the "thermo-siphon type." There is testimony tending to discredit the authenticity of each of these four samples; but whether or not, as to the others, the testimony of identity will stand the rigid test required, the identification of Exhibit 17A cannot well be discredited, except on the theory of willful perjury and active fraud, which does not commend itself to our judgment. In addition to the identification of 17A (as taken from the pump radiator) made by defendant's "foreman of the maintenance stock," there is the testimony of defendant's factory manager (since 1903) to the effect that the sheet-metal cap with struck-up lugs first made by defendant was substantially identical with Exhibit 17A; also the testimony of defendant's present engineer (who was manager of the Keim Mills, of Buffalo, until it was taken over by defendant in 1912, which company is testified to have made defendant's sheet-metal caps in 1907 and 1908) to the effect that Exhibit 17A is of the kind then made by Keim Mills.

Taking into account the entire history of the case, both oral and written, including the drawings and the drafting room records of changes, we have no doubt that defendant actually designed and used sheet-metal caps in 1907 and 1908; that the use of such caps was suspended only because of their imperfect workmanship; that defendant never abandoned the intention to revert to the sheet-metal cap when it could get satisfactory manufacture thereof, and that such preliminary and experimental use as was had was not an abandoned experiment within the applicable law; and while the identity of the old cap (Exhibit 17A) is not demonstrated beyond all peradventure, a careful consideration of the entire record impresses us that there is no good reason to doubt its authenticity. Defendant continued buying filler caps from plaintiff for a year or two after the contract of April 30, 1912. Since that time it has bought from other manufacturers, including the Diamond Company. While the caps of these various manufacturers, so far as shown, including that of plaintiff and that of Exhibit 17A, are of the same general form and appearance, and fully meet the claims of the patent, the workmanship is not identical. Plaintiff's manufacture is, in that respect, readily distinguishable from that of either the Diamond Company or the manufacturer of the cap marked "H. E. R."; there being testimony that the latter is inferior in workmanship to either of the other two. Exhibit 17A is likewise, to our minds, readily distinguishable in point of workmanship from either of the three last mentioned. We find no satisfactory testimony as to its manufacture by any company from whom defendant is shown to have bought since it ceased buying of plaintiff.

If however, we have given too much credence to the proof of identity of Exhibit 17A, it is otherwise clear that no invention on Webster's part was involved in the design in question. So far as Webster's

participation in the manufacture of the sheet-metal filler cap from the brass casting model is concerned, the only testimony that impresses us as of value is that of plaintiff's mechanical superintendent, who says that Webster gave him the brass-casting model and told him to "reproduce it in sheet metal, \* \* \* and explained how he wanted it made"; but there is no satisfactory evidence that such explanation related to anything, except the purely mechanical methods involved in making the dies and the "cut and try" processes for reproducing the metal cap with struck-up lugs from the model of the cast cap. On the contrary, the testimony as to the nature of the problem presented is convincing that it involved only "cutting and trying," and that reproduction in sheet metal of devices theretofore made in brass by casting is an ordinary mechanical operation.

But whether or not Webster or plaintiff's mechanical superintendent should, as between them, be credited with whatever invention might be thought to reside in the designing and construction of the cap in question, we think no invention whatever on the part of any one connected with plaintiff company is involved therein, even though changes in method of construction and form were involved, and although the sheet-metal construction possesses advantages over the cast-metal construction, due merely to the inherent advantages of the material used. In the last analysis, the conception involved merely the substitution of sheet metal for cast metal. This change rendered the product cheaper, lighter, and stronger with respect to weight, but it did not change the mode of operation of the cap or otherwise increase its utility. It involved no new discovery of results to be secured by the change to sheet metal or of the properties of that substance. The patent is not for a design. Sheet-metal stamping was not only old, but it had become merely a mechanical art. We content ourselves with referring to several confirmatory decisions of this court. *Strom Mfg. Co. v. Weir Frog Co.*, 83 Fed. 170, 27 C. C. A. 502; *Drake Co. v. Brownell*, 123 Fed. 86, 88, 59 C. C. A. 216; *Wise Soda Apparatus Co. v. Bishop, etc., Co.*, 240 Fed. 733, 736, 153 C. C. A. 531; *Wagner v. Meccano, Ltd.*, 246 Fed. 603, 607, 158 C. C. A. 573.

The only respects in which the design of the sheet-metal cap can be said to differ appreciably from the cast-metal cap is that in the latter the dome is less flattened and the gripping wings are not carried above the plane of the top of the dome, and so the upper arm of the wing does not slant downward to meet the dome. If Webster devised anything, it was merely the idea of striking the wings up to a higher point; but this, in our opinion, was not invention. It involved no substantial change in either means or result. *Wagner v. Meccano*, supra, 246 Fed. at page 608, 158 C. C. A. at page 579. He introduced no new idea of a gripping feature, and it is not clear that carrying the wings higher has materially added to the strength or effectiveness of the grip. For all that satisfactorily appears, the carrying of Webster's radial wings higher than in the cast sample was only incidental to methods employed in striking up from sheet metal.

Throughout the record the sheet-metal cap of the patent is spoken of as substantially a reproduction of the cast metal cap. One of the

prominent witnesses for plaintiff compares defendant's cast cap with Exhibit 48 (which is one of the sheet-metal caps claimed by defendant to have been of a design antedating the cast cap) by saying, "It was a cap similar, but of cast construction, the lugs not being struck up on the top, but simply cast in a mold," and that defendant's cast cap "was of about the same appearance as the one used to-day, except that it was a casting, instead of a stamping, and that the ears on top of the cap were thinner than the ears of the stamping, that is, in width across the base of the ear"; and Webster, when asked to state the material differences between defendant's cast cap and the sheet-metal sample, claimed to have been made by plaintiff and submitted to defendant as basis of the order, said, "It had hollow wings, instead of solid ones, thinner and lighter; more highly finished."

There is no claim that this sample differed materially, if at all, from the device of the patent. Other facts tending strongly to negative invention are the delay in applying for patent, that it is not claimed that notice of the fact of application therefor was ever given defendant, either directly or by so stamping the manufactured articles, or that defendant had any knowledge of the application for patent until after its issue (January 19, 1915), and after it had for apparently a year or so been having similar caps manufactured by others. Under the circumstances which appear in this record, a conclusion that defendant is pirating the rights of plaintiff is against reason.

It follows from these views that plaintiff's bill was rightly dismissed, and the decree of the District Court is accordingly affirmed.

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**GERBER et al. v. SPENCER et al.**

(Circuit Court of Appeals, Ninth Circuit. February 13, 1922. Rehearing Denied March 2, 1922.)

No. 3749.

**1. Seamen §33—Penalty for delay in paying wages is protected by lien.**

The penalty for delay in paying wages of merchant seamen, imposed by Rev. St. § 4529 (Comp. St. § 8320), was intended to compensate the seamen for the delay in securing payment, and is an incident to their claim of wages proper, protected by the lien for the wages.

**2. Seamen §33—Insufficient tender of wages does not relieve from liability.**

A tender of wages on behalf of a ship, which was insufficient to cover the amount of wages then earned and the penalty for delay in payment already accrued, is not sufficient to release the liability for penalties for delay in paying wages, under Rev. St. §§ 4529, 4530 (Comp. St. §§ 8320, 8322).

**3. Seamen §33—Financial difficulties of owner do not relieve from liability to pay wages and penalties.**

The fact that the owner of vessel was in financial difficulties does not relieve it from the obligation of paying wages when due, including the extra pay.

**4. Seamen §33—Attempted assignment of freight to pay wages held not sufficient to avoid penalties.**

An agreement by a ship's agent to assign to the proctor for seamen a portion of the freight sufficient to cover their wages was not sufficient to

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⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

prevent further penalties for nonpayment of the wages, where the shipper had dealt with another agent of the ship as principal and paid the freight to such agent, in whose hands it was attached.

5. Seamen ⇨24—Rights of other creditors are subordinate to wage claim.

The rights of other creditors of a vessel are subordinate to the claim for wages as a general rule.

6. Admiralty ⇨37—Consolidation of independent libels before sale is not necessary.

Where independent libels were filed, the junior one being by seamen for their wages, it was not illegal for the court to direct a sale of the vessel on such libel, and the payment of the proceeds into the registry of the court without consolidation of the libels, in view of Admiralty Rules, rule 40 (267 Fed. xvi), and District Court Rules, Northern District of California, rule 25.

7. Seamen ⇨26—Excessive demand for wages held not to prejudice claimants of vessel.

Claimants of a vessel were not prejudiced by the excessive demand of seamen for wages, where the amount demanded was not disputed by the owner of the vessel, which failed to take steps to meet the demand, and where the libel filed by the seamen correctly stated the wages due.

8. Seamen ⇨17—Computation of daily wage as one-thirtieth of monthly wage is correct.

The action of the court in computing the daily wage of the seamen as one-thirtieth of their monthly wage was proper.

9. Seamen ⇨26—Decree for seamen's wages can provide for payments, if transportation is not furnished.

Where seamen were entitled to transportation back to their shipping port, a decree for their wages which provided that, if transportation and subsistence were not furnished, each libellant should receive the amount set opposite his name, was proper in form.

Appeals from the District Court of the United States for the First Division of the Northern District of California.

Libel by Richard J. Spencer and others for wages, transportation, and subsistence, as seamen on the ship Benowa, owned by the Pacific Motorship Company, in which W. E. Gerber, Jr., and the Anglo-California Trust Company a corporation, intervened. Decree for the libellants, and interveners appeal. Affirmed, subject to inclusion of amounts thereafter ascertained.

Gerber and the Anglo-California Trust Company appealed from a decree in favor of appellees libellants, for wages and transportation and subsistence against the ship Benowa, and, in the event transportation and subsistence were not furnished, in lieu thereof libellants should receive certain specified sums. In October, 1920, the Pacific Motorship Company, owner of the Benowa and other ships subject to mortgages in favor of the Australian government, contracted with the Australian government, whereby the Anglo-California Trust Company, as trustee, acquired the ships. On January 21, 1921, libellants signed at Baltimore for a voyage from Baltimore via coastwise points on west coast and final port discharge on west coast, for a period not exceeding three months, and, if crew were discharged on the west coast, transportation was to be paid back to Baltimore. A few days afterwards Houlder, Wier & Boyd, of New York, as principals, but who were in fact agents of the Pacific Motorship Company, contracted with the Navy Department of the United States for the ship to carry coal from Hampton Roads, Va., to Bremerton, Wash. On February 28, 1921, the Benowa, in distress, put into the harbor of San Francisco, and arrangements were made to discharge cargo at San Francisco. The captain, unable to obtain money from the Pacific Motorship Company, obtained provisions on credit to last until about March 9, 1921. When

the provisions were exhausted, the captain and the crew, except the chief engineer, the boatswain, and the chief cook, remained on the ship and performed duties. Demand for wages to pay the crew was refused. During the delay incident to telegraphic communication between the Navy Department at Washington and W. L. Comyn, asking permission to deliver cargo at San Francisco, on March 8, 1921, the commonwealth of Australia brought suit for the foreclosure of the equitable lien created by the contract of October 21, 1920, and asked for a receiver of the Benowa and other ships. On March 9 the Navy Department granted permission to discharge the cargo at San Francisco. On March 10, 1921, libel was filed by McIntosh & Seymour Corporation against the Benowa, and the marshal seized the ship. Other lienholders and other independent libels were filed against the ships, and in personam against the Pacific Motorship Company, and on March 15th these libelants filed suit.

In the libel libelants demand wages from the time of their shipping and sailing to the date of the filing of the libel, and money sufficient to procure passage back to Baltimore and support in the meantime until they could secure such passage, and their passage, including subsistence during the time libelants were traveling on their way home, and also two days' pay per day for each of the days the wages referred to remained unpaid from and after March 15, 1921. Wages calculated to March 15 aggregated \$10,395.83. On March 16 libelants' proctor telegraphed the Navy Department at Washington that owners apparently abandoned the ship, crews were unpaid and without support, and notified the Department to withhold from the payment out of freight money amount due crew, \$10,395.83, plus amount due captain for his wages and advances. The ship was discharged on March 17. Comyn, agent of the Pacific Motorship Company, testified that his company assigned the freight to proctor of libelants as trustee for the payment of the crew's wages. On the 17th of March the proctor telegraphed to Washington that, upon understanding that out of freight money \$12,000 would be paid him as trustee for payment of crew and captain, release would be had of notice sent day before.

On March 26 a receiver was appointed, and on March 29 the proctor for libelants was notified that the freight due on the cargo of coal was paid to Holder, Wier & Boyd of New York, and that the money was attached in the hands of Holder, Wier & Boyd in a suit of Pacific Steam Navigation Company v. Pacific Motorship Company. About April 21, appellant W. E. Gerber, Jr., and Anglo-California Trust Company, the other appellant, negotiated for the purchase of the claim of the Australian government; that claim being a first mortgage. Thereafter an order was made referring the present case to a United States commissioner to take testimony and report findings and conclusions. On April 27, Gerber, Jr., filed an offer to pay libelants \$5,609.20, "wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which sum is herewith deposited with the clerk of this court." Gerber also offered to pay libelants their costs theretofore incurred, and also "to furnish to such libelants as may desire the same transportation in accordance with said shipping articles." Deposit of \$5,609.20 was made in the registry of the court. About May 5, 1921, the Benowa was released from the receivership, and on May 10 Gerber was substituted as intervener in place of commonwealth of Australia. On May 14 the District Court rendered its final decision that the libelants were entitled to wages earned under shipping articles, less amount paid, together with the penalty provided by section 4529 of the Revised Statutes as amended (Comp. Stat. § 8320), and also awarding libelants transportation together with subsistence while traveling between San Francisco and their home port.

Pillsbury, Madison & Sutro, of San Francisco, Cal. (Oscar Sutro and Felix T. Smith, both of San Francisco, Cal., of counsel, for appellants.

Ira S. Lillick, of San Francisco, Cal. (J. Arthur Olson, of San Francisco, Cal., of counsel, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The assignments of error call for consideration of several elements of the decree, especially what are called penalties, the provisions for transportation, and the order for the sale of the ship under a junior libel, without consolidating it with earlier and intervening libels under which the ship is held.

[1] Section 4529 of the Revised Statutes, which provides that a master or owner shall pay every seaman his wages within certain days after termination of the agreement under which he was shipped, also provides that a master or owner, who refuses or neglects to make payment in the manner provided "without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court." The purpose of the statute, where there is not sufficient cause for refusal or neglect to pay as required, is to secure to the seamen an amount as extra pay by way of compensation for delay. The extra pay is an incident to the claim of wages proper. We adopt the clear statement by Judge Choate in *Covert v. British Brig Wexford* (D. C.) 3 Fed. 577, 578, 579:

"These statutes are designed for the protection of seamen, to prevent the abuse of withholding their pay, and thereby keeping them in port at expense and out of employment while waiting for a settlement. It is a liquidated indemnity for such enforced expense and delay. It is limited to 10 days, perhaps upon the theory that the summary powers of the admiralty courts, everywhere exercised for the protection of seamen, can, within that time, be brought to bear for their relief, and to encourage diligence on their part in presenting and prosecuting their claims. These protective statutes would be of little or no value to the seamen, if they do not give them a lien on the vessel. A mere right to enforce a personal claim for such small sums against the master or owner would generally be of no value to them; and, if they have a lien, it must, I think, be presumed that it was intended to be a lien in all respects like that for their stipulated wages—one equally beneficial to them." *The Amazon* (D. C.) 144 Fed. 153.

[2] Argument is made that the "penalty" is imposed for the refusal to pay wages, not for refusal to meet "all demands which seamen may see fit to make." Granting that to be true, it cannot affect a case where there is no sufficient excuse for the refusal or neglect for nonpayment which has resulted in keeping the seamen in port at expense and out of employment while waiting for settlement. The tender made by Gerber was not sufficient to cover wages up to and including March 17, 1921, and in addition thereto a sum equal to two days' pay for each and every day from March 17 up to and including the date of tender, while for the delay in payment after April 27 there was no sufficient cause. Appellants were therefore not released from the liabilities to which they became subject under sections 4529 and 4530 of the Revised Statutes (Comp. St. §§ 8320, 8322). When the demand for wages due was made, libelants were entitled to certain definite sums, as provided by the shipping articles, including wages, transportation, and subsistence during time of transportation, and it does not appear that the demands made were not due.

[3, 4] The circumstance that the Pacific Motorship Company was in financial difficulties did not relieve it from an obligation with respect to claim for wages, including extra pay. The Chas. L. Baylis (D. C.) 25 Fed. 862. The company seems to have regarded effort to pay as not required, because Comyn, as agent, made what he called an "assignment" of some of the freight money to the proctor for libelants. No assignment was introduced in evidence, and the correspondence included in the record made it plain to all concerned that Houlder, Wier & Boyd, of New York, were parties, as principals, to the contract with the Navy Department, and that the freight was paid to them, not as agents, but as principals, and that the Navy Department would recognize only that firm, and would not notice any possible "assignment" as testified to by Comyn. Cases pertinent to this are Cubadist (D. C.) 252 Fed. 662; City of Montgomery (D. C.) 210 Fed. 675.

[5] The general rule that rights of other creditors are subordinate to claim for wages is applicable. The rights of seamen have always been cautiously guarded by statutes and the courts should make their decrees in accord with the spirit and intent of the law to protect the seamen.

[6] There was no error in decreeing a sale of the ship under a junior libel without consolidation with earlier libels, and intervening libels, under which the ship is held. The practice may not be uniform, as pointed out by Hughes on Admiralty (2d Ed.) 397; but where independent libels are filed it is surely not illegal to direct a sale without consolidation and to direct the proceeds of the sale to be paid into the registry of the court. Rule 25, District Court Rules, Northern District of California, and rule 40, Admiralty Rules (267 Fed. xvi), seem to contemplate such procedure.

[7] There is a contention that the demands made were greatly in excess of the sums due. But if the schedule attached to the libel correctly states the wages due under the shipping articles, including transportation and subsistence during transportation, appellants cannot complain. When the seamen demanded their wages, the company did not dispute the amounts claimed by the men. It failed to take steps to meet demands; so did the receiver after he was appointed, for he denied that the libelants were entitled to wages from the day of shipping to the date of filing the libel. It cannot be held that there was an agreement between counsel for libelants and the company, that the penalties should stop running from May 17th. It is evident there was some suggestion to that effect, but the proctor for libelants did not agree to it.

[8] The computations of the penalties in the decree are said to be wrong, but no errors were pointed out to the District Court and appellees contend there are none. In the computation the court took one-thirtieth of the amount of the monthly wage as the basis for ascertaining the daily wage, and awarded double pay for each day that payment has been withheld without sufficient cause. This was proper. But, as there may be some mistake in the computations made, we have concluded to withhold the decree of this court until report may be made in pursuance of an order of this court directing re-examination into the several amounts specified in the decree of the District Court.

The costs of such re-examination shall abide the further order of this court.

[9] We find no objection to the form of the decree, which provides that, if transportation and subsistence are not furnished to libelants upon satisfaction of the provisions of the decree, in lieu thereof each libelant should receive the amount set opposite his name.

Affirmed, subject to inclusion of the amounts to be ascertained.

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**TROY LAUNDRY MACHINERY CO., Limited, v. INTERNATIONAL EQUIP-  
MENT CO.**

(Circuit Court of Appeals, First Circuit. February 2, 1922.)

No. 1520.

1. Patents ~~328~~—1,213,999, for drying apparatus, held void for lack of invention.

The Balzer patent, No. 1,213,999, for a drying apparatus, the only novel feature of which is a screen for removing lint from recirculating air and means of access for cleaning the same, in view of the fact that screens were used in the prior art at the outlet for removing lint from the air before its discharge, *held void for lack of invention.*

2. Patents ~~310~~(7)—Pleading in infringement suits.

In pleading defenses in a suit for infringement, the distinction should be carefully observed between the pleading of patents and printed publications, which, as disclosures, take effect only from the date of issue, and allegations of priority of invention, in which actual dates of invention are to be the subject of testimony, and, under an answer pleading a patent as a prior disclosure, evidence of the date of the application for such patent is not admissible to establish prior invention.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by the Troy Laundry Machinery Company, Limited, against the International Equipment Company, doing business as the Empire Laundry Machinery Company. Decree for defendant, and complainant appeals. Affirmed.

George L. Wilkinson, of Chicago, Ill. (Charles D. Woodberry and Roberts, Roberts & Cushman, all of Boston, Mass., on the brief), for appellant.

George N. Goddard, of Boston, Mass., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is an appeal from the decree of the District Court dismissing a bill for infringement of claims 2 and 12 of letters patent to F. Balzer, No. 1,213,999, January 30, 1917 (on application filed April 27, 1914), for drying apparatus. The claims in suit are as follows:

"2. In a drying tumbler, the combination, with a casing, of a rotary foraminous cylinder in said casing, heating coils, a blower for circulating air

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around the heating coils and through the cylinder, a screen through which the air passes before being drawn through the blower, and means for permitting access to said screen to clean the same."

"12. In a drying tumbler, the combination, with a casing, of a rotary cylinder in the casing, a heating chamber, a blower for circulating air through the heating chamber and cylinder, means for eliminating the lint from the air after it passes through the cylinder and before it enters the blower, said casing having a restricted air inlet for maintaining the required volume of air in circulation in the casing, and a restricted outlet for permitting the escape of surplus air from the casing."

[1] "A restricted air inlet for maintaining the required volume of air in circulation in the casing, and a restricted outlet for permitting the escape of surplus air," refers only to a feature common to drying machines having a casing. Inlets and outlets are ordinarily "restricted," and a description of them by this term does not involve means for regulating inflow and outflow. A damper or other device for controlling outlets to maintain them closed until a predetermined pressure has been obtained in the casing sufficient to open the outlets is not involved in the claims in suit, but is a feature which is a special element of claims 13 and 14, which are not in suit. Means for keeping substantially the same volume of air in continuous circulation are not, therefore, an element in either of the claims in suit.

The combinations of claims 2 and 12 seem to differ from combinations in the prior art only in the feature described in claim 2 in the words, "A screen through which the air passes before being drawn through the blower, and means for permitting access to said screen to clean the same," and in claim 12, "Means for eliminating the lint from the air after it passes through the cylinder and before it enters the blower."

The prior art discloses drying apparatus in which heated air is recirculated in the dryer. It is stated that in the prior art there are two types of drying tumblers—the fresh air type, in which the air that was passed through the cylinder is wholly discharged into the atmosphere; and the recirculating type, in which part of the moisture-laden air is returned to the heating coils to reheat and again enter the cylinder. In each type there was produced more or less lint, due to rubbing against the rough cylinder surface. In the fresh air type of machine the discharge passage was screened to prevent the discharge of lint into the outer air; in the device of the patent in suit a screen is used to collect the lint from heated air which is to be recirculated, instead of from the air which is to be discharged. In claim 2 is a reference to "means for permitting access to said screen to clean the same."

The substantial question in the case is whether it involved invention to provide a screen so located as to eliminate lint from the recirculating heated air. The recirculating type of machine was already in the art, and the problem was merely how to remove objectionable lint from a machine that already had been invented. Balzer's solution of this problem was the provision of a screen accessible for cleaning it from accumulated lint. Instead of locating the screen at the outlet, as in the fresh air type of dryer, it was located at a point in the path of the recirculating air.

The removal of lint by screening the air passage was old in this art. Whether the air passage is direct from inlet to outlet, or circular, a screen is an equally efficient means of cleansing the air.

We think this quite analogous to the screening against the intake or discharge of dust, which is a common feature of shop practice.

[2] The patents to Raymond, No. 1,091,706, March 31, 1914, and Spencer, No. 849,581, April 9, 1907, disclose recirculating drying machines in which the heated air may be used repeatedly, and we think are sufficient to limit the claims in suit to the feature of the accessible screen, without consideration of the defense based upon Balzer's application record in the Patent Office, and regardless of the admissibility under the pleadings of the Binder patent No. 1,136,645, issued April 20, 1915, on application filed January 21, 1914. The plaintiff appellant objects to this patent as evidence of prior invention, the objection being based upon the pleadings. By answer it was set up "that the alleged improvements \* \* \* claimed in the letters patent in suit had been patented or described prior to said Balzer alleged invention \* \* \* in the following patents and printed publications," among them No. 1,136,645, Binder, April 20, 1915. Binder's issue date was prior to the issue date of the patent in suit. In rebuttal the plaintiff offered a certified copy of Balzer's application, which showed the application date April 27, 1914, a date prior to Binder's date of issue.

It appears by the record that the defendant filed an interrogatory:

"Will plaintiff set up, or attempt to prove in this suit, a date of invention by Fritz Balzer, the patentee, and the plaintiff's assignor, of the subject-matter of the patent claim sued on earlier than April 27, 1914, the alleged filing date of the application on which was issued the patent in suit?"

To which the plaintiff answered:

"Not unless the defendant pleads other defenses than those set up in its answer filed in this cause."

The plaintiff contends that it has overcome the patent to Binder as a prior patent, and that it is entitled to rely upon Balzer's application date of April 27, 1914. The defendant in turn seeks to rely upon Binder's application date, which is January 21, 1914. The plaintiff contends that it had the right to rely upon defendant's failure to either plead or prove that Binder had prior knowledge of the thing patented, relying upon section 4920, R. S. (Comp. St. § 9466), *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68, and many other cases which it cites in support of its contention. The defendant appellee argues that it may rely upon Binder's application date as prima facie evidence that Binder was the inventor at the date of filing. It cites *Lemley v. Dobson-Evans Co.*, 243 Fed. 391, 397, 156 C. C. A. 171, and other cases.

We are not informed by the opinion whether this point was raised before the District Court. Had it been, an application for amendment of the answer to set up Binder as a prior inventor, instead of a prior patentee, would doubtless have removed all occasion for a technical controversy over the sufficiency of the pleadings to authorize the introduction of the Binder patent as evidence of a prior invention, dating from the application date rather than a mere patent or publication dating from its date of issue.

We are of the opinion that in pleading defenses the distinction should be carefully observed between the pleading of patents and printed publications which, as disclosures, take effect only from the date of issue, and allegations of priority of invention in which actual dates of invention are to be the subject of testimony. As in answer to the defendant's interrogatory the plaintiff had asserted that it would not set up for Balzer, under the present state of the pleadings, an earlier date than April 27, 1914, the plaintiff seems technically right in its contention that it was not called upon to anticipate Binder's application date of January 21, 1914, but only Binder's date of issue.

While the Binder patent was offered as defendant's exhibit without objection, its relevancy was limited and controlled by the pleadings and the position taken on interrogatories, and we do not regard it as proof of prior invention.

It seems to be true that recirculation of the air would involve the carrying of successive accumulations of lint, unless it were intercepted after each passage of the air through the cylinder, and that the accumulation of lint within the machine might result in objectionable deposits.

While means of disposing of superfluous lint are not specifically shown in the recirculating machines of the prior art, we think that the addition of a screen to an existing and operative combination does not entitle Balzer to deprive prior inventors of the right to use the well-known expedient of a screen to obviate an incidental defect like that arising from the production of lint or dust. It is common experience that after an operative machine is installed there is produced an undesirable amount of dust or lint. The machine is still operative, and, considered as a mechanical organization or patentable combination, needs no change. The problem of dealing with excessive dust or lint, or the prevention of clogging or obstruction by foreign matter, then becomes a separate and special problem of limited scope. It did not require the invention of a drying machine to solve the problem of removing lint from a drying machine already invented, nor the invention of a means of removing lint, since a screen at the outlet was an efficient device for that purpose.

Instead of screening the air after it had passed through the cylinder on its way to the outlet, Balzer screened the air after it had passed through the cylinder and while on its way to the blower. We are of the opinion that the addition of this screen to the existing combination did not amount to invention of a patentable combination, nor entitle Balzer to claims for patentable combinations. See *Scott & Williams, Inc., v. Hemphill Mfg. Co.* (D. C.) 247 Fed. 540, 542, 543, on appeal (C. C. A.) 262 Fed. 968.

The decree of the District Court is affirmed, with costs to the appellee in this court.

THE EDWARD G. MURRAY. THE McCALDIN BROS. NAVIGAZIONE  
GENERALE ITALIANA v. TIMMINS.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 80.

1. Towing ~~§~~11(2)—Tug under control of master liable for tort though under general direction of another.

Where several tugs were under the direction of one person employed to move a steamer from one point to another, but each in performing the duty assigned her was exclusively under the control of her own master and acted independently in doing her part of the work, liability in rem must be first ascertained by inquiring what if any marine tort any tug committed.

2. Towing ~~§~~11(2)—Tug held at fault.

A tug which took a line over the stern of a steamer being moved from dry dock to a pier out of a narrow basin, instead of hanging on behind to help steer her out of the gap, was liable for damage to the ship in a resulting collision, though acting in strict obedience to the orders of one in control of several tugs engaged in the removal; the master of the tug not being justified in blind acquiescence in anything so plainly wrong.

3. Towing ~~§~~4—Mere act of agreeing to remove steamer did not create conventional maritime lien.

Mere agreement of tug owner to move a steamer from one place to another did not create a conventional maritime lien for nonperformance or malperformance in respect of the tugs furnished, though any towing or helper tug might be obliged to respond for its own wrongdoing.

4. Towing ~~§~~11(2)—Tug owner agreeing to move steamer responsible for negligence of agent.

A tug owner, who undertook to move a steamer from a slip to a pier and sent an employee to do the job, was responsible as principal for such employee's negligence in controlling several tugs called upon to move the steamer, even though the employee held a license as master and pilot, and though he demanded and received \$5 for his services; such payment being a mere gratuity.

5. Towing ~~§~~15(2)—Recourse to be had to experts for estimates as to damages.

In assessing damages for injuries to a hull rendering it necessary to remove refrigerating apparatus, expert testimony was necessary to estimate the expense in respect of the refrigerating apparatus, the removing and replacing of which was done without any record of actual days' work, and libellant never having paid any bill therefor.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the Navigazione Generale Italiana against Edward M. Timmins, with the steamtug Edward G. Murray, the Edward G. Murray Lighterage & Transportation Company, claimant, impleaded, and others. From an adverse decree the claimant of the Murray appeals. Modified and affirmed.

Libellant sues as owner of steamship Procida. On February 8, 1916, that steamer, without cargo, and without steam in her boilers, lay at a pier in the Erie Basin, Brooklyn. She had been repaired at the Robins Drydock and equipped with a refrigerating apparatus for the transportation of fresh meat, and was ready to be shifted to her loading berth at Thirty-Fourth street, North River, although her new refrigeration plant had not yet been tested and some work remained undone that could not be performed until test was made. It was the expectation of the contractors that with some allowance

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for unforeseen contingencies all work would be completed and the vessel ready to load on February 16th.

Respondent Timmins is the owner of several tugboats, was engaged in harbor transportation generally, and known as one furnishing tugs for the conveyance from one wharf to another of vessels temporarily without motive power of their own, as was the Procida.

The testimony is uncontradicted that Timmins was employed to move libellant's steamer in the following manner: Libellant's superintendent called Timmins' office on the telephone and said, in substance, "Arrange to have tugboats remove (Procida) from Erie Basin to the north side of our pier, Pier 74, North River." The Timmins concern accepted the order and telephoned to the master of their tug "John J. Timmins," then at the Bush Stores, and gave him orders (as testified by the master himself) "to transport (Procida) from Erie Basin to Thirty-Fourth street, North River." This employee, Capt. Keene, did not "receive any instructions with reference to how (he was) to do the work. \* \* \* That was left to (his) own judgment." Capt. Keene summoned the tugs Edward Murray and McCaldin Bros., to assist him on this job; they did not belong to Mr. Timmins and were obviously selected (as is customary) because they happened to be in the neighborhood.

For a vessel of Procida's size the waters of Erie Basin are very narrow. The slip in which she lay was on the side opposite to the gap or entrance of the basin, and it was necessary to haul her out of the slip stern first, swinging her in such manner as to head for the gap, and then go ahead.

Capt. Keene went on the steamer's bridge and took charge of the whole enterprise. In his own language he "gave instructions to the tugs as to what they should do." He admittedly told McCaldin Bros. to "take a hawser off the port bow and go ahead," i. e., go ahead when it was time so to do. His own tug, the J. J. Timmins, he placed on the starboard quarter, and there is no doubt that he ordered the Murray to begin the operation in the only way it could begin, by hauling the Procida out of the slip stern first; and this the Murray did. The only conflict of evidence is as to the orders given by Capt. Keene concerning the Murray's duties after the Procida was out of the slip and in the basin. Keene declared that when the steamer was in the middle of the basin the Murray was to "hang on behind and help steer her out of the gap." The master of the Murray declared that the orders covering his whole duty were, "You take a line over her stern and pull her out and when you get her out come alongside on the port side." It is admitted that when Murray had pulled the steamer out of the slip she did come up on the Procida's port quarter and there make fast. It is proven overwhelmingly, if not admitted, that the only proper way to get such a vessel out of the basin in her then helpless condition was to have a tug hang on behind and act as a sort of rudder.

Under the impetus given to Procida by pulling her out of the slip she nearly crossed the basin, and when McCaldin Bros. started ahead, struck a vessel moored on the basin's opposite side, and received injuries, to recover for which this suit was brought. The Murray on the port quarter was in no position to render assistance and had just time to back out of the way in order to avoid injury to herself.

Capt. Keene held a license from the United States inspector as master and pilot; he guided the Procida in the sense not only of giving orders to her only motive power, the tugs, but of selecting their courses in going to destination in the North River. He personally rendered a bill to the steamship agents for \$5—a charge separate and distinct from that made by Mr. Timmins for the transportation work.

The lower court exonerated the tug McCaldin Bros. from all fault; held that the proximate cause of damage was that the Murray was not hanging on the stern as she ought to have been, and was therefore at fault, and that Capt. Keene "had ample time and space" to see to it that the Murray assumed her proper position. Also, held that Keene was Timmins' agent in the premises—wherefore Timmins was liable. From a decree holding both Mr. Timmins and the steamtug Murray at fault and exonerating McCaldin Bros., the claimant of the Murray only appealed.

Foley & Martin, of New York City (William J. Martin and Geo. V. McCloskey, both of New York City, of counsel), for appellant.

Harrington, Bigham & Echglar, of New York City (T. Catesby Jones and Vine H. Smith, both of New York City, of counsel), for the McCaldin Bros.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for Edward M. Timmins.

Loomis, Barrett & Jones, of New York City (Homer L. Loomis, of New York City, of counsel), for libellant.

Before HOUGH and MAYER, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). [1] Although all the tugs engaged were under the general direction of Capt. Keene, yet each in performing the duty assigned her was exclusively under the control of her own master, and acted independently in doing her part of the work. It follows, under *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83, and *The Anthracite*, 168 Fed. 693, 94 C. C. A. 179, that liability in rem must first be ascertained by inquiring what if any marine tort any tug committed.

[2] None has been alleged against the John J. Timmins, and we agree with the court below that the McCaldin Bros., was without fault, and that the Edward G. Murray was guilty, in that she failed to keep the stern of *Procida* under control, and permitted that steamer to get into collision. The collision occurred because the Murray took a wrong position; on the port quarter she was useless. It makes no difference, so far as her own liability is concerned, whether the faulty conduct was in strict obedience to Keene's orders or not. The Murray's interpretation (as testified to) of Keene's command involved obedience to orders so opposed to a reasonable skill in towboat work, that no competent tugmaster was justified in blind and silent acquiescence in anything so plainly wrong.

The matter is one of degree; doubtless the Murray's master would have been justified in doing what Keene told him to do, if it were merely a matter of judgment in detail; but to leave the helpless steamer without a stern tug in the narrow waters of Erie Basin was navigation so obviously bad that unnecessary obedience to orders therefor was lack of reasonable skill in towboat craft.

But further, the Murray was not justified in interpreting even what her master declared Keene said, as meaning that the tug was to go on the port quarter as soon as the steamer cleared the slip; reasonable skill required the words to mean that the Murray should get on the quarter when the *Procida* was "out," not of the slip, but of the basin. The necessity for the Murray's being where she was not was so obvious, and Keene's order as testified to from the Murray so very wrong, that we find as matter of fact that the tug did receive directions as claimed by Keene; a finding of fact which, for another reason, fixes responsibility on the Murray.

[3] Timmins' liability, as asserted, permits no application of the doctrine of marine torts; nor did he by the mere act of agreeing to move the *Procida* create a conventional maritime lien for nonperformance or malperformance in respect of the tugs furnished. The *Sarnia* (C. C. A.) 261 Fed. 900. This does not mean that any towing or helper tug might not be obliged to respond; but the proximate reason for such response would be its own wrongdoing, and not an owner's contract. This is no more than the familiar doctrine of tower's liability, which always depends upon that lack of care under the circumstances, which is negligence.

[4] In this action in personam as against Timmins, his liability is to be determined upon principles of agency. He undertook to move the *Procida*; not only to furnish the motive power, but, as is plain from the evidence, to furnish the brains in control. He further undertook to do the job by Capt. Keene as his agent and servant. It follows upon legal principles as applicable in admiralty as elsewhere, that he is responsible as principal for Keene's negligence, if any; and we agree with the court below—assuming (as we have now held) that Keene gave proper orders to the Murray, that he had ample time and space wherein to correct the Murray's misconduct, and to make her hang on to the *Procida*'s stern as he had told her to do.

This part of Mr. Timmins' contract, i. e., the agreement to supervise the job, is a separate and distinct thing, although included in what the parties would doubtless call a "towing contract"; for not only did Mr. Timmins by the engagement to "transport" the steamer promise to furnish several tugs, but he also promised to furnish some one who would tell all the tugs what to do.

From this result Mr. Timmins seeks escape by insisting that Capt. Keene, while on the steamer's bridge, was an independent pilot in charge; the corollary being that for the acts and omissions of such pilot no one is responsible but the pilot himself.

Undoubtedly Keene is a pilot, his license gives him the title; as plainly he was not the compulsory pilot of *The China*, 7 Wall. 53, 19 L. Ed. 67. He was a voluntary pilot, for whose acts or omissions doubtless the ship guided by him is responsible to third parties. *Homer Ramsdell, etc., v. Compagnie Generale*, 182 U. S. 406, at 416, 21 Sup. Ct. 831, 45 L. Ed. 1155. If Keene were a pilot voluntarily furnished by Mr. Timmins and without compulsion accepted by the *Procida*, so that Keene piloted as Timmins' agent, plainly the latter is responsible (cf. *The Manchioneal*, 243 Fed. 801, at 806, 156 C. C. A. 313).

The contention that Capt. Keene was an independent pilot seems to us wholly based upon inferences from the fact that he demanded and received \$5 for his services. The evidence is quite sufficient for us to recognize the well-known custom of tugmasters in this harbor obtaining, or at least requesting a similar recompense, when transporting vessels from one harbor berth to another.

The crucial inquiry is whether men like Capt. Keene get the \$5 because they are licensed pilots or because they are in command of the leading tug engaged in the transportation. The answer is plain: they are only paid because they are furnished by the employing tug

owner with whom contract has been made, and what they get is a mere gratuity. To test this: Would Capt. Keene have been justified, when performing Timmins' contract, in staying on board his own tug off on the Procida's starboard quarter, and saying to the steamship master, "You can start now, Mr. Timmins is furnishing nothing but the power"? The question answers itself; Keene expected to do the job and all of it, as part of his duty to Timmins, and the latter with good right expected Keene to act as he did.

The decree is affirmed as to the distribution of liability.

The appellant herein further complained of the assessment of damages, and this portion of the appeal was heard before HOUGH, Circuit Judge, and AUGUSTUS N. HAND, District Judge.

Chauncey I. Clark and George V. A. McCloskey, both of New York City, for the exceptions.

Homer L. Loomis, of New York City, opposed.

HOUGH, Circuit Judge. No doubtful question of law is raised by any exception to the commissioner's report, which was substantially confirmed by the District Judge.

There are three contested items: (1) The cost of repairs; (2) demurrage, i. e., loss of use of the Procida; (3) allowance of interest.

The Procida's hull was injured only in respect of certain plating. The cost of repairing these plates is not disputed, but in order to get at the injured portion of the hull it was necessary to remove, and subsequently replace, and test some of the newly installed refrigerating apparatus. This item is in dispute.

This whole plant was evidently something of an experiment, and the work of removing and replacing so much of it as was necessary to repair the steamer's hull was done without any record of actual days' work. We find that the only method of stating the expense to which libellant was put in respect of this refrigerating plant is by expert evidence, and down to date of commissioner's report libellant never paid any bill in the premises.

[5] Under such circumstances, recourse must be had to expert estimates. The Mason, 249 Fed. 718, at 721, 161 C. C. A. 628. In our opinion the estimate given on behalf of claimants is obviously the best, and this item is accordingly reduced to \$1,800.

The rate per day for detaining the Procida is agreed upon. The only question is as to the number of days she was actually and necessarily detained by reason of the collision. This is a very doubtful matter, for the libellant has the advantage of having actually remained in port the number of days allowed, when, from all the testimony, it was more profitable to go to sea. We are not able to say that the matter is so clear as to warrant disturbance of the commissioner's findings, and the exceptions are overruled as to the amount of demurrage awarded.

As to interest, we think exceptants and appellant have shown good cause for refusing a full allowance. It is substantially admitted that there was great delay in the assessment; more than three years and a half intervened between interlocutory and final decrees, and for such

delay as this we find no excuse in the record. We have not overlooked the excuses suggested in argument by libelant, but do not find them borne out by the testimony. In drawing the final decree to be entered on the mandate herein, libelant will be awarded interest only from the date of the commissioner's report, to wit, July 20, 1920.

The cause will be remanded to the District Court, with directions to modify the final decree as herein indicated, and, as modified, said decree is affirmed. Appellants will recover the costs of this court as against libelant. No other costs.

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**NEW YORK CENT. R. CO. v. LAZARUS et al.**

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 89.

1. Carriers ~~§~~160—Provision in Transportation Act, suspending "periods of limitation" during federal control, does not apply to contract period.

The expression "periods of limitation," in Transportation Act Feb. 28, 1920, § 206f, providing that the period of federal control shall not be computed as part of the periods of limitation, applies to limitations fixed by federal or state statute, in view of section 206a, expressly providing that causes of action arising out of federal control may be brought within the periods of limitation prescribed by state or federal statutes, and of section 438, amending the provision relating to contract periods of limitation, but making no reference to the exclusion of the periods of federal control.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Period.]

2. Carriers ~~§~~160—Minimum period of limitation permissible in bill of lading is fixed by contract, and not by statute.

Where the bill of lading established the period of limitation for the commencement of action against the carrier at the minimum period permitted by Transportation Act Feb. 28, 1920, § 438, the limitation was nevertheless fixed by contract, and not by a statute, since the right to establish such period was not given by the statute, but was merely restricted thereby.

3. Carriers ~~§~~63—Contract held subject to uniform bill of lading, though none was issued.

Where an interstate carrier had on file two tariffs, one for shipments under the uniform bill of lading, and the other fixing a 10 per cent. higher rate for shipments subject to the carrier's common-law and statutory liability, a shipment of imported goods on which the freight was charged at the former rate was subject to the uniform bill of lading provisions, though no bill of lading was in fact issued.

4. Constitutional law ~~§~~171—Suspension of contractual period of limitation would be unconstitutional.

Though Congress can suspend the statute of limitations as to personal debts without depriving a debtor of his property, because such period did not become a part of the contract, a suspension of the time within which an action could be brought under the terms of the contract would be a violation of Const. Amend. 5.

In Error to the District Court of the United States for the Southern District of New York.

Action by Samuel O. Lazarus and others, copartners doing business under the firm name and style of Lewis Lazarus & Sons, against the

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New York Central Railroad Company to recover the value of freight lost while in the possession of defendant. Judgment for the plaintiffs (271 Fed. 93), and the defendant brings error. Reversed and remanded.

Alex. S. Lyman, of New York City (William Mann, of New York City, of counsel), for plaintiff in error.

Harrington, Bigham & Englar, of New York City (Arthur W. Clement, of New York City, of counsel), for defendants in error.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. On May 12, 1917, at Singapore, China, there was delivered to the Seattle Vladivostock Steamship Line, 994 slabs of tin to be carried to Seattle, Wash., by the steamship Louise Nielson, and then by rail to New York. The tin was consigned to the defendants in error. Eventually the tin was delivered to the defendants in error, all except 183 slabs, which were lost by theft while in its possession. Below the defendants in error have recovered a judgment for the value of these stolen slabs of tin. It was an interstate shipment, and therefore subject to the rules and regulations contained in the interstate tariffs established by the plaintiff in error as required by the Interstate Commerce Act (Comp. St. § 8563 et seq.). There were two through bills of lading issued by the steamship company in China, but they were not on file with the Interstate Commerce Commission. The interstate tariffs established by the plaintiff in error and applicable to this shipment were conditioned on the terms and conditions of the form of the uniform bill of lading. Therefore the liability, if any imposed, must be determined by the conditions of the uniform bill of lading. As a defense, the following provision of the uniform bill of lading was pleaded:

"Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed."

This action was not commenced within two years and one day after delivery of the property referred to in the complaint, or within two years and one day after a reasonable time for delivery of the property had elapsed. The rate charged by the plaintiff in error for the transportation of the tin was the rate contained in the tariffs and classifications for the transportation of property shipped subject to the terms and conditions of the uniform bill of lading. The tariffs and classifications were fixed at a higher rate for the transportation of property when not subject to all the terms and conditions of the uniform bill of lading. The consignments of tin were received by rail carrier at Seattle, Wash., on June 17, 1917, and delivered in New York City, with the exception of the 183 missing slabs, on the 21st of August, 1917. The rate paid for the transportation was 56.02 cents per 100 pounds, which is the rate contained in the transcontinental east-bound import tariff, duly published and filed with the Interstate Commerce Commission, and in effect at the time the rules and regulations filed with the Interstate Commerce Commission provided that the above-

mentioned rate applies to properties shipped subject to all the terms and conditions of the uniform bill of lading which are contained in said classification. The rate charged when the consignor notifies the carrier that he elects to have his property transported subject to carrier's common-law and statutory liability, and not subject to all the uniform bill of lading conditions, is 10 per cent. higher than the rate charged for transportation of property subject to all those terms and conditions. No bill of lading was actually issued by this rail carrier. The usual time for transportation of carloads of tin from Seattle to New York and delivered to the consignee is from 20 to 23 days. These cars were in transit approximately 28 days. Claims were presented for the loss of the property in question on August 21, 1917, and investigations and other negotiations were pending up to the time of the commencement of this action.

[1] It is contended that the condition of the bill of lading as to the time within which this action must be commenced was suspended by virtue of the provisions of the Transportation Act of February 28, 1920 (section 206f [41 Stat. 462]). It provides:

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control."

Section 206 (a) relates to causes of action arising out of federal control, and provides:

"Such actions, suits, or proceedings may, within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

It is contended that section 206 (f) of this act invalidates the period of limitation set forth in the conditions of the uniform bill of lading, and that therefore this action was commenced in time. The argument is that section 206 (f) applies to all periods of limitations, whether applied by contract, regulation or statute. As the phrase "periods of limitation" is used in these sections of the Transportation Act, we think the words apply to limitations "now prescribed by the state or federal statutes." We think Congress did not intend a different meaning in the use of the words "periods of limitation," as used in paragraph (f), than their meaning as defined in paragraph (a). A phrase repeated in several sections of the statute will bear the same meaning throughout the statute, unless a different intention clearly appears. It will be presumed to be used in the same sense, and where its meaning is clear in the one instance, the same understanding will be attached to it elsewhere, unless the legislative body makes clear its intention that it be used in a different sense. *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205.

Of the same act section 438 was an amendment and provided that:

"It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant

that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The changes made in this section indicate clearly that Congress did not intend section 206 (f) to apply to provisions in tariff schedules which the common carrier is required to file with the Interstate Commerce Commission. The provisions upon which the plaintiff in error relies as a defense was contained in the contract of transportation, and not in a state or federal statute. And it appears that, if Congress intended to provide in section 206 (f) of the Transportation Act that the period of federal control should not be included in computing the time specified in the uniform bill of lading conditions, it would have so stated in section 438 of the act, which relates to the provisions of tariff schedules. *Louisville Cement Co. v. Interstate Commerce Comm.*, 246 U. S. 644, 38 Sup. Ct. 408, 62 L. Ed. 914.

[2] The court below held that, where there is a valid contract between the shipper and carrier for a longer period, even by one day, than the period mentioned in the statutes, it would be improper to speak of the limitation as prescribed by the statute, but held that in this case there was no such contract, and it was not by contract, but by legislative permission that any period at all was fixed. But section 20 of the Interstate Commerce Act (Comp. St. §§ 8604a, 8604aa) merely prohibits a carrier from incorporating in a bill of lading conditions which it is required to file with the Interstate Commerce Commission. By a provision requiring suits be instituted within less than two years from the time the cause of action accrues prior to March 4, 1915, the date of the amendment to the Interstate Commerce Act, it was lawful for a carrier to provide in the bill of lading or file tariff schedules that claims should be presented and suits brought within a much shorter period than that fixed by the statute. *So. Pacific R. R. Co. v. Stewart*, 248 U. S. 446, 39 Sup. Ct. 139, 63 L. Ed. 350; *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690. From the last-quoted cases it is apparent that the right of the carrier to provide "a rule, contract, or regulation" that suits must be brought within a reasonable time is not derived from the statute, but existed before the statute was enacted. The statute prohibits the carrier from inserting a provision in the uniform bill of lading conditions which it is required to file with the Commission and which, when filed, constitutes the contract of shipment that suits must be tried within less than two years from the time the cause of action accrues.

[3] By the schedules filed with the Interstate Commerce Commission by the plaintiff in error, two forms of agreement for transportation of property were given to the shipper. One was known as the uniform bill of lading, with its conditions referred to, requiring that suits should be instituted within two years; the other contained no provisions with respect to the time for the commencement of actions. It is clear to us that in the uniform bill of lading the condition as to the two years became a part of the agreement for the transportation of the property in question. *Chicago, Rock Island & Pacific Ry. Co. v. Cramer*, 232 U. S. 490, 34 Sup. Ct. 383, 58 L. Ed. 697. The time

within which the defendants in error were entitled to bring an action is therefore one fixed by the contract and not by statute, and the extension of time granted by the provision of the Transportation Act does not permit adding thereto the period of federal control, and it cannot apply, so as to change the terms of the contract entered into between the carrier and the shipper. Congress had the right to suspend the operation of the statute of limitations where the statute deals solely with the remedy, and does not at the same time destroy liability if the action is not brought within the prescribed time.

[4] The suspension of the statute of limitations in actions on personal debts does not, as applied to the debtor, deprive him of property in violation of the Fifth Amendment. *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483. And the reason therefor is that Congress had the right to extend the statute of limitations because the right to bring the action did not enter into or become a part of the contract. But where the time within which an action could be brought is agreed upon by the terms of the contract of shipment, it is one of the terms and conditions thereof and Congress could not deprive the plaintiff in error of this property right, for to do so would be a violation of the provisions of the Fifth Amendment. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Phillips Co. v. Grand Trunk Ry.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774; *Central Vt. Ry. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. It was held in *Jones v. Delaware, L. & W. R. R. Co.*, 114 Atl. 331 (N. J. Court of Errors and Appeals), that section 206 (f) was inapplicable to actions under the federal Employers' Liability Act of 1908 (Comp. St. §§ 8657-8665).

Since it appears that this action was not commenced for two years from August 21, 1919, we think that, by the contract of transportation between the parties, the defendants in error may not maintain this action.

Judgment reversed, and a new trial is ordered.

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#### MUSER v. BELL.

(Circuit Court of Appeals, Second Circuit. December 14, 1921.)

No. 67.

1. Patents  $\S$ 26(2)—To constitute invention in combination of old elements, the result must be produced by the combination.

To constitute invention in a new combination of old elements, the result must be the product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined elements.

2. Patents  $\S$ 328—1,207,142, and 1,242,659, for washing machine and mechanism for operating attached wringer, held void for lack of invention.

The Darrow patents, No. 1,207,142, for a washing machine for household use, and No. 1,242,659, for mechanism for operating a wringer attached to such machine, held void for lack of invention.

3. Patents  $\S$ 25—To produce better operating mechanism is not invention.

To produce a more convenient operating mechanism than those who preceded may make for superiority, but this does not make an aggregation patentable.

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$\S$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Heart Lee Muser, executrix, against Harry A. Bell. Decree for defendant, and complainant appeals. Affirmed.

Gorham Crosby, of New York City, for appellant.

Howson & Howson, of New York City (Charles W. Hills and Charles W. Hills, Jr., both of Chicago, Ill., of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This is a suit for infringement on two patents, No. 1,207,142, granted December 5, 1916, and No. 1,242,659, granted October 9, 1917, to H. W. Darrow, and assigned to appellant's intestate Fritz Muser. Both relate to portable washing machines commonly used in the household. Patent No. 1,207,142 relates to a washing machine of the rotating cylinder type; the clothes being washed in a cylinder and the mechanism for rotating the cylinder being arranged and constructed in such a manner, as claimed by the appellant, to be an improvement in the art. Claims 3, 6, and 14 are involved. Patent No. 1,242,659 relates to an improved means for operating a clothes wringer attached to such washing machine. All of the six claims are involved.

The court below held the patents void for lack of invention, and the bill was dismissed. The appellant contends that upon this record the inventions in suit were shown to have been made by Darrow in 1907 or 1908, and that they constituted a definite and important advance in the art, and have contributed to making the cylinder washing machine practicable for general home use. She contends that Darrow invented "a machine having an admirable assemblage of co-operating parts, the first safe, compact, reliable, and convenient arrangement for controlling a driving washing machine of the cylinder type," and that the inventions reside in a new arrangement of old elements and are for combination patents. It is conceded that the separate parts are old.

The claims of patent No. 1,207,142 are as follows:

"3. In a washing machine, the combination of a supporting frame, a tank in the frame, and a cylinder rotatably mounted therein; an upwardly extending driving shaft journaled upon the supporting frame; a gear mounted thereon; means for rotating the cylinder adapted to be actuated by the gear on the driving shaft; manually operatable means controlling the operative connection between the gear on the driving shaft and the means for rotating the cylinder; a motor mounted beneath the machine upon the supporting frame, and operative connections between the motor and the driving shaft."

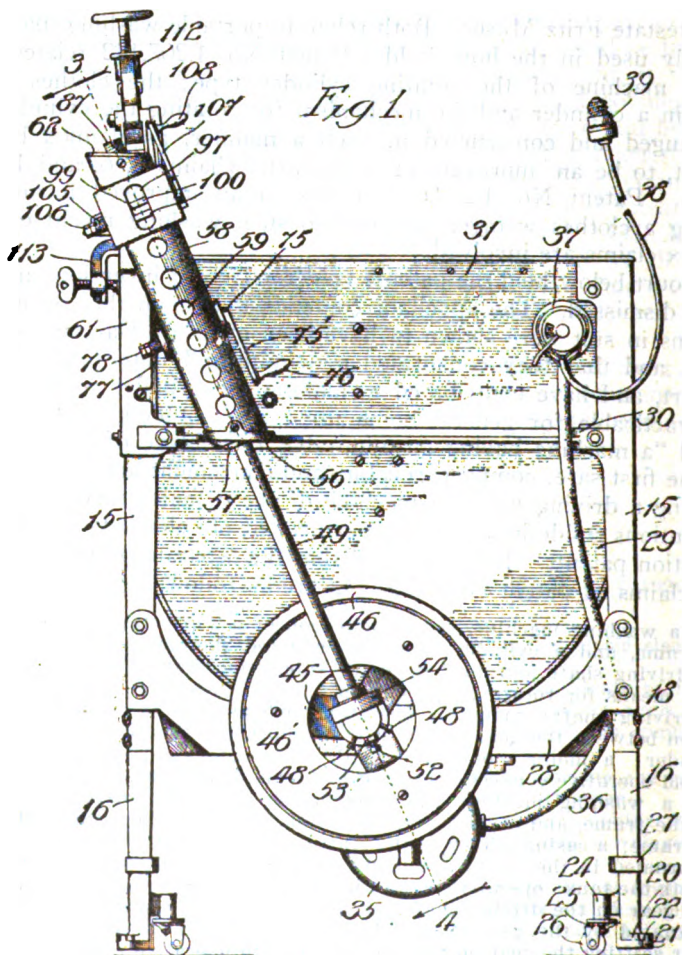
"6. In a washing machine the combination of a supporting frame; a tank in the frame, and a cylinder in the tank, rotatably mounted in the supporting frame; a casing affixed to the frame on one end of the tank, a driving shaft journaled in the casing; a motor mounted upon the supporting frame underneath the tank; operative connections between the motor and the driving shaft; a gear on the driving shaft; means for rotating the cylinder, adapted to be actuated by the gear on the driving shaft; and manually operatable means for shifting the gear on the driving shaft in operative relation with the means for rotating the cylinder, and for controlling the rotation of the cylinder without stopping or reversing the motor."

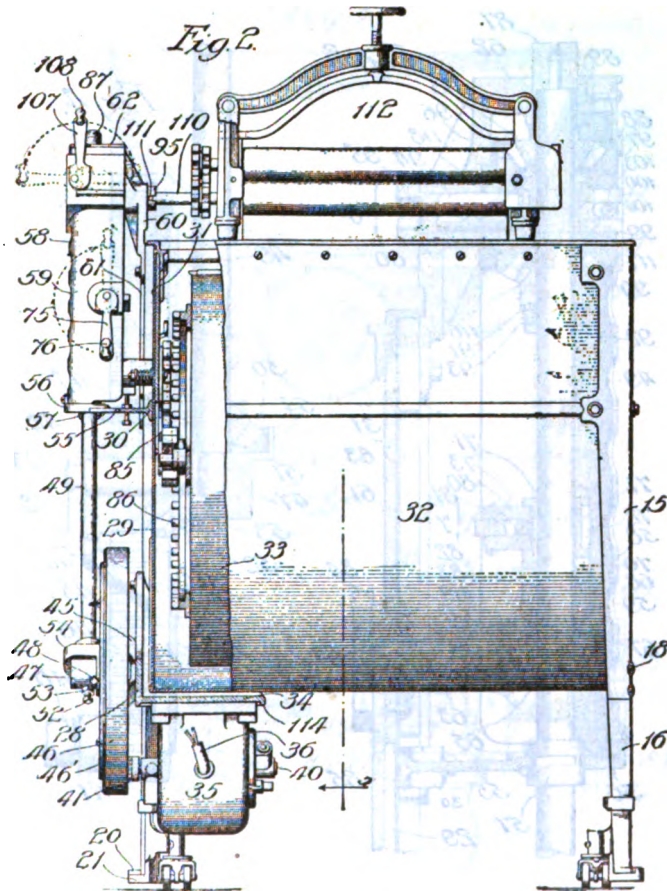
"14. In a washing machine, the combination of a frame; a tank in the

frame; a cylinder rotatably mounted therein; a motor mounted on the frame underneath the tank; a driving shaft journaled on the frame at an approximately right angle to the axis of the cylinder; means operatively connecting the motor with the driving shaft; means on the cylinder, adapted to be engaged by a driving gear; a gear on the driving shaft; an intermediate gear, adapted to be actuated by the gear on the driving shaft, and engaging the means for rotating the cylinder, and manually operatable mechanism for operatively connecting the gear on the driving shaft with the intermediate gear, substantially as herein shown and described."

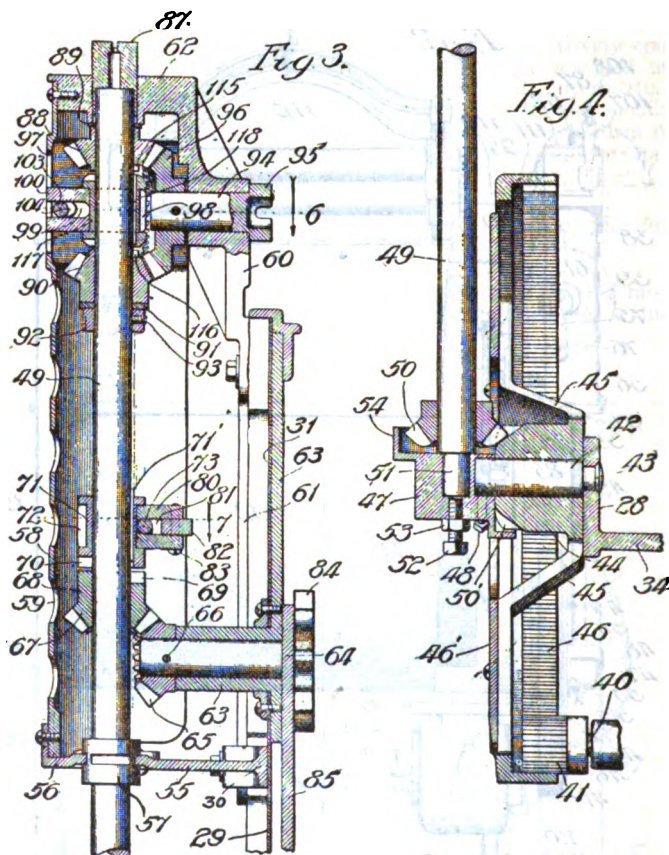
This patent relates solely to the driving mechanism of the machine. The specifications read that the invention relates—

"in general to washing machines and more particularly to driving mechanism for both rotating the washing cylinder and operating the clothes wringer."





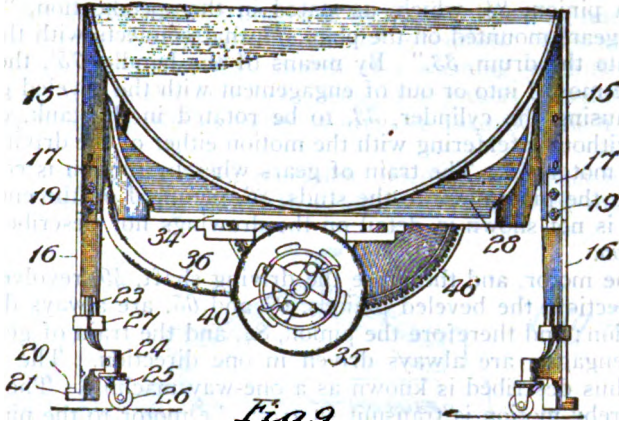
The drawings show a machine supported on four legs, each of which comprises two sections, 15 and 16, screwed together by bolts, 18, supported on legs. There is a tank, 32, inside of which is rotatably mounted a washing drum, 33. This drum is called the washing cylinder. There is nothing in the specifications in the way of description of the washing cylinder or drum, nor do the drawings show the details of construction thereof. The object is stated to be to provide a self-contained safe and easily operatable washing machine for household use, and that the invention consists in devising and in co-operatively combining the component parts of a cylinder washing machine and the driving mechanism thereof. The prior art, as disclosed by the record, is replete with knowledge of washing machines having rotatable cylinders of two kinds. In one kind, the clothes are placed in the tank and washed on the outside of the rotating cylinder, while in the other kind clothes are placed in the cylinder and there washed by being caused to rotate



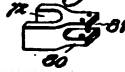
therewith. See Pratt patent, No. 130,821; Smith patent, No. 109,258; Block patent, No. 783,690; Low patent, No. 839,863.

Machines of the cylinder type, in which the clothes to be washed are inside the cylinder, may have the cylinder rotate continuously in one direction, or the cylinder may make a part of the revolution in one direction, and then may be reversed and caused to make a part of the revolution in the opposite direction, or the cylinder may make several revolutions, first in one direction, and then in another. Here the inventor does not limit his machine to one having any particular kind of cylinder, nor does he specifically describe any particular kind of rotation for the cylinder. The mechanism for rotating the cylinder 33, comprises a motor, 35, mounted beneath the tank of the machine and provided with the spur wheel, 41, which engages with the internally toothed wheel, 46, mounted on the stud shaft, 42. The hub, 44, of the gear wheel, 46, has formed on its outer end the beveled teeth, 50, which engage with the beveled wheel, 50, which is mounted on the driving shaft, 49.

*Fig. 5.*

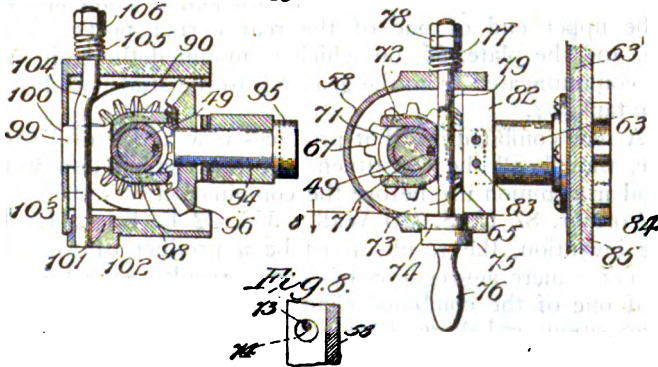


*Fig. 9.*



*Fig. 6.*

*Fig. 7.*



The driving shaft, 49, extends upwardly along one end of the tank, 32, and has its lower end supported in the block, 47, and its upper end journaled in the bushing, 57, supported on the bracket, 55. The extreme upper end of the shaft, 49, is journaled in the bushing, 87, mounted in the cap plate, 62, of the casing, 58. As shown in Fig. 3, the shaft, 49, has loosely mounted on it a beveled gear, 67, which engaged with the beveled gear, 65, mounted on the short shaft, 84. 71 is a collar slidably mounted on the shaft, 49, so as to rotate therewith, and which may be shifted up or down on said shaft by means of the eccentric, 73, operated by the crank handle, 75'. The collar, 71, has clutch teeth, 70, formed on its lower end, which are adapted to engage with the clutch teeth, 69, formed on the hub of the beveled gear, 67. When the handle, 75', is in down position, as shown by the full lines in Fig. 2, the clutch teeth, 70, of the collar, 71, engage with the clutch teeth, 69, of the beveled gear, 67, and the beveled gear, 67, is thereby

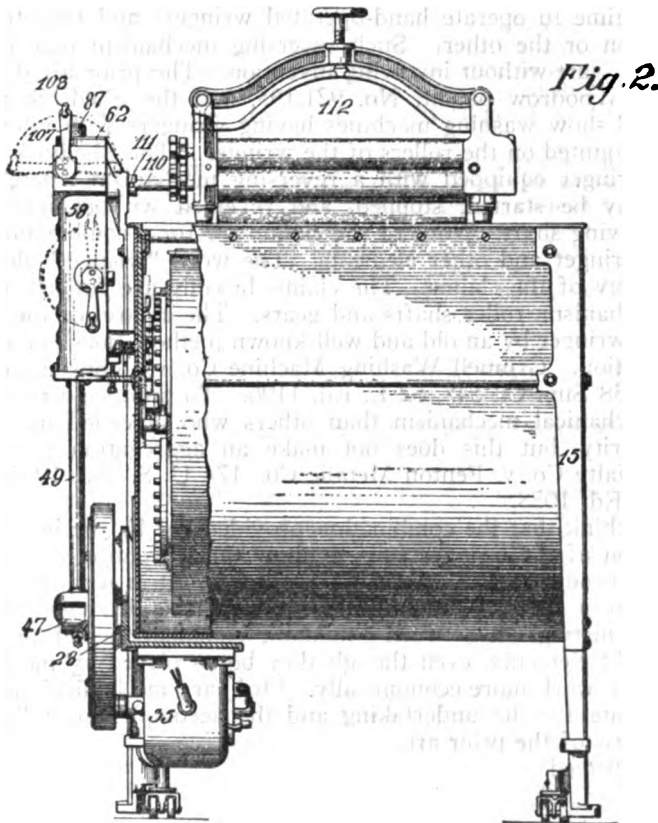
operatively connected to the beveled gear, 65, so that the latter is driven by the driving shaft, 49. On the inner end of the shaft, 64, there is mounted a pinion, 84, which, as stated in the specification, "engages a train of gears mounted on the plate, 85, that connects with the studs, 86, to rotate the drum, 33." By means of the handle, 75', the collar, 71, may be moved into or out of engagement with the beveled gear, 67, thereby causing the cylinder, 33, to be rotated in the tank, or to be stopped, without interfering with the motion either of the driving shaft, 49, or the motor, 35. The train of gears whereby motion is communicated from the pinion, 84, to the studs, 86, mounted on the end of the drum, 33, is not shown in detail on the drawings nor described in the specification.

Since the motor, and therefore the driving shaft, 49, revolve always in one direction, the beveled pinions, 67 and 65, are always driven in one direction; and therefore the pinion, 84, and the train of gears with which it engages, are always driven in one direction. The washing machine thus described is known as a one-way machine. The various gears whereby motion is transmitted from the motor to the pinion, 84, are inclosed by casings. Casing, 58, which incloses the slidable collar, 71, and the beveled gears, 67 and 65, is attached to the washing machine at its lower end by means of the bracket, 55, and at its upper end to the upper end of one of the rear corner posts. The gear wheel, 84, and the plate, 85, on which is mounted the train whereby motion is communicated from the gear, 84, to the studs, 86, lies wholly within the tank, 32.

[1, 2] A new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. *Hailes v. Van Wormer*, 87 U. S. (20 Wall.) 353, 22 L. Ed. 241. But, to constitute invention, the results must be a product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined elements. Merely bring old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention. To constitute invention, the inquiry is, has there been produced a new and useful result? The joint product of the elements of the combination must be something which is more than an aggregation of old results. To obtain a monopoly awarded by a patent, and thus prevent others from using the same devices, it must appear by the use of the combination of elements that a new and useful result is obtained. A mere multiplicity of elements does not make it patentable, and so long as each element performs some old and well-known function, is not a patentable combination but an aggregation of elements. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; *Brinkerhoff v. Aloe*, 146 U. S. 515, 13 Sup. Ct. 221, 36 L. Ed. 1068. In the combination considered at bar, each of the several parts of the driving mechanism is old. The motor and its use is old. The incasing of gearing is old. When the patent was issued, washing machines having all the elements set forth in the claims were in common use, and were being made and sold by a number of manufacturers.

If prior to December 5, 1916, the inventor taught the public and manufacturers of washing machines the alleged combination set forth in the claims, he must have taught it to them by making and publicly exposing machines embodying his alleged invention. This would constitute a public use. For this control of a washing machine with the co-operation of the elements here brought together, accomplished no new result involving the exercise of creative faculty, which is invention.

Patent No. 1,242,659 is for reversible driving mechanism for clothes wringers. The drawing shows the clothes wringer, 112, mounted on



the rear side of the washing machine and driven by power shaft, 49, operated by means of a motor, 35, supported beneath the tank of the machine. The mechanism whereby the motion is communicated from the driving shaft, 49, to the wringer, 112, is inclosed in a housing, 58, attached at its upper end to a bracket, 62, which is secured to the upper corner of the machine. The claim substantially set forth a combination comprising a frame and pair of rollers rotatably mounted in the frame, intermeshing gears mounted on their axes to convergently rotate

the rollers, a driving shaft, gears mounted thereon, an intermediate shaft, operatively connected with the gears mounted on the axes of the rollers, a gear on the intermediate shaft meshing with the gears on the driving shaft.

We think the claims cover an aggregation, since the mechanism could be adapted to any other apparatus as well as a clothes wringer. A clothes wringer cannot be claimed as an element of the combination. The addition of reversing mechanism connected to a wringer is not considered to involve invention. Reversing gearing was old, and to operate a wringer by power and incorporating a reversing mechanism would not involve invention for the reason that it has been well known for a long time to operate hand-operated wringers and turn them in one direction or the other. Such reversing mechanism may be employed in any art without involving invention. The prior art discloses this. The Woodrow patent, No. 921,195, and the Shedlock patent, No. 421,198 show washing machines having wringers with intermeshing gears mounted on the rollers of the wringer. The Shedlock patent shows a wringer equipped with a reversing mechanism whereby the wringer may be started, stopped, and reversed without interfering with the driving shaft. None of the claims are for a combination with a clothes wringer and other elements. The word "wringer" does not appear in any of the claims. The claims broadly are for a combination of mechanism, roller shafts and gears. The control of the operation of the wringer by an old and well-known method, does not amount to an invention. *Grinnell Washing Machine Co. v. Johnson Co.*, 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. To produce a more convenient mechanical mechanism than others who preceded may make for superiority, but this does not make an aggregation patentable. *Office Specialty Co. v. Fenton Metallic Co.*, 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058.

[3] We think that the combination provided for by the inventor in the operation of the wringer fails to show that invention is achieved. It does not produce such a novel and useful result in what is claimed by the inventor for the co-operating action of the elements, which is essential to distinguish between patentable combination and an aggregation of old elements, even though they be so placed by mechanical skill as to do work more economically. Ordinary mechanical skill was fully adequate for the undertaking and the accomplishment here obtained in view of the prior art.

Decree affirmed.

MARTIN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 76.

1. Criminal law ~~§~~ 13—Conviction proper under statute not defining.

A conviction may be had for extortion under Criminal Code, § 85 (Comp. St. § 10253), though such statute does not define the term, notwithstanding sections 332, 333, 340 (Comp. St. §§ 10506, 10507, 10514).

2. Extortion ~~§~~ 4—Special agent of Department of Justice held guilty of extortion.

A special agent of the Department of Justice, who falsely informed one who applied for a visa on a passport to permit an alien to visit the United States, that to get the matter attended to promptly a man must be sent to Washington and that the expenses incidental thereto would be \$300, and required the applicant to pay the \$300 after the application had been granted at Washington, was guilty of extortion under Criminal Code, § 85 (Comp. St. § 10253).

3. Bribery ~~§~~ 1(1)—Criminal law ~~§~~ 37—Offense of accepting bribe complete when person asks for money; defense of entrapment held without merit.

The offense of accepting a bribe, under Criminal Code, § 117 (Comp. St. § 10287), consists in asking for the money, and one prosecuted therefore cannot insist that government agents laid a trap, where the latter did nothing until the crime or arrangements were completed, and then only for the purpose and with the result of verifying the report of the person called on to pay the bribe.

In Error to the District Court of the United States for the Southern District of New York.

Eugene P. Martin was convicted of accepting bribes and extortion, and brings error. Affirmed.

The indictment contained seven counts. The first six charged that defendant accepted bribes as a special agent of the Department of Justice in violation of section 117 of the Criminal Code (Comp. St. § 10287). The seventh count charged extortion under section 85 (Comp. St. § 10253). Defendant was acquitted upon the first five counts and convicted on the sixth and seventh counts.

Defendant was a special agent of the Department of Justice, attached to the Bureau of Investigation in New York City. One Daus, a German subject, applied to the State Department for a visa upon his passport in order to permit him to visit the United States. He named, as a reference, one Leo Levy, a retired stockbroker and an American citizen. The State Department, in accordance with its routine, referred the Daus application to the Department of Justice for examination of the persons named as references, and, in due course, the duty was assigned to defendant. Levy was formally requested by defendant to call at the bureau for examination and he did call on defendant on November 16, 1920. Levy explained that he wished to aid Daus, who was his brother-in-law, to pass through the United States on his way from Cuba to Germany, as Daus was a sick man, and wished to avoid a three-weeks crossing in a small vessel from Cuba. Levy told defendant that, "if there were any incidental expenses connected with expediting the matter," he would not object to paying them.

After asking Levy some formal questions, defendant told him to obtain two affidavits from reputable merchants as to the character of Daus and to return later in the day. This Levy did. After defendant had read the affida-

vits, he said, according to Levy: "There are two ways of doing this thing. One is the regular way, which \* \* \* may take weeks, and which may take months. Then again there is another way, according to which matters can be considerably expedited. But that \* \* \* will cost you money. \* \* \* You know those fellows down in Washington want to be greased. \* \* \* They are not down there for their health." Martin said it would cost \$300, and when Levy demurred, saying he did not like to pay \$300, unless he felt "sure there is going to be a favorable result," defendant answered: "All you will have to agree to \* \* \* will be to pay for the preliminary expenses, the incidental expenses, in connection with sending a man down to Washington," and the amount named was \$30, to the payment of which Levy agreed, and thereupon defendant said: "All right; \* \* \* you will hear from me further."

Defendant did not transmit the affidavits through the Washington office, as was his duty. Instead, he retained them from November 16th to November 23d, and on the latter date wrote to Metcalf, an employee of the Department of Justice at Washington, inclosing the affidavits and stating: "I promised to forward these affidavits with the idea in view that, if the State Department \* \* \* are shown these affidavits, no doubt it will expedite the matter, and therefore take the liberty of asking you, at your earliest convenience, to take up this matter at your earliest convenience." No copy of the letter was made for the files of the local bureau, nor any record made thereof. Metcalf (the propriety of whose conduct is not questioned) and defendant had been acquainted for some years, first having met in official relationship. Metcalf's duties were not, in any way, concerned with visa references. Metcalf carried out defendant's request, and delivered the letter and affidavits to an employee of the Department of State at Washington, and the letter thus became part of the official file of that department.

Having learned from Metcalf that the application had been granted, defendant, on November 24th, informed Levy by telephone accordingly. At that time, defendant's official duties in this connection were ended. On cross-examination, it developed that on November 16th, after Levy's conversation with defendant, he communicated the substance of the conversation to an employee of the Department of Justice, whom he happened to know. Thus it was that on November 26th Levy telephoned from an office of the Department of Justice in New York to defendant at the latter's home, and a stenographer in the Department of Justice took down the conversation, at the end of which Levy said that he was willing "to go through with it," and defendant said, "That is all right."

On December 1st, defendant called at Levy's office and collected the \$30 for the pretended expenses of sending a man to Washington. At the same time defendant showed Levy a letter written by an employee of the State Department to Metcalf, stating that the application had been granted. Metcalf mailed that letter to defendant, pursuant to a telephone request made by defendant, when he called Metcalf at Washington, and inquired whether the latter had heard anything in regard to the application. On December 7th Levy called upon the defendant, pursuant to the latter's suggestion. Levy was then acting with the knowledge of Lamb, Division Superintendent of the Department of Justice, and defendant's superior. Levy handed defendant \$270 in currency, contained in an envelope. Defendant drew from his pocket a long envelope, addressed and bearing postage. He placed the envelope, containing the money given by Levy, in the larger envelope, sealed that envelope, and placed it in his pocket. The envelope was obtained from one Newman, a special agent, and defendant admitted he had given the envelope to Newman to mail. It was addressed to Frederick L. Kramer, 120 Broadway, and on the back bore the writing, "E. P. M., 197 Highland Place, Brooklyn, N. Y."

The defendant resided in New Rochelle. His sister resided at the return address written on the back of the envelope addressed to Kramer. Kramer, an attorney, was an old friend of defendant, and had permitted him to use his office on previous occasions as a mailing address. Defendant did not testify, although a statement made by him to Lamb, after he had attempted to mail the \$270, was introduced as part of the prosecution's case.

Slade & Slade, of New York City (David H. Slade, of New York City, of counsel), for plaintiff in error.

William Hayward, U. S. Atty., and John E. Joyce, Asst. U. S. Atty., both of New York City.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). [1] 1. It is contended that the seventh count fails to charge a crime, because the statute fails to define extortion. Section 85 of the Criminal Code reads as follows:

"Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who, under color of his office, clerkship, agency, or employment or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

Attention is called by defendant to sections 332 and 333 of the Criminal Code (Comp. St. §§ 10506, 10507), where the expression "an offense defined in any law of the United States" is used, and to section 340 (Comp. St. § 10514), which provides: "The crimes and offenses defined in this title shall be cognizable in the Circuit and District Courts, \* \* \*" as prescribed in R. S. §§ 563, and 629 (Comp. St. § 991). Briefly stated, the argument is, first, that in any event the statute must define the crime of extortion; and, secondly, that under section 340, *supra*, the crime is not cognizable in the national courts, because not defined "in this title."

An examination of the Criminal Code and of the Revised Statutes will show that, in a considerable number of instances, crimes denounced have not been defined. Some of these statutes, in substantially their present form, have been on the books for over or nearly a century. Thus R. S. § 5286 (Comp. St. § 10177), as to military expeditions against people at peace with the United States, had its origin in a statute of 1794; section 5368 (Comp. St. § 10463), as to piracy, in a statute at least as early as 1819; and the statute here under consideration (section 85), as to extortion, in a statute at least as early as 1825. "Steal," for instance, is not defined in Criminal Code, §§ 36 and 47 (Comp. St. §§ 10200, 10214); nor "forge" in sections 27 and 30 (Comp. St. §§ 10191, 10194); nor "rob," in section 46 (Comp. St. § 10213); and the illustrations could be multiplied.

Thus, by a long history of practical construction by the Legislature and by the decisions of the courts, resort is had either to the common-law definitions of offenses of an ancient character or to the ordinary meaning of words or to both. Two noteworthy cases, each well worth reading and highly instructive, have settled the principle.

In *United States v. Smith*, 18 U. S. (5 Wheat.) 153, 5 L. Ed. 57, it appears that Smith was indicted for piracy committed in violation of the Act of March 3, 1819, § 5, 3 Stat. 513. That act provided "that if any person \* \* \* shall, on the high seas, commit the crime of piracy, as defined by the law of nations, \* \* \*" he should be

punished with death. The case was argued by Wirt for the United States and Webster for defendant, and Mr. Justice Story delivered the opinion of the court. "The argument," said Mr. Justice Story, "is that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. \* \* \*" After disposing of this argument, Mr. Justice Story continued:

"But supposing Congress were bound, in all the cases included in the clause under consideration to define the offense, still there is nothing which restricts it to a mere logical enumeration in detail, of all the facts constituting the offense. Congress may as well define, by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is, by necessary reference, made certain. When the act of 1790 declares that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where 'malice aforethought' is of the essence of the offense, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation."

Considering next whether the crime of piracy was defined by the law of nations with reasonable certainty, Mr. Justice Story observed:

"What the law of nations on this subject is may be ascertained by consulting the works of jurists, writing professedly on public laws, or by the general usages and practice of nations, or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature, and, whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations (which is part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race."

After an exhaustive review of the authorities, it was concluded:

"So that, whether we advert to writers on the common law or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea."

These quotations are extracted solely for convenience, although the opinion should be entirely read to appreciate its full value.

In *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, defendant, with others, was indicted for setting on foot a military expedition and enterprise against Cuba. The court was called upon, *inter alia*, to ascertain the meaning of "military expedition or enterprise," as used in R. S. § 5286, forbidding "any military expedition or enterprise" against any state or people at peace with the United States. Mr. Chief Justice Fuller said:

"The first and the main question in the present case is whether the trial judge erred in his instructions to the jury in respect of what constitutes a 'military expedition or enterprise' under the statute. The question is one of municipal law, and the writers on international law afford no controlling aid in its solution."

The court then examined the definitions of lexicographers and laid down its definition.

Section 273 of the Criminal Code (Comp. St. § 10446) defines the crime of murder, but its predecessor, R. S. § 5339, did not. Lacombe, J., in charging a jury where defendant had been indicted under R. S. § 5339, said:

"But the statutes do not define the offense of murder. Therefore we must turn to the common law, as it was in England before the Revolution, and has been interpreted since by our courts, for a definition of that crime." *United States v. King* (C. C.) 34 Fed. 302, 306.

To the same effect, Maxey, J., charged the jury in *United States v. Lewis* (C. C.) 111 Fed. 630, 632.

[2] Apparently, the first case under the statute as to extortion, of which there is a report, is *United States v. Waitz* (1876) 28 Fed. Cas. 386, No. 16,631. There, Hillyer, J., defined extortion, when charging a jury, as did Dick, J., in *United States v. Deaver* (D. C., 1882) 14 Fed. 595. Judge Thomson in the case at bar instructed the jury in an admirably clear and comprehensive charge. He defined extortion as follows:

"Extortion is the unlawful taking by any officer under color of his office of any money or thing of value that is not due him, or more than is due, or before it is due."

He thus adopted the classic definition of Blackstone. 4 Blackstone, Com. 141; also 1 Hawkins, P. C. 418; 25 C. J. 233. With this definition in mind, if the jury believed the witnesses for the prosecution, the crime of extortion, under section 85, was committed by defendant.

[3] 2. It is contended that defendant was induced to commit the crime charged, and that the government agents laid a trap for him. On the evidence, it appeared that the crime or arrangements were completed on November 16th, and that everything occurring thereafter was done properly and lawfully for the purpose and with the result of verifying Levy's report to the Department of Justice as to the transactions of November 16th. *Grimm v. United States*, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; *United States v. Wight* (D. C.) 38 Fed. 106, 111.

Under Criminal Code, § 117, the crime, inter alia, consists in asking for money or in promising to pay money with intent, etc. As the evidence shows, defendant asked for the money on November 16th, and in any event then agreed to pay the \$30. Everything done thereafter was merely in furtherance of a crime which had been completed on November 16th.

We have examined into the other assignments of error, but they do not present any questions calling for discussion.

Judgment affirmed.

**THE MAREN LEE. THE HERMAN LEE. CONSOLIDATION COASTWISE CO. v. LEE TOWING LINE, Inc., et al.**

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

Nos. 97, 98.

**1. Collision ¶115—Tug is liable for her fault, which caused collision by tow.**

Where a tug, which was made fast to the starboard quarter of a schooner, was at fault for going astern when the schooner took a sheer to starboard, which resulted in a collision, the tug is liable in rem for the resulting damages, though her master, who gave the wrong order, was acting as pilot of the schooner.

**2. Pilots ¶2—Tug master on vessel, directing course in attempt to follow tug, is "pilot."**

The master of a tug, who was stationed on the deck of a schooner in tow, directing her course merely in an endeavor to make her follow another tug, which was towing ahead, was a "pilot," which is the term applied to the officer on board a ship having charge of the helm and of the ship's route, or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.

[Ed. Note.—For other definitions, see Words and Phrases, Pilot.]

**3. Collision ¶115—Vessel is liable for wrong order of contractual pilot.**

Where the pilot in charge of a vessel, whose negligent orders resulted in the collision, was not a compulsory pilot, but one voluntarily accepted as the result of a contract, the vessel is liable in rem.

**4. Collision ¶115—Value of tug, whose master was at fault, exhausted before recourse to tow.**

Where a collision resulted from the negligent order of a tug master, who was on the schooner in tow at the time, under circumstances making both vessels liable in rem for the resulting damages, the value of the tug, whose master caused the collision, should be first exhausted before recourse is had to the tow.

Appeals from the District Court of the United States for the Southern District of New York.

Libels in admiralty by the Consolidation Coastwise Company against the steam tugs Maren Lee and Herman Lee, the Lee Towing Line, Inc., claimant, and against the schooner Cora F. Cressy, Samuel R. Percy, claimant, and by Samuel R. Percy against the steam tugs Maren Lee and Herman Lee, the Lee Towing Line, Inc., claimant, and against the steam tug Cumberland and the barge No. 18, the Consolidation Coastwise Company, claimant. From a decree adjudging the tug Herman Lee and the schooner Cora F. Cressy liable for the damage, the Lee Towing Line, Inc., appealed. Affirmed.

The schooner Cora F. Cressy lay at the Staten Island anchorage on a fair and clear day in April. She is a large five-masted vessel, and drew on the day in question, partly loaded, 24 feet. She employed the Lee Towing Line to take her through the East River, and the two tugs Maren and Herman Lee were assigned to do the work. The larger tug (Maren Lee) took position ahead with the usual towing line, the Herman Lee made fast on the starboard quarter of the schooner, and the flotilla started, entering the East River through Buttermilk Channel. There was a strong flood tide in the river, and the tugs attained considerable speed, it is said as much as seven miles an hour. At the same time the tug Cumberland, with two light barges in tow

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on short hawsers, was coming down the river on a voyage from Boston to Baltimore. Congestion of shipping compelled the Cumberland to get over on the Brooklyn side of the East River approximately in the neighborhood of Manhattan Bridge, at the time when the Maren Lee was passing or about to pass under the Brooklyn Bridge.

The master of the Herman Lee left his tug on the schooner's starboard quarter and took position on the latter vessel's forecandle head. The schooner's master was not aboard; she had two mates, however, of whom the senior was forward with the tug captain, and the second aft, in such a position that he could see what the man at the wheel was doing and give him orders, if necessary. The tug captain went on the schooner's forecandle head, because he thought that the best place to give orders, not only to the man at the wheel of the schooner, but to his own tug, to the end that the long and heavy tow might follow the Maren Lee properly. The tug master gave orders for the schooner's helm by waving his arm, though by some of the evidence he either also gave oral commands, or the schooner's officers translated the tug master's arm wave into words, and so passed the command to the wheelman.

Between the Brooklyn and Manhattan Bridges the Maren Lee and her tow were obliged to pass the Cumberland and her tow starboard to starboard. As they were about to pass, the schooner sheered suddenly toward the Brooklyn shore, and with such violence that the Maren Lee was unable to check the sheer before the schooner came in contact with one of the Cumberland's barges, injuring both vessels. At the time of collision the Cumberland and tow were within less than 100 feet of the Brooklyn pierhead line. While going through Buttermilk Channel the schooner had manifested a tendency to sheer; whether she again sheered, and toward Brooklyn, when approaching the Cumberland, is not clear, but probable; but the immediate cause of collision was that the helm of the schooner was so moved as to direct her course toward Brooklyn, while at the same time, according to his own evidence, the tugmaster ordered his own vessel, the Herman Lee, to go "hard astern and hook her up again."

At or just before the moment of collision the helm of the Cressy was hard aport and the tug on her starboard quarter was backing strong. The owners of both injured vessels filed libels against all the other parties concerned. The lower court exonerated the Cumberland and the Maren Lee, adjudging that all the resulting damage should be borne by the Herman Lee and the Cora F. Cressy. The only appeal was taken by the owner of the Herman Lee, but in this court the owner of the Cressy reasserts the schooner's freedom from blame.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter and Robert S. Erskine, both of New York City, of counsel), for the Herman Lee.

Carter & Carter, of New York City (Peter S. Carter, of New York City, of counsel), for the Cora F. Cressy.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for the Cumberland and her tow.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This collision was singularly inexcusable; in investigating accidents of this class, one piece of gross negligence is usually discovered. In commenting on the evidence, an experienced trial judge said that he found the captain of the Herman Lee "untrustworthy, not only in his report to the local inspectors, which is extremely uncandid, but also in his conflicting stories of the orders given to his tug." We entirely agree with this estimate of the witness, and find that the main responsibility for

collision rests on him. We further agree that the *Maren Lee*, the *Cumberland*, and the latter's tow were wholly without fault. The *Cumberland* was excused by the exigencies of navigation in going down the river near the Brooklyn shore; there was plenty of room for the schooner and her tugs to pass starboard to starboard, and if the schooner had followed straight after the *Maren Lee* (which vessel was laying a proper course) there would have been no collision.

It is quite probable that the root of the difficulty was that the tug master on the forecastle head faced aft and attempted to give his steering orders by waving his hand in the direction that he wished the schooner's head to turn. It is the historic rule of the sea that orders are always given to the helm, and it may be true that, when the tug captain waved his hand to port, the signal was interpreted as meaning to put the helm to port. But, however this may be, no excuse can be suggested for ordering the tug on the starboard quarter to go astern as hard as she could, when a sheer toward Brooklyn was developing, no matter what the cause of the sheer. This was the commission of a marine tort on the part of the helper tug *Herman Lee*, and is sufficient to hold her in rem.

[2] So far as the liability of the schooner for injury to a third party—i. e., the *Cumberland's* barge—is concerned, it makes no difference whether the sheer toward Brooklyn which brought about collision was caused or contributed to by a wrong order from the tug master or a wrong understanding of that order, if that tug master was a pilot. He was, of course, a pilot in the sense that he was a licensed man; but the question is whether, when performing so humble a duty as merely trying to keep the schooner straight behind the *Maren Lee*, he was acting as a pilot.

"The name of pilot or steersman \* \* \* is applied either to a particular officer serving on board a ship during the course of a voyage, and having the charge of the helm, and of the ship's route, or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port." *The Wave v. Hyer*, Fed. Cas. No. 17,300, 2 *Palne*, 181.

"The term pilot is equally applicable to two classes of persons, to those whose employment is to guide vessels in and out of ports, and to those who are entrusted with the management of the helm and the direction of the vessel on her voyage." *Pacific Mail, etc., v. Joliffe*, 2 *Wall.* 461, 17 *L. Ed.* 805.

Within these authoritative definitions it is plain that in the legal sense the master of the *Herman Lee* was acting as pilot of the *Cressy* when directing, or attempting to direct, her course, even though that course was but the wake of a towing tug.

[3] He was not a compulsory pilot, but one voluntarily accepted as the result of contract. Wherefore, if he gave a wrong order, which caused or contributed to collision, the *Cressy* is liable as the offending res (*Homer Ramsdell, etc., Co. v. La Compagnie Générale*, 182 *U. S.* 406, 21 *Sup. Ct.* 831, 45 *L. Ed.* 1155, and cases cited); whereas, if he gave a proper order (which we do not believe he did), and that order was misunderstood by the ship's officers and/or the man at the wheel, the schooner is also liable, though for another reason.

[4] It is evident from the apostles that the liability of the *Cressy*

is important, because the Herman Lee is not sufficiently valuable to cover all the damage. As we have found that a wrong order given by the master of the Herman Lee was the proximate cause of collision, it was correct (as was done in the court below) to order that the value of the Herman Lee should be first exhausted before recourse was had to the Cressy.

Decree affirmed, with the costs of this court to the Consolidation Coastwise Company only.

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**BERTHELOT v. ISAACSON et al.**

(Circuit Court of Appeals, Fifth Circuit. February 13, 1922.)

No. 3686.

**Trusts** §31—Voluntary conveyance held to create implied trust.

Where a grantee of property admitted that for some years she had lived with and cared for the grantor in the home of the latter, and that, though not of kin, their relationship was as intimate as that of mother and daughter, and it was not claimed that any money consideration was paid for the conveyance, and where on her death the grantor left a daughter, to whom she bequeathed all her property, the circumstances raised an implied trust, and the burden of explanation and affirmative proof of the complete fairness of the transaction rested on the grantee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, New Orleans Division; Rufus E. Foster, Judge.

Suit in equity by Mrs. Beatrice Berthelot, widow of Alvin E. Herbert, against Mrs. Aline J. Isaacson and others. Decree for defendants, and complainant appeals. Reversed and remanded.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La., for appellant.

Charles Carroll, Joseph W. Carroll, and Henry G. McCall, all of New Orleans, La., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Mrs. Celeste Berthelot was an elderly woman residing in the city of New Orleans, who owned certain property situated in the Sixth district of said city. She had, on July 12, 1911, borrowed \$4,000 from the Union Homestead Association, and to secure the same had conveyed said property by an act of sale to said association, and had contemporaneously received from said association a reconveyance, which reserved a vendor's lien and special mortgage to secure said \$4,000; she pledging at the same time 40 shares of the stock in said association as additional security for said loan. Mrs. Berthelot had a daughter, Mrs. Beatrice Berthelot Hebert, a widow, complainant in the court below and appellant, with whom she had had some disagreement arising from a remarriage which Mrs. Hebert proposed. Mrs. Hebert had gone to California. The defendant, Mrs. Isaacson, now Mrs. Simon, was living with Mrs. Berthelot. Their relations were very close; although not actually related, they treated

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each other as mother and daughter, and Mrs. Isaacson called Mrs. Berthelot and spoke of her as her mother, and was apparently looking after her.

Mrs. Berthelot was evidently unable to keep up her payments to the association, which was pressing her for settlement. On July 31, 1918, by some arrangement with Mrs. Isaacson, Mrs. Berthelot transferred said property to said Homestead Association for a stated price of \$4,300, and upon the same day said association granted a loan of \$4,300 to Mrs. Isaacson, as shown by the minutes of the Homestead Association, in which the president reported that, the application for this loan having been approved, he had signed the act of sale from Mrs. Berthelot to the association for \$4,300 and the act of resale from the association to Mrs. McEniry (Isaacson) for \$4,300. The only payment shown in the matter was a check of the association for the sum of \$4,300, drawn to the order of Mrs. Isaacson and indorsed by her to the notary public before whom these acts had been executed. Mrs. Berthelot and Mrs. Isaacson continued to occupy the premises, moving into a small house on the rear thereof and renting out the main buildings. About a year thereafter, Mrs. Berthelot made a trip to California to visit her daughter, Mrs. Hebert. While there she executed a will, in which she bequeathed all of her property to Mrs. Hebert, and on the 29th of June, 1919, she died.

It appeared that shortly before leaving New Orleans for California she had made a will in the holographic form in favor of Mrs. Isaacson, constituting her universal legatee, expressing therein the hope that she would see that the minor children of Mrs. Hebert should never want for anything. Mrs. Isaacson went into possession of the property. It appears that she had subsequently made an additional loan of \$2,000 and sold the rear part of the premises for \$4,250 cash. She admits in her answer that the remaining part of the property is worth approximately \$7,000. Mrs. Hebert, on April 9, 1920, filed a bill of complaint, alleging that Mrs. Berthelot was induced to make the transfer of said property to Mrs. Isaacson on the representation that she believed it to be necessary to secure the same to her grandchildren, the children of Mrs. Hebert, from being dissipated by complainant and her intended husband. She prayed that upon payment by her of the amount due to the Homestead Association that Mrs. Isaacson should account for the proceeds of the sale of the part sold to the Eureka Homestead Association, and be required to reconvey the property to Mrs. Hebert.

The answer of the defendant admitted the relationship between herself and Mrs. Berthelot, and said that for many months prior to her death Mrs. Berthelot lived with said defendant, was in feeble health, and unable to work, and that friendship and intimacy existed between them. The letters introduced showed that their relationship was as intimate as that of mother and daughter, and that the defendant called and spoke of Mrs. Berthelot as her mother. No proof was introduced of anything paid to Mrs. Berthelot for the conveyance of said property. The answer of the defendant did not so claim. A subsequent answer of the defendant to a petition for rehearing of the case

admitted the receipt of all of the money, but claimed \$378.92 was expended on account of Mrs. Berthelot. The defendant, although present in court, did not take the stand, or offer any explanation or testimony as to the reasons for the vesting of the title to this property through the Homestead Association in her.

The court below held that there was nothing in the case to create an implied trust, although it held that the property was sold for a good deal less than it was worth at the time. While the law of Louisiana prohibits the creation of express trusts, it has been ruled by the Supreme Court of the United States that this does not abolish implied trusts. *Gaines et al. v. Chew, Executor*, 2 How. 619, 650, 11 L. Ed. 402. It has also been held by the United States Circuit Court for Louisiana:

"The purchase by Bell, with the money of the bankrupt estate, subjected the property, though standing in the name of Bell, to a resulting trust in favor of the bankrupt estate. *Perry, Trusts*, § 128; *Trench v. Harrison*, 17 Sim. 111; *Gaines v. Chew*, 2 How. (43 U. S.) 619; *McDonogh v. Murdoch*, 15 How. (56 U. S.) 367. This same doctrine is recognized in Louisiana: *Hall v. Sprigg*, 7 Mart. (La.) 244; *Rhodes v. Hooper*, 6 La. Ann. 357; *Giannoni v. Gunny*, 14 La. Ann. 632; *Livingston v. Morgan*, 26 La. Ann. 646." *Flanders v. Thompson et al.*, 3 Woods, 9, 11, Fed. Cas. No. 4,853.

The jurisdiction for enforcement of such trusts is a well-known equitable jurisdiction of the United States courts sitting in equity. The procedure for enforcing such rights is—

"not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. *Rev. Stat.* §§ 913, 917; *Neves v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430; *Dodge v. Tulleys*, 144 U. S. 451, 457; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204." *Guffey v. Smith*, 237 U. S. 101, 114, 35 Sup. Ct. 526, 530 (59 L. Ed. 856).

It is well settled that:

"When two persons occupy to each other a confidential or fiduciary relation, and a sale is made by the party reposing confidence to the party in whom confidence is reposed, equity raises a presumption against the validity of the transaction; and to sustain the sale the buyer must show affirmatively that the transaction was conducted in good faith, without pressure of influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. There is a well-defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence arising from fiduciary relations existing between the parties. The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one." 26 R. C. L. 1250.

See, also, *Townes v. Townes* (C. C. A.) 270 Fed. 744, 748.

We think that the admissions in the answer of the defendant in this case, and in the correspondence introduced, show that such a confidential relationship existed between these parties that the burden of explanation and affirmative proof of the complete fairness of this transaction is upon the defendant, and that the court therefore erred in holding that under the proof in the case no implied trust existed.

The decree of the District Court is reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

**HIRSCH v. ISAAC JOSEPH IRON CO.**

(Circuit Court of Appeals, Third Circuit. February 14, 1922.)

No. 2719.

1. Principal and agent ¶103(5)—Inspector agreed on in contract held not agent of buyer to accept delivery.

Where a contract for the sale and immediate delivery by defendant to plaintiff of 1,000 tons of rails, subject to inspection by a testing company, was made, as known by defendant, to fill a contract by plaintiff to supply such rails to a third party, the representative of such third party and the inspector of the testing company, who were present at the time and place where the rails were to be delivered and loaded, cannot be held agents of plaintiff, with authority to accept delivery, or to waive any conditions of the contract.

2. Sales ¶62, 164—Contract held entire; buyer not required to accept partial performance of entire contract.

A contract for the sale and immediate delivery of 1,000 tons of rails is an entire contract, and both time and quantity are of its essence, and the buyer is not required to accept delivery of a smaller quantity, with no offer or intention by the seller to make further delivery within the reasonable limit of time required by the contract.

3. Contracts ¶316(1)—Waiver of provisions must be with knowledge of material facts.

Waiver of the requirements of a contract must be based on knowledge of the material facts.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the Isaac Joseph Iron Company against Henry Hirsch, doing business as the Contractors' Machinery & Supply Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sachs & Caplan and Charles H. Sachs, all of Pittsburgh, Pa., for plaintiff in error.

Alter, Wright & Barron, of Pittsburgh, Pa., Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, Gifford K. Wright, of Pittsburgh, Pa., and A. W. Goldsmith, Jr., of Cincinnati, Ohio, for defendant in error.

Before WOOLLEY and DAVIS, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge. The Isaac Joseph Iron Company, plaintiff below, hereafter referred to as the plaintiff, and Henry Hirsch, doing business as Contractors' Machinery & Supply Company, defendant below, hereafter referred to as the defendant, on March 7, 1918, entered into a contract, through letters and telegrams, by the terms of which the defendant agreed to make immediate delivery to the plaintiff of 1,000 tons of 56-pound relaying rails with angle bars, subject to the Pittsburgh Testing Laboratory inspection, for the price of \$55 per ton f. o. b. Durbin, W. Va. The plaintiff sued to recover damages for the defendant's alleged breach of the contract in failing to deliver in accordance with its terms. At the trial the plaintiff's evidence tend-

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ed to show that it had entered into a contract with the Miami Conservancy District for the sale of the rails to it for immediate delivery, and that the defendant had notice that the rails were required for the performance of its contract with the Conservancy District. The defendant attempted to supply the rails from track of the Thorny Creek Lumber Company.

The plaintiff's representative, Hoeffler, went to Durbin on March 9, and, finding no cars, had three cars placed for loading. Monk, an inspector of the Pittsburgh Testing Laboratory, was there to inspect the rails, and the representative of the Conservancy District, Kramer, was upon the ground looking after the interests of the Conservancy District. The inspection and loading of the rails had begun on March 12th, when Hoeffler left Durbin, and he, having learned that a sufficient quantity of rails was not available in the Lumber Company's tracks, and that there was no possibility of those available being ready for shipment within five or six weeks, on the 13th and 14th by letter demanded information from the defendant of the whereabouts of the rails to make up the balance of 1,000 tons. On March 18th three cars, containing 110 tons of rails that had passed Monk's inspection, were shipped.

Meanwhile the plaintiff, having received no information from the defendant concerning other rails to fill the contract, and having been informed that but 140 tons altogether were available for immediate delivery, owing to the fact that the Thorny Creek Lumber Company refused to allow any more rails to be taken up until it had finished hauling out its logs, which was likely to take several months, on March 20th notified the defendant that it had defaulted in its contract for immediate delivery of 1,000 tons, that it refused to accept the three carloads shipped, and that it would hold the defendant liable for damages for breach of its contract. The defendant offered no evidence, moved for a nonsuit, which was refused, and thereupon presented a point for a directed verdict for the defendant, which was also refused. Upon a verdict for the plaintiff, and a refusal of a new trial, the defendant prosecuted his writ of error, assigning as error the refusal of the defendant's request for binding instructions and the entry of judgment upon the verdict.

[1] It is contended on the part of the defendant that the plaintiff breached the contract by its refusal to accept the three cars. It is argued that Monk and Kramer were the agents of the plaintiff, and that, inasmuch as Monk accepted the three cars of rails on inspection, and Kramer was present at their loading and rode with them to Englewood Junction, Dayton, Ohio, and the cars had been placed on March 11th on Hoeffler's order, the facts constitute a delivery to and acceptance by the plaintiff and a modification of the contract as to time and quantity. Unless the defendant is right in his contention that Monk and Kramer were acting as agents for the plaintiff, his entire case falls, for it is dependent upon that hypothesis. But there is no evidence to sustain it.

[2] Monk's sole authority was to represent the Pittsburgh Testing Laboratory in the inspection provided in the contract. Kramer was

there to look after the interests of the Miami Conservancy District as its representative. No inference can be drawn from the evidence that either of them had authority to accept a quantity of rails less than provided in the contract. It was an entire contract for 1,000 tons for immediate delivery (*Norrington v. Wright*, 115 U. S. 203, 6 Sup. Ct. 12, 29 L. Ed. 366), and time and quantity were both of its essence. There was no evidence of waiver of time or quantity on the part of the plaintiff, neither Monk nor Kramer having authority to bind it, by virtue of which the trial judge could have held as matter of law that there was an acceptance of part of the quantity. The evidence shows that Hoeffler did not know, until after he left Durbin and the cars had been loaded, that the defendant had made no provision for filling the contract, except from the Thorny Creek Lumber Company's tracks. As to the placing of the cars, the evidence shows that Hoeffler ordered them placed, when he found that none had been ordered by the defendant, and that action on his part has no further significance.

There was no evidence in the case of any tender of other rails to make up the 1,000 tons, or of any offer to perform, except from the Thorny Creek Lumber Company's tracks. It is perfectly palpable that the defendant could not, and did not intend to, perform its agreement, except by the immediate shipment of 110 tons, and of the rest at an indefinite time in the future. Under these circumstances, the plaintiff was not bound to accept a partial shipment, and its refusal to do so was not a breach of the contract upon its part. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *McFarland v. Savannah River Co.*, 247 Fed. 652, 159 C. C. A. 554.

[3] If there was a modification of the contract, it must have been based upon waiver of the right to have immediate delivery made of the entire quantity. Waiver must be based upon knowledge of the material facts. *Cable v. Insurance Co.*, 111 Fed. 19, 49 C. C. A. 216. The evidence in this case shows that, while Hoeffler knew of the conditions concerning the rails in the Thorny Creek Lumber Company's tracks, he did not know, although he inquired of the defendant, that it had made no other provisions to provide the full quantity of rails. Repeated inquiries on his part were, so far as the evidence shows, ignored by the defendant. The learned trial judge correctly refused the defendant's request for binding instructions, and left the case to the jury after an adequate review of the evidence, under instructions to which no exceptions were taken, and in which we find no error.

The judgment is therefore affirmed.

ALASKA PACKERS' ASS'N v. GOVER.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 3705.

1. Master and servant ⇨219(8)—Risk of defects in permanent ladder not assumed.

A ladder 25 feet long, permanently fixed to the side of a building, having the rungs nailed in mortises in the perpendicular side pieces, is not a simple tool, risk of defects in which is assumed by a workman required to use it, but a part of the place to work, and it is the duty of the employer to exercise reasonable care to see that it is properly inspected and kept in safe condition.

2. Master and servant ⇨286(24)—Negligent inspection of ladder held question for jury.

That defendant's superintendent climbed a fixed ladder before plaintiff, an employe, began to use it in his work, and observed no defects, *held* not an inspection by defendant; and in an action for injury to plaintiff caused by the pulling out of a rung, which was so decayed that the nails failed to hold it in place, the question whether defendant used proper care in inspection and repair *held* properly submitted to the jury.

3. Appeal and error ⇨1004(1)—Amount of damages assessed by jury not reviewable by appellate court.

In a federal appellate court the amount of damages assessed by a jury is not reviewable.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action at law by D. J. Gover against the Alaska Packers' Association. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, the plaintiff in the court below, was employed by the defendant to work as a common laborer in and about the defendant's salmon hatchery. On April 19, 1920, the superintendent of the hatchery directed the plaintiff to get some boards down from an old flume for use in building a fence. The top of the flume was a little more than 25 feet from the ground, and it was reached by a vertical ladder used only for that purpose. The ladder was constructed of spruce. The rungs or steps were 1 inch by 4 and were 24 inches long. Each was mortised into the uprights and was fastened with three spikes at each end. The top rung was 25 feet from the ground. The ladder was perpendicular, the uprights being nailed solidly to the building. It had been in use eight or nine years. In pursuance of the defendant's instructions, the plaintiff took a rope and a peavy and went up the ladder to loosen the boards. He lowered each board to the ground by the rope, and then descended the ladder to detach the rope. He testified that he had been up and down the ladder at least three times, and that as he was making the last of these descents and while he had his foot on about the fourth rung from the top of the ladder, and his right hand upon the top rung, that rung pulled out and he fell backward to the ground, striking the edge of a tramway and sustaining serious injuries. The complaint alleged that the timbers to which the rung was attached by nails were very old and rotten, and unfit for the purpose for which they were used; that the defendant knew, or ought to have known, their condition; and that it was the defendant's duty to exercise ordinary care to keep said ladder in reasonable repair, and that it was negligent in failing to exercise such care.

H. L. Faulkner, of Juneau, Alaska, and Chickering & Gregory, of San Francisco, Cal., for plaintiff in error.

A. H. Ziegler, of Ketchikan, Alaska, for defendant in error.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the denial of the defendant's motion for an instructed verdict. It is contended that the motion should have been allowed for the reason that the ladder was a simple tool, and that the risk of injury from any defects therein was assumed by the plaintiff. Several cases are cited to the proposition that a ladder is a simple tool, and is in the class of tools with respect to which the master is not liable under the rule that where a tool is simple in construction and defects therein can be discovered without special skill or knowledge and without intricate inspection, the servant is as well qualified as any one else to detect them and to judge of the probable danger of using them; his opportunity for inspection being better than that of his master. But we are unable to agree with the plaintiff's contention that the ladder in this instance was a simple tool. It was not a movable ladder, such as is carried by hand and is open to inspection in the handling of it. It was in effect a stairway. It was part of the building. The perpendicular uprights were mortised for the insertion of the steps, and were nailed firmly to the building. The necessity for sound construction and timely inspection in such a structure is far greater than in the case of an ordinary ladder which in practice is carried about from place to place and when used is inclined at an angle, thus affording opportunity to grasp the leaning uprights in case a rung gives way. The present case is not dissimilar to *O'Brien v. Northwestern Consol. Milling Co.*, 137 N. W. 399, where it was held that a ladder installed by the defendant in lieu of a stair should be held to be a stair in the contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe for the use of employes as though it had been a stair in fact. So in *Pendergrass v. St. Louis & S. F. R. Co.*, 179 Mo. App. 517, 162 S. W. 712, a case in which the plaintiff was injured by the breaking of a rung in a ladder 10 or 12 feet long, which was used as a means of ingress and egress from the ground floor to a pit where a pump and boiler were installed, the court held that the ladder was a part of the premises upon and about which the plaintiff was required to work, and that it was the master's duty to exercise ordinary care to furnish him a reasonably safe place to work, which included a reasonably safe means of descending into the pit. And in *Pacific Telephone & Telegraph Co. v. Starr*, 206 Fed. 157, 124 C. C. A. 223, 46 L. R. A. (N. S.) 1123, this court held that a ladder of unusual length used by employes of a telephone company in putting up wires on buildings is not a simple appliance like mechanics' tools, the risk from which is assumed by an employe.

[2] But it is urged that on the morning of the day on which the plaintiff was injured, the superintendent of the hatchery discharged the full measure of the defendant's duty of inspection. He testified that on that day he went clear from the bottom to the top of the ladder, and put his weight on the rungs of the ladder and observed no defect. That testimony amounts to little, if any, more than to say that the superintendent, who weighed 220 pounds, went up and down the

ladder on that day without accident. What he did can hardly be said to be an inspection as to the soundness of the uprights or rungs. The plaintiff testified that he observed the rung that came off, and found that it was decayed on one side, that he could see pieces of rotten wood there, and that the nails were out. The court below, properly, we think, submitted to the jury the question whether a reasonably prudent person would have inspected the ladder by tapping it or in some other way in addition to what the defendant said it did in inspecting the ladder, and that it was for the jury to say whether such other inspection was called for under the circumstances, and whether other inspection would have revealed a defect. The court further instructed the jury that if an ordinarily prudent man would inspect the ladder from time to time to discover the defects, and if the defendant did not inspect it, and that an inspection would have revealed a defect, and that that defect caused the injury, ordinary care would not have been observed. No exception was taken to any of the instructions. We think that upon the case as it stood at the close of the testimony, there was no error in denying the motion for an instructed verdict.

[3] It is assigned as error that the court below overruled the defendant's motion to set aside the verdict and grant a new trial, and it is urged in the defendant's briefs that the amount of the verdict is grossly excessive. But it is so well settled as to require no citation of authorities that in a federal appellate court the ruling of a trial court on a motion for a new trial is not assignable as error. Nor can the question of the amount of damages assessed by a jury be re-examined in an appellate court. *Phoenix Ry. Co. v. Landis*, 231 U. S. 581, 34 Sup. Ct. 179, 58 L. Ed. 377; *St. Louis & Iron M. T. Ry. Co. v. Craft*, 237 U. S. 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.

The judgment is affirmed.

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COHEN v. HESSEL.

In re NASH.

(Circuit Court of Appeals, Third Circuit. February 28, 1922.)

No. 2789.

**Bankruptcy § 116—Person commingling goods of bankrupt with his own cannot complain of seizure.**

If, in the seizure of alleged concealed goods of a bankrupt, they were found commingled with other goods, such commingling did not deprive the court of the power to take steps to separate the goods, and the party commingling the goods cannot complain of the consequences following his conduct, and contend that the court had no jurisdiction to seize the property and require him to show the nature of his title and claim to the goods seized.

Petition for Review from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

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For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.  
278 F.—59

In the matter of the bankruptcy of Harry Nash, bankrupt, in which John R. Hessel was appointed receiver. Petition by George M. Cohen to review and revise a decree. Decree affirmed.

R. L. Levy, of Scranton, Pa., and David Oppenheimer, of Wilkes-Barre, Pa., for petitioner.

Sophia M. R. O'Hara, of Wilkes-Barre, Pa., for receiver.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a petition to review and revise certain proceedings had in the administration of the bankrupt estate of one Nash. From an examination of the record, the following facts, *inter alia*, are disclosed:

On November 11, 1920, a petition in bankruptcy was filed. On November 15, one Hessel was appointed receiver. On December 13, Nash was adjudged bankrupt. On December 27, a petition of Hessel, the receiver, was presented to the court, setting forth the above jurisdictional facts, and that on November 29, and prior to adjudication, the receiver had seized certain assets of Nash which the latter had concealed with fraudulent intent; that Nash averred that, on the night preceding such seizure, the place where part of his assets were secreted in Wilkes-Barre, Pa., had been broken into and \$3,042.50 of goods stolen. The petition averred, on information received, that the stolen goods and other assets concealed by Nash were in possession of John Cohen, under the name of the New York Store, in Danville, an adjoining town.

The petition further represented that on December 20 the receiver, under an order of court, had sold to one Druck, a resident of Wilkes-Barre, the assets so found and received by Cohen, and that immediately after confirmation of the sale Druck carted the goods by auto truck to Cohen's Danville store; that prior to the delivery of these latter purchased goods to Cohen's storeroom an examination of the goods there had been made, and certain goods therein were identified as belonging to Nash, and which were part of the goods which the latter claimed had been stolen in Wilkes-Barre, at the place where his remaining goods were found concealed.

On presentation of this petition, the court issued an order to the marshal to seize the goods of Nash in the possession of Cohen, and to hold the same until the further order of the court. This order further directed—

"the said New York Store, alias John Cohen, on the seizure of the goods by the United States marshal, to file claim in this court, to show his *title to the same*, within 10 days from the day of seizure, and, if he fails to file any claim for these goods within 10 days from the seizure thereof, the United States marshal to turn over the said goods to John R. Hessel, receiver of the goods, and to be disposed by him under the further order of this court."

At this point we note that, under the allegations of this petition, the order to the marshal to seize the concealed goods of the bankrupt and hold the same pending the further order of the court was justified by that provision of the Bankruptcy Law which authorized the court "to take charge of the property of bankrupts after the filing of the peti-

tion and until it is dismissed or the trustee is qualified." If in the seizure of these alleged concealed goods they were found commingled with other goods of Cohen's, such commingling certainly did not deprive the court of power to take proper steps to separate Cohen's own commingled goods from those of the bankrupt, and if by the commingling Cohen subjected himself to inconvenience while this separation took place, he cannot complain of the consequences which usually follow such conduct.

Seeing, then, that the allegations of the petition justified the issue to the marshal of the order to seize and hold, the record shows that Cohen, on coming into court on his petition, sworn to by his counsel on December 30, and replying to the petition, made no claim or alleged no title to the property seized by the marshal, but limited his petition to questioning the jurisdiction of the court to issue the order, and the sufficiency of the averments of the petition to warrant the court's action. But the matter did not stop with these proceedings, which, it will be seen, shows no assertion of title by Cohen, or any claim of title, or any disclosure of such nature as to enable the court to determine whether there was a claim of title adverse to the bankrupt, and that the case was one for a plenary suit. No doubt, in line with Cohen's suggestion of lack of definiteness of averment in relation to Nash's goods, the receiver on January 5, 1921, filed a second and more definite petition, and again the court—vacating, as it is said, though the record does not show that fact, the first order entered on the receiver's first petition—by its second and later order gave Cohen an opportunity to inform it as to the nature of his title, if any, to the goods which the marshal then held. The reply of Cohen on January 17, 1921, was a repetition of a challenging of the court's jurisdiction and power to seize, and again failed to state the nature of his claim or title to the goods then in the possession of the marshal, and the only suggestion of right on his part was the right of possession, and a challenge of the court's jurisdiction in these words:

"This court has no jurisdiction to seize property in the possession of a person other than the bankrupt, which property admittedly was never a part of the bankrupt estate. \* \* \* The order as made in this proceeding is null and void, in that it is made in denial of the right of your petitioner to have his right to the possession of his property inquired into by due process of law."

But, in spite of this failure of Cohen to inform the court as to the general nature of his title, the court did not conclude him, but on January 8 referred the whole matter to its referee, who heard the testimony, afforded Cohen a third opportunity to show what was the nature of his title or claim to the goods the marshal had seized, which jurisdiction and power on the court's part to ascertain whether the case is one for a plenary action has been so long exercised by courts of bankruptcy—see *In re Friedman* (D. C.) 153 Fed. 939 (decided 1907), and *In re Holbrook* (D. C.) 165 Fed. 973 (decided 1908)—that it would serve no present purpose to here vindicate it. Thereafter the referee found Cohen's claim was a colorable one, and the court approved that finding. Presumably this finding of the referee and the

court's approval were right, and in the absence of the testimony, which we have not before us in this petition to revise, we have no warrant or ground for disturbing it.

No error appearing in the record, the decree below is affirmed.

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**THORN v. UNITED STATES.**

(Circuit Court of Appeals, Eighth Circuit. February 3, 1922.)

No. 5712.

**1. Prostitution ⇐4—Evidence held not to sustain conviction for violation of White Slave Traffic Act.**

In a prosecution under White Slave Traffic Act June 25, 1910 (Comp. St. §§ 8812-8819), for knowingly causing the transportation of a girl from one state into another for an immoral purpose, where the testimony of the girl, which was uncontradicted, was that she insisted on going to a city in the other state, for reasons which she stated, and that she paid for both tickets, the evidence held insufficient to sustain a conviction.

**2. Prostitution ⇐3—Indictment for Mann Act held sufficient.**

An indictment under White Slave Traffic Act June 25, 1910 (Comp. St. §§ 8812-8819), for knowingly causing the transportation of a girl from one state into another for an immoral purpose, held not insufficient because it stated that the common carrier over which the transportation occurred was unknown to the grand jurors.

In Error to the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Criminal prosecution by the United States against Raymond Thorn. Judgment of conviction, and defendant brings error. Reversed.

Chase Morsey, of St. Louis, Mo., for plaintiff in error.

Eustace C. Wheeler, Asst. U. S. Atty., of St. Louis, Mo. (James E. Carroll, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before CARLAND, Circuit Judge, and LEWIS and COTTERAL, District Judges.

COTTERAL, District Judge. The plaintiff in error was convicted and sentenced upon the second count of an indictment, under the Act of June 25, 1910, 36 Stat. 825 (Comp. St. §§ 8812-8819), wherein he was charged with knowingly causing the transportation, over the line of a common carrier, by name to the grand jurors unknown, of Virginia Eagle, then 17 years old, from Marion, Ill., to St. Louis, Mo., for the purpose of illicit sexual relations.

[1] At the conclusion of the testimony, defendant's counsel moved the court to direct a verdict in his favor. The motion was denied, and error is assigned upon that ruling. Three witnesses testified at the trial—Virginia Eagle, her mother, and a landlady at St. Louis—all in behalf of the government. The question is presented whether upon their testimony the defendant was entitled to such peremptory instruction.

The mother testified that the defendant resided with his wife, a sister of Virginia Eagle, at the home of their parents at Parkersburg, W. Va.; that the girl was unemployed, received "a little money along" for her needs from her father, and had only \$4 or \$5 when she left home. The girl testified that immoral relations between her and the defendant began there, and that she, being enceinte, suggested their departure, to avert disgrace. She denied such relations thereafter. Continuing her account: They left in July, traveling on the same train to East St. Louis, engaged in light housekeeping there two weeks as husband and wife, under an assumed name, and thence went to Marion, Ill., where they lived in furnished rooms as Mr. and Mrs. Thorn until November. Then they went on the journey from Marion to St. Louis, by railroad, the name of which she did not remember. The defendant left the train at East St. Louis, but rejoined her the same afternoon at the Union Station in St. Louis. Shortly they engaged rooms on Laclede avenue, which they occupied apparently, but not actually, as husband and wife, until they rented a flat, always nominally as Mr. and Mrs. Thorn. A child was born to her at the Laclede place in February. They resided there at the time of the trial, but not as "man and wife." The landlady confirmed the renting to them of a room containing but one bed, by arrangement of defendant, who represented they were Mr. and Mrs. Thorn, and later a kitchenette in addition; also their occupancy of those quarters until their arrest in July.

The girl, when asked why they went to St. Louis, answered:

"Well, I wanted to come because there was no place in the little town of Marion for me to go in case I was ill." "I persuaded him to come on over. I wanted him to come, and I asked him to come with me, because I did not know the place very well; so he came."

She also stated she had never been at St. Louis. She explicitly denied that he induced or persuaded her to go, and said it was her idea and suggestion, with the object of confinement there; that she bought both tickets for the trip with her own money, carried a suitcase and a satchel, and he checked the trunk, which he and another carried to the depot. She further testified that in three or four days he obtained a position on a street car, being experienced in such employment, and, when she persuaded him to go to St. Louis, he was ready to take a similar and more remunerative position at Marion.

With the testimony thus summarized for our consideration, we feel compelled to hold that it was insufficient to sustain defendant's conviction of the offense here charged, however reprehensible his conduct. The statute makes the transportation, or causing it, or aiding in obtaining it, or in transporting, a necessary element of the offense. It must be recognized that either of these parties might have planned or been the moving cause of the journey to St. Louis. The testimony is direct, both in denying that the defendant caused or had part in bringing it about and in fixing the responsibility with Virginia Eagle. There is a dearth of testimony on the subject as against him, unless by way of circumstances; but they tend only to create suspicion or show acquiescence in her will with respect to the

transportation. In our opinion, the case falls within the rule announced in *Wright v. United States*, 227 Fed. 855, 142 C. C. A. 379, where it was said:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

[2] The indictment was challenged by demurrer and motion in arrest, on several grounds. There has been no discussion of them, and only a reference to a supposed uncertainty in the failure to specify the carrier on which the alleged transportation occurred, whereby it is claimed the defendant was unable to refute the evidence of the government. It is clear there is no force in any of the objections, and we therefore hold the indictment to be sufficient.

Another assignment is that there was error in receiving the testimony as to the means possessed by Virginia Eagle. Its tendency was to show that she was unable to buy the tickets at Marion, and, while it was remote, the objection was addressed rather to its weight than its admissibility, and was properly overruled.

Upon the ground that the peremptory instruction asked by the defendant should have been given, but was refused, the judgment must be reversed, with direction to the District Court to grant a new trial. It is so ordered.

CARLAND, Circuit Judge, concurs, except as to the language quoted from *Wright v. U. S.*, 227 Fed. 855, 142 C. C. A. 379.

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### Laurie v. United States.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1922.)

No. 3580.

1. Criminal law §1159(2)—Appellate court cannot review weight of evidence. A federal appellate court has no authority to determine the weight of the evidence.

2. Criminal law §1156(1)—Ruling on motion for new trial not reviewable. In the federal courts a motion for new trial is addressed to the sound discretion of the trial court, and its ruling can be reviewed and reversed only when it clearly appears that the court has abused its discretion.

3. Intoxicating liquors §224—In prosecution for unlawful possession, lack of permit need not be proved.

Under an information for unlawful possession of intoxicating liquors, the prosecution is not required to prove that defendant did not have a permit authorizing such possession.

4. Criminal law §799—Instruction as to argument on credibility of policeman held not erroneous.

An instruction, commenting on argument of defendant's counsel, that the testimony of a police officer should be weighed on its merits and that he was not to be discredited because of his occupation, held not erroneous, as it was the court's duty to advise the jury not to be misled by the argument.

**5. Criminal law ¶1111(1)—Record conclusive as to sentence imposed.**

An appellate court is concluded by the record as to the sentence imposed on a defendant on a particular count, and cannot consider whether or not there is a clerical error therein.

**6. Criminal law ¶984—Illegality of sentences on one count does not affect validity of sentence on another count for different offense.**

Where the court imposed a separate sentence on each count of an indictment charging different offenses, the fact that the sentence of one count was unauthorized does not affect the validity of the sentence on another count.

In Error to the District Court of the United States, for the Eastern Division of the Northern District of Ohio; D. C. Westenhaber, Judge.

Criminal prosecution by the United States against John Laurie. Judgment of conviction, and defendant brings error. Affirmed, but remanded for correction of sentence.

Benj. H. Schwartz, of Cleveland, Ohio (Rocker & Schwartz, of Cleveland, Ohio, on the brief), for plaintiff in error.

Berkeley W. Henderson, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., and D. J. Needham, Asst. U. S. Atty., both of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 25th of January, 1921, John Laurie, the plaintiff in error, was convicted upon both counts of an information filed by the United States district attorney in the United States District Court, Northern District of Ohio, Eastern Division. The first count of this information charged Laurie with unlawful possession of intoxicating liquor. The second count charged him with the unlawful sale of intoxicating liquor. A separate sentence was imposed upon each count.

[1] It is insisted by counsel for plaintiff in error that the verdict of the jury is against the manifest weight of the evidence. This court, however, has no authority to determine the weight of the evidence. Revised Statutes, § 1011 (Comp. St. § 1672); *Casualty Co. v. White-way et al.*, 210 Fed. 782, 127 C. C. A. 332; *Atlantic Ice & Coal Corp. v. Sam Van*, 276 Fed. 646.

[2] It is further claimed on behalf of plaintiff in error that the verdict of the jury is not sustained by any substantial evidence, for the reason that the government offered no evidence whatever tending to prove that the defendant had not secured a permit to sell intoxicating liquor. No motion was made by the defendant, at the close of all the evidence, for a directed verdict. On the contrary, defendant sought to raise the questions, both as to the weight of the evidence and the sufficiency of the evidence, by a motion for a new trial. Such a motion, however, is directed to the sound discretion of the trial court, and cannot be reviewed and reversed, unless it clearly appears that the court abused its discretion. *West v. U. S.*, 258 Fed. 413, 169 C. C. A. 429; *Howard v. U. S. (C. C. A.)* 271 Fed. 301.

[3] If it were conceded, however, that the record properly presents the question of the sufficiency of the evidence, nevertheless that ob-

jection is without merit. On an indictment of this character the government is not required to prove that the defendant did not have a permit authorizing him to possess intoxicating liquors. *Kiersky v. U. S.* (C. C. A.) 263 Fed. 684; *Faraone v. U. S.*, 259 Fed. 507, 170 C. C. A. 483.

[4] It is also insisted that the trial court erred in its charge in commenting upon the statement made by counsel for defendant in his argument to the jury in reference to the attitude of state judges as to the weight and credibility that should be given the uncorroborated testimony of police officers. The charge of the court in this particular informs the jury that the testimony of the police officer is to be weighed upon its merits, and that the witness is not to be discredited because of the occupation he follows. Counsel in his argument stated in substance, the reverse of this proposition. It therefore became the duty of the court to direct the attention of the jury to the statements made by counsel, and advise the jury that it must not be misled thereby.

[5] It does appear from this record, however, that the trial court erred in sentencing the defendant to imprisonment on the first count of this indictment, the statute not providing such penalty for the offense there charged. It is claimed on the part of the defendant in error that the court did nothing of the kind, but, on the contrary, assessed a fine against the defendant upon the first count of the indictment and sentenced him to imprisonment upon the second count. While this is practically conceded by counsel for the defendant, nevertheless the transcript of the record of the proceedings in the District Court in this case, imports absolute verity. This court is not at liberty to question the accuracy of that transcript, nor has it authority to determine whether or not a clerical error has intervened in the entering of that judgment.

[6] The court imposed a separate and distinct sentence upon each of these counts. Nothing appears in the entry of judgment to indicate that the sentence upon one count in any way affected the judgment of the court in imposing sentence upon the other count. The situation here is not substantially different from a conviction and sentence upon two separate indictments. Therefore, in the absence of anything in the entry to the contrary, this court must accept this record showing the sentence imposed by the trial court upon the second count of the indictment as conclusive of the trial court's judgment upon that subject; but, for the reason that the sentence imposed upon the first count is not authorized by law, the sentence as to that count is reversed, and the cause remanded to the District Court, with directions to impose a sentence upon the defendant upon the first count in the indictment, in conformity with the statute declaring the limits of the punishment for this offense.

The judgment upon the second count is affirmed.

STONE et al. v. DANENHOWER.

In re CRAMER & ROGERS GROCERY CO.

(Circuit Court of Appeals, Third Circuit. February 17, 1922.)

No. 2794.

**Bankruptcy** § 446—Matters of fact not considered on petition to review.

On petition to review in proceedings resulting in a decree assessing stock, the Circuit Court of Appeals cannot disturb findings of fact.

Petition for Review from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the Cramer & Rogers Grocery Company, bankrupt; J. C. Danenhower, trustee. There was a decree assessing stock held by John W. Stone and another, and they petition to revise and review in matters of law. Affirmed.

James Mercer Davis, of Camden, N. J., for petitioners.

Carr & Carroll and Walter R. Carroll, all of Camden, N. J., for respondent.

Before BUFFINGTON, Circuit Judge, and WITMER and THOMSON, District Judges.

BUFFINGTON, Circuit Judge. This is a petition to revise and review in matters of law certain proceedings had in the bankruptcy of the Cramer & Rogers Grocery Company, which resulted in a decree assessing the stock in said company held by John W. Stone and James H. Birch, Jr., respectively. The case turns on the facts of this particular case and on the procedure which the parties have themselves shaped and followed, so that what is now said and done in no way qualifies or affects the general procedure outlined and the principles laid down by this court in *Re New Foundland Syndicate*, 201 Fed. 917, 120 C. C. A. 255; *Bergdoll v. Harrigan* (C. C. A.) 263 Fed. 280.

Confining ourselves, therefore, to the inquiry whether the record before us discloses any error in law, we note that after the adjudication in bankruptcy of the corporation, Danenhower, the trustee, presented his petition, setting forth in great detail the facts concerning the organization, flotation, and stock issuing of the bankrupt corporation; that the corporation acquired the grocery business theretofore owned by Joseph T. and Clifford B. Rogers, and paid them therefor in the capital stock of the company, largely in excess of the value of such business, and in contravention of the New Jersey state statute regulating such issues; that of the common stock so issued John W. Stone, one of the petitioners, became the owner of 300 shares, of the par value of \$3,000, as a bonus for subscribing for preferred stock, and James H. Birch, Jr., the other petitioner, became the owner of 50 shares of the common stock as a bonus for buying preferred stock and for serving as a director. The trustee further represented that the Rogerses were both irresponsible financially, that the assets of the corporation were insufficient to pay its debts, that Stone and Birch were respectively

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liable to pay upon such overvalued common stock, and prayed that they answer such petition, "in so far as the same relates to his separable individual liability," and that the trustee "be empowered and directed to levy an assessment of the amount due and unpaid on the shares of common stock held, respectively," by Stone and Birch. On this petition a rule was issued and served on the latter to show cause why "an assessment of the amounts due and unpaid on the shares of common stock by them held, respectively, should not be ordered and directed made, pursuant to the prayer of said petition."

No answer was made by either, but, on the matter being referred to the referee, both appeared by counsel and defended; Birch on the ground that his stock had been paid for by services rendered the bankrupt corporation, and Stone on the ground that his stock had been fully paid for when originally issued, and that the present proceeding was barred by the statute of limitations. Thereafter testimony in support of the petition was taken, and the respondents appeared by counsel, and had opportunity to cross-examine and produce testimony. Both parties having rested, no objection was made by Stone or Birch to the form of the procedure, or to the form or substance of the issue of their individual liability being determined by the referee, their counsel contending the proofs showed no liability on their part and defining on the record their position in these words:

"My understanding is that the testimony on the part of the petitioner shows that Mr. John W. Stone received of the capital stock of this concern certain shares of the preferred stock, for which full cash value was paid, and that along with this preferred stock a certain amount of the common stock belonging to one of the Rogerses, who was a director and stockholder of the concern, was given to Mr. Stone, and that in the case of James H. Birch, Jr., a certain amount of the common stock belonging to one or both of the Rogerses was given to Mr. Birch for services rendered."

These trial issues, acquiesced in by all parties, were thereafter determined by the referee, who found that \$65,000 of the common stock of the company had been issued in violation of the statute of New Jersey, in that the tangible property paid for it was only of the value of \$12,835.30, and it was therefore liable to assessment; that Birch and Stone had not paid for their stock, and had received the same under such circumstances as to charge them with full and complete knowledge that said shares of common stock had not been paid for in full, and that Stone was liable upon his \$3,000 of common stock for \$2,409, and Birch, for his \$500, for \$401.50. An order accordingly having been entered by the referee, and counsel for Stone and Birch being heard in opposition thereto, the referee's order was approved. Thereupon this petition to review was filed, the grounds for which were therein stated as follows:

"(1) The court erred in not vacating and setting aside the order of S. Conrad Ott, referee. (2) The court erred in failing to find that the said James H. Birch, Jr., and John W. Stone were bona fide holders without notice of any defect in the payment of said stock. (3) The court erred in failing to find that said stock was fully paid for. (4) The court erred in finding that there was liability on the part of these petitioners. (5) That said order was not warranted under the law facts."

Without discussing in detail these grounds of review, it suffices to say that, as to the second and third grounds, they cover matters and findings of fact which, on this petition to review, we have neither the testimony before us nor jurisdictional warrant to disturb. As to the action of the court covered by the first, fourth, and fifth grounds, we find no error disclosed by the record which warrants a reversal of such action.

Apart from these questions, which were raised in the court below, some other questions and objections are now raised for the first time on this appeal, as to admission of evidence and the like. Assuming for present purposes they are timely, we find none of them of substantial merit.

The decree below is affirmed.

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THE STELLA.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1922.)

No. 3744.

**Collision** ¶115—Tug which is merely assisting steamship under orders of latter's master is not liable.

Where a tug was employed merely to assist a steamship, which was proceeding under her own power, in passing through a channel, and was subject to the orders of the steamship's master, she is not liable in rem for a collision between the steamship and another vessel, resulting from her obedience to an order of the steamship's master.

Appeal from the District Court of the United States for the Eastern District of Texas; W. Lee Estes, Judge.

Libel in admiralty by the Standard Oil Company of New Jersey against the steam tug Stella, of which D. M. Picton & Co., Inc., was claimant. From a decree dismissing the libel, libellant appeals. Affirmed.

F. D. Minor, of Beaumont, Tex., and Robert S. Erskine, of New York City, for appellant.

Wm. B. Lockhart and J. W. Lockhart, both of Galveston, Tex., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is an appeal from a decree dismissing appellant's libel in rem against the tug Stella. Appellant seeks recovery against the tug for damages sustained in a collision between its steamship, the A. J. Bostwick, and the steamship War Nizam, which occurred in the Port Arthur Canal, below Port Arthur, Tex.

The negligence relied on was the failure of the War Nizam to give way for the Bostwick to pass. The position of the Stella did not contribute to the collision, and its liability, in appellant's view of the case, depends upon whether it was responsible for the position of the War Nizam in the canal. The War Nizam was proceeding under her own

steam, but, owing to the fact that she was heavily laden and had to plow her way through the mud in the bottom of the canal, she engaged the assistance of the Stella. The pilot of the War Nizam assumed command also of the Stella. Passing signals were exchanged between the steamships, by which it was agreed that they would pass each other port to port. The Stella and the War Nizam had been brought practically to a standstill some time before the collision occurred, for the purpose of enabling the Bostwick to pass safely. The Bostwick passed the Stella without difficulty, but her stern came into collision with the War Nizam.

Appellant contends that the tug was negligent in entering the canal before the Bostwick had proceeded beyond the turning basin at its head; but the pilot of the War Nizam testified that he was responsible for not waiting, and that he would have proceeded down the canal with the War Nizam, with the assistance of another tug, if the Stella had refused to obey his orders. The question presented is whether the Stella is liable for obeying the orders of the War Nizam.

We are of opinion that she is not, and that the decree of the court below is correct. There is no principle of law which forbids a tug to subject itself to the orders of the steamship, whose movements it is merely assisting. That the tug is not liable under such circumstances is clearly established by the following cases: *Sturgis v. Boyer*, 24 How. 110, 16 L. Ed. 591; *The Connecticut*, 103 U. S. 710, 26 L. Ed. 467; *The Edgar Baxter*, Fed. Cas. No. 4,278; *In re Walsh*, 136 Fed. 557, 69 C. C. A. 267.

In *The Connecticut*, *supra*, the steamer was assisted in a towing operation by the tug Stevens. In exonerating the tug, the Supreme Court said, speaking through Chief Justice Waite:

"So far as the Stevens is concerned, she was clearly not to blame. She was the mere servant of the Connecticut, and could exercise no will of her own. She was bound to obey orders from the Connecticut, and no part of the responsibility of the navigation, so far as the approaching vessel was concerned, was on her. It was not her duty to signal the movements of the Connecticut, under whose exclusive control she was. The Connecticut is alone responsible for the consequences of her own faults."

To sustain liability upon the part of the Stella, appellant relies principally upon *The Civilta*, 103 U. S. 699, 26 L. Ed. 599, and *The Procida* (D. C.) 243 Fed. 251. The cases of *The Civilta* and *The Connecticut* were decided during the same term, and at about the same time. There is no conflict between them. In the opinion in the case of *The Civilta*, which was also by Chief Justice Waite, it is stated:

"The tug furnished the motive power for herself and the ship. Both vessels were under the general orders of the pilot on the ship, but it is expressly found as a fact that the tug actually received no orders from him."

Both tug and tow were held liable. In *The Procida* it was held that a tug has no right to obey improper orders, and is liable in tort if it does so. The decision in that case was by District Judge Learned Hand. In the later case of *The Beaverton* (D. C.) 273 Fed. 539, the same judge held that the rule laid down by him in the *Procida* Case does not apply when the tugs are operating under the orders of the ship, and said:

"I cannot see that this is in any sense involved in the rule of *The Anthracite* and *The Proclida*; but, if it be, I can only say that the rule is not to be followed with consistency. Such a rule would be totally impracticable in practice. Ships are not to be required to take their tugs into preliminary council of deliberation."

Inasmuch as what we have said disposes of the case, it is unnecessary to consider the other assignments of error, or whether the War Nizam was negligent.

The decree is affirmed.

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CLARK v. ALDRICH.

(Circuit Court of Appeals, First Circuit. February 21, 1922.)

No. 1534.

1. Logs and logging ¶3(14)—Products of standing timber not forfeited by failure to remove them within time fixed by contract.

Under a contract for the sale of standing timber to be cut and removed by a date specified, lumber and other products manufactured from the timber by the purchaser become his personal property, and they do not become the property of the seller because not removed from the land within the time limited.

2. Trover and conversion ¶22—Breach of contract held no defense.

In an action for conversion of products of timber cut by plaintiff from defendant's land under a contract, that plaintiff willfully violated the contract by failing to remove the products within the time therein provided held to constitute no defense.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action at law by Herbert O. Aldrich against Ernest I. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

William Reed Bigelow, of Boston, Mass., for plaintiff in error.

Virgil C. Brink, of Boston, Mass. (John M. Maguire, Grafton L. Wilson, and Hale & Dorr, all of Boston, Mass., on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an action for the conversion of wood and sawed lumber. On April 12, 1917, Clark executed a bill of sale in familiar form of "all the standing timber" on a designated lot of Clark's land in Framingham, "said Aldrich to have 2½ years to cut and remove said timber, and during said time to have use of part of the pasture adjoining, not exceeding one acre, to pile lumber on, and to have a free passage to said state road." Aldrich cut all the timber within the time limit, but at the expiration of the 2½-year period there were still on Clark's land about 425 cords of wood, 25 cords of slabs, and 150,000 feet of sawed lumber. Clark thereupon claimed that the wood and lumber were forfeited to him by reason of Aldrich's failure to remove them from his land within the 2½-year period. He excluded Aldrich from his premises and, as is conceded, converted the wood and lumber to his own use. The District Court, on the plaintiff's motion,

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directed the jury to return a verdict for the plaintiff, and submitted the case to the jury for assessment of damages, instructing the jury that, in order to avoid multiplicity of actions, they were also to assess such damages, if any, as the defendant suffered by reason of the plaintiff's failure to remove his property from the defendant's land on or before the agreed date, October 12, 1919, and for his failure to store his property upon the agreed lot and to leave the premises in such condition as it was agreed that they should be left in.

[1] Counsel on both sides agree, as clearly they must, that when the timber was cut it became personal property belonging to the plaintiff. *Nelson v. Nelson*, 6 Gray (Mass.) 385; *Peirce v. Finerty*, 76 N. H. 38, 76 Atl. 194, 79 Atl. 23, 29 L. R. A. (N. S.) 547; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Dyer v. Hartshorn*, 73 N. H. 509, 63 Atl. 231. Under such circumstances the court below was plainly correct in ruling that this personal property could not be forfeited to the defendant unless such intention was plainly expressed in the contract; also that in this contract there was no language importing forfeiture of the cut wood and lumber. Cf. *Peirce v. Finerty*, 76 N. H. 38, 40, 76 Atl. 194, 79 Atl. 23, 29 L. R. A. (N. S.) 547.

Most of the cases cited by the defendant's learned counsel have on fair analysis no application to this case. We have no occasion to undertake to reconcile the numerous and somewhat conflicting rulings as to contracts for the cutting and removal of timber; it is enough to note that the overwhelming weight of authority applicable to such a contract as was made by these parties is in support of the view taken by the court below. See *Wimbrow v. Morris*, 118 Md. 91, 84 Atl. 238, 47 L. R. A. (N. S.) 882, and note, in which most of the authorities are reviewed. On page 888, in this note, it is stated:

"It seems to be the rule, even in those jurisdictions which hold that all the rights of the parties to the timber terminated at the expiration of the time limit, if the timber is manufactured into lumber, the owner of the timber does not lose his right thereto by the expiration of the time limit."

See, also, *Fletcher v. Livingston*, 153 Mass. 388, 390, 26 N. E. 1001; *Claflin v. Carpenter*, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Drake v. Wells*, 11 Allen (Mass.) 141; *Hill v. Hill*, 113 Mass. 103, 105, 18 Am. Rep. 455; *United Society v. Brooks*, 145 Mass. 410, 14 N. E. 622.

There is no "Massachusetts rule" that supports the defendant's position in this case.

[2] Willful nonperformance, the basic idea in defendant's eleventh, twelfth, and thirteenth assignments of error, has no bearing on the issue in this case. Of course the plaintiff's rights to the lumber and wood originated in the contract. But after it was cut it was his. This suit sounds in tort for its conversion. Plaintiff does not declare on a contract which he may or may not have willfully broken. Defendant's rights were all fully secured by the court's instruction that the jury should assess any damages defendant had suffered.

The judgment of the District Court is affirmed, with costs to the defendant in error.

THE EMILY S. MALCOLM.

SOUTH SEAS IMPORT & EXPORT CO. v. MALCOLM et al.

(Circuit Court of Appeals, Third Circuit. March 7, 1922.)

No. 2713.

**Shipping** 39—Charter party held not to guarantee capacity of schooner.

Under a charter of a vessel "estimated" to "carry 225 tons, more or less, but not binding," the vessel could recover the full sum of money mentioned in the charter party, though capacity of the vessel was only 125 tons; there being no guaranty of tonnage.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Libel by Algernon Scott Malcolm, captain of the schooner Emily S. Malcolm, against the South Seas Import & Export Company, claimant of 2,441 bags red mangrove bark, which filed cross-bill for non-carriage. From a decree for libellant, the cargo owner appeals. Affirmed.

Wall, Haight, Carey & Hartpence, of Jersey City, N. J., for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Harry D. Thirkield and Robert S. Erskine, both of New York City, of counsel), for appellees.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In entering the decree which is appealed from in this case, the court below sustained the libel of the schooner Emily S. Malcolm, and awarded her the full balance of freight remaining unpaid on a charter party. The facts, as stated in the court's opinion, are:

"Algernon Scott Malcolm was the master and owner of the schooner Emily S. Malcolm, chartered while lying at Kingston, Jamaica, to New York, on or about March 10, 1919. Stern (charterer for the South Seas Company) engaged to provide and furnish said vessel 'with a full cargo of mangrove bark and/or other lawful merchandise which she can reasonably stow and carry, not exceeding her loading depth, which is designated by her Plimsoll mark—it is estimated that the vessel will carry 225 tons, more or less but not binding.' (The italics are mine.) Stern agreed to pay \$3,750, American gold, or its equivalent, for the voyage, on signing the bills of lading in Kingston. The vessel was duly loaded with mangrove bark. It being bulky it was not possible to stow on her more than 130 tons, part of which was stored on the deck. The charterer of the vessel failed to pay, at Kingston, the full sum of money mentioned in the charter party, but did pay \$520 on account and received from Capt. Malcolm a receipt. Capt. Malcolm, upon arrival at the port of New York, demanded payment of the balance of money due under the charter party, which was refused, and forthwith filed his libel against the cargo for the balance of the freight money earned."

The cargo owner filed a cross-bill for noncarriage, up to 225 tons, and for injury to the cargo carried. The case turned on the question whether the schooner would carry 225 tons of mangrove bark more or

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less. If there was such guaranty, clearly, her failure to carry more than 125 tons was a breach. On that point the court held:

"The exact phraseology of the charter, however, clearly indicated that the capacity of the vessel was a mere estimate, and, as was stated, was *not binding*."

We find no error in the court so construing the charter party, for if, as is the rule of construction, these (italicized) words are to be given the effect the words import, we can see no construction other than that adopted by the court. The word "estimated" itself implies an absence of contract certainty, and when to this uncertainty of an estimate are added the words "but not binding" we have an entire absence of those elements of certainty which would justify our construing a statement of the supposed, and therefore uncertain, tonnage capacity of a ship into the certainty of an absolute and ascertained guaranty of tonnage. We find no error in the court's construction of the charter party. Its decree should therefore be sustained, unless there was fault on the part of the schooner in cargo carriage. Such failure the court below held was not made out by the proofs, and a careful study of them on our part, leads us to the same conclusion.

The decree below, which sustained the schooner's libel and dismissed the cross-bill filed by the cargo owner, is affirmed.

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**UNITED STATES v. VARIOUS DOCUMENTS, PAPERS AND BOOKS OF  
BRIGGS & TURIVAS et al.**

(Circuit Court of Appeals, Seventh Circuit. December 14, 1921.)

No. 2980.

**Courts ~~4~~405(4)—Circuit Court of Appeals without jurisdiction to review action of Commissioner.**

The Circuit Court of Appeals is without jurisdiction to review an order or judgment of a United States Commissioner on a writ of error to the District Court.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Proceeding by the United States against various documents, papers and books taken on search warrant and claimed by Briggs & Turivas, a corporation. The United States brings error to review an order of a United States Commissioner. Dismissed.

Robert A. Milroy, of Chicago, Ill., for the United States.

John L. Hopkins and William Burry, both of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Commissioner Mason of Chicago, on the affidavit and oral testimony of a revenue agent, issued a search warrant on which the marshal seized various documents, papers, and books

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belonging to Briggs & Turivas, Incorporated. Thereupon Briggs & Turivas appeared before the Commissioner and filed a petition to have the search warrant quashed and the property returned. To this petition the district attorney filed an answer; and the Commissioner, after hearing the evidence and arguments of counsel, entered an order or judgment in accordance with the prayer of the petition. For the purpose of having the Commissioner's judgment reviewed, the United States sued out this writ of error addressed to the District Court.

Briggs & Turivas insist that the writ of error be dismissed because: (1) This court has no appellate jurisdiction over the order or judgment of the Commissioner; (2) the proceeding was based on the alleged commission of a felony, and the case was therefore of the kind in which the government has no right of review; and (3) the order was interlocutory.

In support of the correctness of the Commissioner's action Briggs & Turivas contend that: (1) No facts were presented which showed either directly or inferentially any probable cause for believing that a felony had been committed; (2) nor that the seized property was the means of committing any felony; and (3) the search warrant contained no particular description of the property to be seized and was therefore only the general warrant against which the Fourth Amendment was aimed. And the cases of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Silverthorne v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; and *Veeder v. United States*, 252 Fed. 414, 164 C. C. A. 338, are cited.

Inasmuch as the record bears out the contentions in support of the correctness of the Commissioner's action, there is no merit in the government's writ of error. But we have no judgment of a District Court before us to affirm, and we therefore dismiss the writ on the first ground, leaving the other grounds for dismissal untouched.

The writ of error is  
Dismissed.

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ANDERSON COAL CO. v. WABAN ROSE CONSERVATORIES et al.

(District Court, D. Massachusetts. November 1, 1921.)

No. 1066.

Judges ¶51 (3)—Affidavit of prejudice, not seasonably filed, and filed for delay, etc., did not affect Judge's right to hear case.

Under Judicial Code, § 21 (Comp. St. § 988), where an affidavit of prejudice was not filed 10 days before the beginning of the term, and good cause for the delay was not shown, and it was filed with a view to delay and contained assertions which were untrue, irrelevant, or scandalous, it had no legal effect on the Judge's right to continue to sit in the cause.

In Equity. Suit by the Anderson Coal Company against the Waban Rose Conservatories and others. On motion to strike from the record an affidavit of prejudice. Motion granted, and affidavit ordered stricken.

Jasper N. Johnson, of Boston, Mass., for plaintiff.

Ernest Vaughan and Vaughan, Esty & Clark, all of Worcester, Mass., for defendant Park Trust Co.

W. E. Ulmer and Forest F. Collier, both of Boston, Mass., specially for defendant Ulmer.

BINGHAM, Circuit Judge. The above cause came on for hearing before me October 28, 1921, on motion of Francis G. Goodale, receiver therein, asking that a certain document, filed in the cause October 13, 1921, by W. Edwin Ulmer and entitled "Affidavit of Prejudice," be stricken from the record, on the grounds: (1) That it was not filed within the time required by law and without good cause for failure to do so; (2) that it is not in the form required by law; (3) that its allegations are insufficient to constitute an affidavit within section 21 of the Judicial Code; (4) that the facts and reasons stated in it are insufficient to show personal bias or prejudice against the affiant on the part of the judge against whom the affidavit was filed; (5) that it shows on its face that it was not filed in good faith but for the purpose of spreading upon the record the scandalous and impertinent statements which it contains; (6) that it shows on its face that it was not filed in good faith for the reason that certain statements therein contained are, upon the record in this case, untrue, specifying in particular paragraphs 8, 10, and 13.

At the hearing it appeared that the original bill was filed January, 1921; that Mr. Goodale was appointed receiver of the Waban Rose Conservatories in February, 1921; that May 5, 1921, Elbridge R. Anderson entered an appearance of record as counsel for W. Edwin Ulmer, an application for contempt having been filed against said Ulmer in the original proceeding; that on June 9, 1921, an ancillary proceeding brought by the receiver against said Ulmer and others to recover assets alleged to belong to the estate was filed; that a motion to dismiss the ancillary petition and pleas to the jurisdiction were filed June 27, 1921; that a hearing on said motion and pleas was had before George W. Anderson, Circuit Judge, sitting in said cause in the District Court under a previous assignment, at which time said Elbridge R. Anderson appeared and acted as counsel for said Ulmer; that the motion and pleas were overruled without prejudice to the right to raise the same questions in an answer, and it was ordered that an answer be filed August 15, 1921; that on or about October 7, 1921, the receiver requested the court (Judge Anderson) to set a time for hearing the ancillary proceeding on its merits; that said Ulmer appeared and asked for delay, stating that his counsel, Elbridge R. Anderson, was otherwise engaged; that delay was granted until October 13, 1921; that on that day the receiver and Ulmer, but without counsel, appeared before Judge Anderson, when said Ulmer filed the affidavit which is the basis of the present motion.

The statute under which the affidavit was filed is section 21 of the Judicial Code (Comp. St. § 988) and reads as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or pro-

ceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. \* \* \*

The affidavit purports to have been made by W. Edwin Ulmer, in his own behalf and that of his wife, Mazie G. Ulmer, and his sister-in-law, Mabel E. Greene, respondents in the ancillary proceeding. It was signed "W. Edwin Ulmer, specially," without more. The certificate in support of the affidavit bears the signature "W. Edwin Ulmer, specially." It was not signed by Elbridge R. Anderson, his counsel of record.

The terms of the District Court in the Massachusetts district begin on the second Tuesday in September, the first Tuesday of December, the third Tuesday of March, and the fourth Tuesday of June.

I find that the affidavit in question was not filed more than 10 days before the beginning of the term at which the cause was in order to be heard; that good cause was not shown for failure to file it seasonably; and that it was filed with a view of delay in the trial of the cause. Whether, under the circumstances above narrated, the certificate accompanying the affidavit was in compliance with the requirements of section 21, I find it unnecessary to determine.

I am satisfied that the affidavit contains some assertions of fact which the record in the case discloses to be untrue; others that are irrelevant, some of which are scandalous in character.

The affidavit, not being in compliance with the statute, had no legal effect upon the right of the judge to continue to sit in the cause. *Keown v. Hughes* (C. C. A.) 265 Fed. 572.

The motion is granted, and it is ordered that the affidavit be struck from the record.

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FRENCH REPUBLIC v. FAHEY et al.

(District Court, D. Maryland. March 16, 1922.)

1. Admiralty §12—May award damages against consignee, who accepts cargo from ship.

Admiralty may award, against a consignee who accepts cargo from a ship, damages for any wrongful detention of it irrespective of whether the respondent was or was not an original party to the bill of lading or other contract of carriage.

2. Admiralty §12—One selling goods, and contracting with ship to load them on her bound by a maritime undertaking.

One who sells goods, and enters into a contract with a ship to load them on her, becomes bound to her for an undertaking maritime in its nature.

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### 8. Admiralty — Held not to have jurisdiction in action against seller.

Where a foreign country purchased grain f. o. b. ship Baltimore, and notified sellers of its liability for demurrage, if they did not load a ship chartered by it within a certain time, but the sellers never at any time made any agreement with the ship, admiralty had no jurisdiction of a proceeding against the sellers to recover the demurrage paid.

In Admiralty. Libel by the French Republic against John T. Fahey and others, doing business as John T. Fahey & Company. Libel dismissed.

Janney, Stuart & Ober, of Baltimore, Md., and Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for libellant.

R. E. Lee Marshall, of Baltimore, Md., for respondents.

ROSE, District Judge. In March and April of 1920, the French Republic bought, and the respondents, Baltimore, grain dealers, sold, some thousands of tons of rye, f. o. b. ship Baltimore. The buyer was to send a vessel or vessels for the grain, which the sellers were to deliver not later than the 31st of July, 1920. The price was to be paid in Paris, upon presentation of draft there with the usual shipping documents. The buyer hired a ship to carry the rye across the Atlantic, and by the terms of its charter party the vessel was—

“to be loaded according to berth terms, with customary berth dispatch, and if detained longer than five days, Sundays and holidays excepted, the charterer was to pay demurrage at the rate of \$1 United States currency per net registered ton per day, and pro rata, payable day by day as incurred.”

When, in conformity with the terms of the contract with the sellers, the buyer sent word to them that the ship was ready for loading, it also in effect told them that, if there was delay in the delivery of the grain, they would have to pay this demurrage. As it turned out, it was well on into August before the respondents delivered the rye to the ship, and in consequence the buyer became liable to the vessel for a demurrage bill of upwards of \$40,000, and now seeks in this admiralty proceeding to recover from the sellers.

The sellers deny that they owe anything, asserting that they are protected by the strike clause of their contract, and they further insist that, whatever may be the relative rights of the parties, admiralty has no jurisdiction over the controversy between them. In their view, they were merely sellers of merchandise, and there was nothing maritime about the bargain they made. The circumstance that the buyer wanted the grain transported by water did not alter the essential nature of the agreement.

[1] The libellant relies on a number of cases, some of which state the now scarcely disputable principle that admiralty may award, against a consignee who accepts cargo from a ship, damages for any wrongful detention of it, and that irrespective of whether the respondent was or was not an original party to the bill of lading or other contract of carriage. *Brooks v. Hilton Dodge Lumber Co.*, 229 Fed. 708, 144 C. C. A. 118; *Sprague v. West*, 22 Fed. Cas. 970, No. 13,255.

[2] There is no room for question that one who sells goods, and

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

enters into a contract with a ship to load them upon her, has become bound to her for an undertaking maritime in its nature. *Melloy v. Lehigh & Western Coal Co.* (D. C.) 37 Fed. 377.

[3] In the instant case, the sellers never at any time made any agreement with the ship. The notice as to the rate of demurrage sent them by the buyer was considered by them, not as changing the nature of their original contract, but merely as calling their attention to the special damage which the buyer would suffer from postponed delivery, and for which it would seek reimbursement from them. In view of the sellers' thorough knowledge of the practices of the export grain trade, it is likely enough that the buyer was right as to the applicable measure of damage recoverable, assuming that the contract was in fact broken; but, even so, an original nonmaritime contract of purchase and sale does not become maritime merely because the buyer may be entitled to recover from the seller a sum which it had to pay because the default of the sellers in their nonmaritime undertaking caused it, in its turn, to break a maritime engagement.

The exception to the jurisdiction of the court of admiralty must be sustained, and, as the reform of pleading and practice has not yet gone far enough to permit a transfer of the case to the law side of the court, the libel must be dismissed.

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IN RE MOBILE.

(District Court, E. D. Louisiana, New Orleans Division. February 8, 1922.)

No. 16854.

**Intoxicating liquors** ~~247~~, 255—Seizure of still found in illegal operation held not unlawful, and owner was not entitled to its return.

The seizure by a police officer of a still, which he saw through an open door being operated in the kitchen of a dwelling house, and which as voluntarily stated by the owner, who was then arrested, was being used in making liquor for sale, held not unlawful, and the owner held not entitled to its return.

On petition of Charles Mobile for return of certain property, in possession of the United States. Denied.

Theodore H. McGiehan, of New Orleans, La., for petitioner.

Louis H. Burns, U. S., Atty., of New Orleans, La.

FOSTER, District Judge. In this case it appears that a copper still, a quantity of mash and some alcohol were removed from the residence of Charles Mobile, No. 917 St. James street, in the city of New Orleans, and he has filed a petition praying for the return of his property, or that it be destroyed according to law, on the ground that his rights under the Fourth and Fifth Amendments to the Constitution were violated by its seizure. The object is, of course, to prevent the introduction of the still and other property in evidence against petitioner on the trial of a criminal information for violation of the National Prohibition Act (41 Stat. 305).

The undisputed facts are these: Kuepferle, a city detective, was assigned to arrest vendors of lottery tickets suspected of operating in the vicinity of petitioner's home. For several days he observed numbers of men entering the gate of the alleyway along the side of petitioner's house. At about 10:40 a. m. of the 6th of January, 1922, he entered the gate, which was not locked, and as he did so a dog barked. Thereupon the petitioner opened the door of his kitchen, and the officer, looking through the door from the alley, saw the still in full operation. The officer had no warrant to arrest petitioner for any offense, and no search warrant.

The petitioner voluntarily stated that he was a longshoreman, and had been hurt, and that he was out of work, and was making a little "booze," which he sold. The officer arrested petitioner and took charge of the still, mash, and liquor, and to this the petitioner made no objection whatever. The still and other property were taken to the police station. Prohibition officers of the United States were then notified by the police, and the property was turned over to them.

Under the provisions of the National Prohibition Act it is unlawful to manufacture or sell intoxicating liquor for beverage purposes. It is also made unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violating the provisions of the act. For the purpose of enforcing the law a search warrant may issue, on probable cause shown, to search any premises whatever. It is further provided, however, that no search warrant may issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house. It is elemental that probable cause must be shown by facts within the knowledge of the affiant, who must swear to them specifically, and no warrant should issue on allegations of mere belief.

Considering the provisions of the statute, it seems to me that under a proper construction of the act, applying thereto the rules of interpretation, the words "some business purpose" would include the manufacture of intoxicating liquor for sale. The words "store, shop, saloon, restaurant, hotel or boarding house" are illustrative, rather than exclusive. Therefore, notwithstanding the building in this case was a private residence, occupied as such, a search warrant could properly have issued on the testimony of Kuepferle. Warrants, sometimes designated search warrants, may be issued after property has been taken into possession by peace officers, for the purpose of seizing and holding the property; but no search warrant was required in this case. The petitioner was apprehended in the active participation of an offense denounced by the law. The violation of the law was disclosed voluntarily by him. He was present and acquiesced in the seizure and removal of his property. Under these circumstances, there was no violation of his constitutional rights.

The petition will be denied.

W. R. GRACE & CO. v. FORD MOTOR CO. OF CANADA, Limited, et al.\*

(District Court, N. D. California, First Division. March 1, 1921.)

No. 16058.

1. Shipping Ⓒ=108—Contract construed as to date of loading.

A contract for the shipment of freight by a specified steamer providing for "June loading," and that, "when vessel is closer at hand, will advise you more definitely as to exact loading date," fixed June as the time at which the steamer should load the cargo.

2. Shipping Ⓒ=108—Vessel's owner could not arbitrarily fix date for loading cargo.

Under a shipping contract providing for "June loading," and for delivery of the freight alongside the steamer as fast as the vessel could load, the owner of the vessel could not arbitrarily fix a date for the delivery of the freight.

3. Shipping Ⓒ=108—No actual breach by shipper, where vessel not ready to load and part of freight on wharf.

Under a shipping contract providing for delivery of the freight alongside the steamer as fast as the vessel could load, under which the shipper was notified that delivery of freight was to begin on June 27th and be completed by June 29th, where the vessel was not in a condition to load on June 27th, and a part of the shipper's freight was then on the wharf and treated by the vessel's owner as delivered in part fulfillment of the contract, there was no actual breach of the contract by the shipper before the filing of a libel on June 27th.

4. Contracts Ⓒ=313(1), 316(1)—Action will lie for anticipatory breach before performance due, but not if part performance accepted.

While an action may be maintained for a breach of contract on a distinct notification by one of the parties that he will not perform the contract, even though performance be not then due, the party aggrieved by such anticipatory breach may not thereafter accept a part performance under the contract, and still maintain his action on such anticipatory breach before performance is due.

5. Shipping Ⓒ=108—No libel for anticipatory breach, where libellant did not accept repudiation of contract, but seized freight on wharf as delivered in part performance.

Under a contract for the shipment of 6,200 tons of automobiles and parts by a certain steamer, though the shipper notified the vessel's owner that 4,075 tons was all that would be furnished, and that this would not be furnished if the owner attempted to hold it for freight on the whole 6,200 tons, the vessel's owner, by refusing to accept this as a repudiation of the contract, and by filing its libel against freight then on the pier, elected to accept such freight as part performance of the contract, and could not maintain the libel as for an anticipatory breach, as it could have no action in rem against the freight on the pier, unless delivered and received as freight under the contract, and it was immaterial that the shipper endeavored to have this freight retaken by the railroad carrier that had delivered it.

In Admiralty. Libel by W. R. Grace & Co., a corporation, against the Ford Motor Company of Canada, Limited, and others. Libel dismissed.

Ⓒ—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

\*Decree affirmed 278 Fed. 955.

Andros & Hengstler and Golden W. Bell, all of San Francisco, Cal., for libellant.

McCutchen, Willard, Mannon & Greene and W. F. Williamson, all of San Francisco, Cal., for respondents.

DOOLING, District Judge. This is an action in rem and in personam for breach of contract to furnish cargo for one of libellant's vessels. On February 25, 1916, libellant and respondent entered into the following written contract:

"San Francisco, February 25, 1916.

"Ford Motor Company, San Francisco, Cal.—Gentlemen: Attention Mr. L. C. Davis. We confirm freighting engagement as follows:

"Commodity: 6,200 tons (40 cubic feet each) automobiles and parts, in packages.

"Rate: \$47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

"Shipment: Per American S. S. Cacique June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

"Delivery: To be delivered alongside steamer at San Francisco as fast as vessel can load; otherwise, shippers to pay demurrage at rate of \$3,000 per day.

"Total shipment weighs approximately 1,550 tons (2,240 pounds each), measuring about four to one.

"Yours very truly

W. R. Grace & Co.,

"[Signed] H. E. Moore, Traffic Manager.

"Accepted: [Signed] Ford Motor Co. of Canada, Limited,

"By L. C. Davis."

[1] As the court construes this contract, it fixed June as the time at which the Cacique should load the cargo of 6,200 tons agreed to be furnished by respondent. Libellant was at all times willing and eager to carry out the contract, while respondent was not willing to furnish more than 4,075 tons of the 6,200 tons contracted for, and on June 14th advised libellant that—

"4,075 tons is the entire cargo that we will furnish for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding on this company for 6,200 tons space, and attempt to hold this 4,075 tons cargo for freight for 6,200 tons at the above rate, we will decline to load any of the cargo whatever."

To this notification libellant replied:

"We now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and always have been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract, but only as a partial satisfaction which it in fact is."

[2] On June 22d libellant informed respondent that delivery of freight was to begin on June 27th and be completed by June 29th. On June 27th, however, the Cacique was not ready to take on cargo, and could not have been made ready to do so. The contract did not permit

libelant arbitrarily to fix a date for the delivery of freight, but required only that freight "be delivered alongside the steamer at San Francisco as fast as vessel can load."

[3-5] This action was commenced on June 27th, at which time there had been no actual breach of the contract on the part of respondent for the reasons: (1) That the vessel was not at that time in condition to load; and (2) there were 1,100 pieces of respondent's freight on the wharf, which libelant treated as having been delivered in part fulfillment of the contract, and notwithstanding the notice that delivery of freight should begin on June 27th, and be completed by June 29th, respondent was required by the contract to deliver only as fast as the vessel could load. As there was, therefore, no actual breach of the contract before the filing of the libel, which, indeed, was filed before performance was due, the action, if maintainable at all, can only be maintained upon the theory that there was an anticipatory breach committed by respondent when it notified libelant that it would furnish only 4,075 tons of freight, and insisted that the amount so furnished should not be held by libelant for the 6,200 tons contracted for.

There is, of course, no doubt that an action may be maintained for a breach of contract upon a distinct notification by one of the parties that he will not perform an executory contract such as this, even though performance be not due at the time of such notification, the notification being regarded as an anticipatory breach; but the party aggrieved by such anticipatory breach may not thereafter accept a part performance under the contract, and still maintain his action upon such anticipatory breach, and before performance is due. In the instant case, by filing its libel in rem against the 1,100 pieces of freight on the pier, libelant, despite its present protests, elected to accept such 1,100 pieces as part performance of the original contract. It could have no action in rem against them, unless delivered and received as freight under the contract. As bearing upon this proposition the testimony of Mr. Carter, libelant's manager, who had charge of the transaction, is of interest.

"Q. So that you knew at that time that the Ford Motor Company had actually delivered 1,100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver? A. Yes; but also knew it was delivered by mistake."

"Q. That is, it was not intended as freight for the steamer? A. No; it was not the intention of the Ford Motor Company to give us that freight."

"Q. And it was not received by you as freight? A. It was received as freight."

"Q. It was received as freight? A. It was received as freight."

"Q. Then you had it as freight? A. We did."

"Q. And you thereafter, as set forth in this libel verified by you, proceeded to foreclose a maritime lien upon the 1,100 packages of freight? A. Yes; the railroad at that time was requesting us either, as I remember it, to return or permit them to take away that cargo; they claimed they had made an error in delivering it to us. We naturally, when we placed our libel, libeled everything we could find of Ford. \* \* \*

"Q. You did not comply with any request of the Southern Pacific Company on that subject, if any such was made to you? A. No; we did not."

"Q. But you proceeded two days after that to foreclose a maritime lien upon those packages, didn't you? A. Yes."

While it is true that respondent endeavored to have this freight retaken into possession by the railroad company that had delivered it, yet

this fact is not very material, in view of the action of libelant, as disclosed by the above testimony and by the course pursued by it in proceeding against the packages in rem as against freight in its possession as such. We have, then, an action for breach of contract commenced before performance was due, based upon a claimed repudiation of the contract, but which repudiation was not accepted by libelant as such, because it held 1,100 packages as freight delivered in pursuance to the contract after such repudiation, and proceeded to foreclose a maritime lien against it as such in the very action based upon such repudiation. But if we regard the letters and conduct of respondent as a repudiation of the contract, libelant could only maintain an action thereon by accepting them as such. It could not for one purpose hold the contract as broken, and for another regard it as in process of being performed. It could not, before performance was due, maintain an action as for an anticipatory breach of the contract, and in the action itself proceed in rem against freight that could not be held as such, unless delivered under and in part performance of the same contract. It is true that in the admiralty an action will sometimes be sustained, even though prematurely brought, where there is some good reason for doing so. But where, as here, performance was not due at the time the action was commenced, where performance of at least a substantial portion of the contract was offered by respondent, and where there is a very grave question as to whether libelant itself was or would be in a position to carry out its portion of the contract, however willing to do so, I do not think that justice requires, or indeed will permit, the maintenance of the action upon an anticipatory breach, unless, when the libel was filed, such breach would sustain it.

During the argument of the case the following colloquy occurred between the court and libelant's counsel:

"The Court: I suppose everybody will agree that the breach must have preceded the filing of the libel?"

"Counsel: Yes, your honor; that the breach must have preceded the filing of the libel. I claim that the breach preceded the filing of the libel, and that the breach continued right down to the moment when the libel was filed. We are not tied down even to this anticipatory breach; that it appears from the evidence that at the time the libel was filed.

"The Court: No after breach would support this libel would it?"

"Counsel: No; I will rest on the breaches down to the time of the filing of the libel."

At the time the libel was filed the breach relied upon could not support an action, for the reasons hereinbefore stated. At that time the libelant had suffered no injury, and respondent was still entitled to perform its agreement. Whatever rights may have later accrued to libelant, or whatever injury, if any, it may have later suffered, when this action was commenced it was still uninjured, and for this reason the present libel must be dismissed.

W. R. GRACE & CO. v. FORD MOTOR CO. OF CANADA, Limited, et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1922.)

No. 8721.

1. Shipping ⇐108—Shipper held not in default when suit commenced.

Under a contract for the shipment of 6,200 tons of automobiles and parts, under which the shipper was notified that the vessel would be ready for loading on June 27th, and that loading was to be completed not later than June 29th, where the shipper on June 27th had 4,650 tons in San Francisco for shipment, and which were actually conveyed on the steamer, and had freight on the pier with which to begin loading, but the vessel could not possibly have loaded any cargo on the 27th, 28th, or 29th, there was no actual breach of the contract by the shipper when suit was commenced on June 27th.

2. Shipping ⇐108—Correspondence held not to show "June loading" did not mean loading before the end of the month of June.

Under a shipping contract providing for "June loading," correspondence between the parties held not to show that the quoted term was not intended to mean a loading before the expiration of the month of June, but only a loading as soon as was feasible or convenient after the expected return of the steamer from a voyage.

[Ed. Note.—For other definitions, see Words and Phrases, June Loading.]

3. Shipping ⇐108—Notice that full cargo contracted for would not be furnished held not anticipatory breach.

Under a contract for the shipment of 6,200 tons of automobiles and parts, a letter from the shipper, stating that 4,075 tons was its entire cargo, and announcing its purpose to withhold loading thereof if the owner of the vessel intended to hold it for freight on 6,200 tons, was not a renunciation of the contract or the expression of a purpose to breach it, and where the owner in reply stood strictly on the contract, and stated that it was ready to perform and accept such quantity as might be delivered, and that it would hold the shipper responsible, a suit could not be maintained as for an anticipatory breach.

4. Admiralty ⇐86—Leave to amend not granted, when there is no suggestion that any other evidence could be adopted.

Where no actual or anticipatory breach of a contract of shipment had occurred when suit was brought, and it did not appear that the owner of the vessel by which the goods were to be shipped had a cause of action for breach of the contract at any time, and there is no suggestion that other evidence on the merits may be adduced, permission to amend the pleadings on the theory that the suit was prematurely brought will not be granted.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Libel in admiralty by W. R. Grace & Co., a corporation, against the Ford Motor Company of Canada, Limited, and another. From a decree dismissing the libel (278 Fed. 951), the libelant appeals. Affirmed.

The appellant brought a libel in rem and in personam against the appellees and against certain automobiles and parts, for breach of a contract of freightment entered into between the appellant and the appellees on February

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

25, 1916. The Ford Motor Company of Canada will be herein designated the appellee. The contract was for the shipment of 6,200 tons of automobiles and parts from San Francisco to New Zealand and/or Australia. It contained this provision: "Shipment per American Steamship Cacique, June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date." The negotiations prior to entering into the contract were these:

On February 23, 1916, the Ford Motor Company of Canada telegraphed to the San Francisco office of the Ford Motor Company, a separate corporation, suggesting the consignment of freight for "May and June sailing." Davis, traffic manager of the Ford Motor Company at San Francisco, after negotiating with the appellant, wired the appellee: "If you can take 6,200 tons for early June, can close with Grace Company same rate Wellington and Sydney or Wellington and Melbourne." To which the appellee on February 25 answered: "Accept Grace offer 6,200 tons. Confirm, advising names and dates of sailing." On the same day the appellant prepared the contract of affreightment which was sued upon. On April 3, 1916, the appellee advised the Ford Motor Company of San Francisco that it had but 4,284 tons for shipment on the steamer Cacique, adding: "However, we expect certain additions from Australia, which will no doubt bring our specifications up to the required amount." On May 1 the appellee wired the San Francisco Ford Motor Company that 5,858 tons would be sent forward for shipment under the contract. The shipments, however, totaled only 4,575 tons.

On June 1 the appellee wrote the appellant, advising that 4,075 tons had been forwarded for shipment on the Cacique, and that the appellee had effected an arrangement with the Union Steamship Company for the transfer of 1,500 tons, and that 524 tons had been procured elsewhere, which made up a total of 6,099 tons, adding that it was the appellee's understanding that the Cacique would leave on June 14, and again that it would sail on June 24, and that the appellee's plans had been made accordingly. The letter directed attention to the fact that the sailing date as then learned had been postponed until July 10, and on that account the appellee disclaimed liability if it should not be able to supply the full 6,200 tons. The letter called attention to the fact that the contract "calls for June loading, which in the parlance must necessarily mean June shipping." The appellant answered on June 6, denying the appellee's contention that the contract called for June shipment, but demanding that the appellee's shipment must be alongside the Cacique on June 27, ready for loading "as fast as ship can receive."

On June 14 the appellee advised the appellant that, if the latter should attempt to hold for dead freight the tonnage then actually shipped by the appellee, the latter would decline to load any of the cargo. The appellee then added its contention that the contract of February 25 was not binding upon it, for the reason that the Cacique had taken out a clearance for July 5, instead of loading and clearing in June. The letter added: "Our shipments of 4,075-ton quantity will be ready and alongside your steamer on June 27, as indicated by you." On June 22, 1916, the appellant advised the appellee's agent: "Supplementary to our letter of June 5, advising that steamer Cacique will be ready for loading June 27: Please note the delivery of 6,200 tons automobiles and parts, full quantity your engagement under contract date February 25, must commence on that date, June 27, and be completed not later than June 29."

About that time 1,500 tons of the appellee's automobiles were delivered on the pier at which the Cacique was to dock. On June 24 the appellee's agent addressed another letter to the appellant, stating that 4,075 tons is the entire cargo for the Cacique, and that that would be withheld from loading if the appellant intended to hold it for the full freight of 6,200 tons. On June 26 the appellant telegraphed the appellee, insisting on full performance of the contract in every particular, and declaring its readiness to perform the same, and to accept such quantity of automobiles as might be delivered "and hold you responsible for all damages, including demurrage, which we may ultimately sustain by any breach of said contract."

On June 27, 1916, the Cacique arrived at San Francisco and docked at Pier 26. There was delay in unloading her inward cargo, and the unloading was not completed until July 8 at 6 p. m., after which the steamer was required to

go into dry dock for repairs. She returned to Pier 26 on July 12. The 1,500 tons of the appellee's automobiles still remained on said pier. No cargo was loaded on the Cacique before July 12. In the meantime, on June 27, at 4 o'clock in the afternoon, the appellant brought the present suit, and under its libel in rem seized the 1,500 tons of the appellee's goods, and by writ of attachment it levied upon 4,000 additional tons of automobiles of the appellee then in the possession of the Southern Pacific Company at San Francisco. On June 28, the day following the commencement of the suit, the appellant telegraphed the appellee: "Please take notice that, in accordance with our previous advices, the steamer Cacique was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at 9 p. m. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of \$3,000 per day commences on the day and at the hour last mentioned."

Andros & Hengstler, Louis T. Hengstler, and F. W. Dorr, all of San Francisco, Cal., for appellant.

W. F. Williamson, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It must be borne in mind that on June 22 the appellant had advised the appellee that the Cacique would be ready for loading on June 27, and that the loading was to commence on that date and be completed not later than June 29. The court below held that the contract required that the cargo must be loaded in the month of June, 1916, that there had been no actual breach of the contract by the appellee at the time when the suit was commenced, that there had been no breach of the contract by the appellee in anticipation of the time of performance, and that the appellant could not proceed in rem against a portion of the cargo that had been delivered and received as freight and at the same time prosecute its libel on the theory of an anticipatory breach.

[1] The appellant contends that there was an actual breach of the contract by the appellee. We think the contention cannot be sustained. On June 27 the appellee had in San Francisco for shipment on the Cacique 4,650 tons of automobiles, and when the vessel finally did sail, in late July, these automobiles were conveyed on the steamer. It is true that the appellee had failed to deliver the full cargo of 6,200 tons as contracted for, but the full performance of the appellee's obligation was not due at the time when the suit was commenced. The appellee had until and including June 29 in which to furnish the cargo. The notice required that loading must begin on June 27 and be completed not later than June 29. There were appellee's goods on hand with which to begin on June 27. The appellee could not be in default at the time when the suit was commenced. The evidence is undisputed that during the 27th, 28th, and 29th the appellant could not possibly have loaded any cargo. She had arrived on the 27th with a cargo of 7,900 tons, which she did not unload until the afternoon of July 8, and thereafter she was ordered into dry dock by Lloyd's surveyor, and she was not seaworthy or in condition to take on cargo for the appellee until after July 12.

[2] But the appellant contends that the contract did not call for June loading; that the term "June loading" was not intended to mean

loading in the month of June, but as soon as was feasible or convenient after the expected return of the Cacique from her voyage to Oriental ports. The preliminary correspondence between the parties clearly indicates that the appellee was looking for transportation of its goods in early June, and that it assented to a contract which provided for June loading. The authority of Davis to engage space was expressly limited, as the appellant well knew, for not later than a June sailing. The appellant drew the contract, and inserted the words "for June loading," a phrase used evidently as equivalent to June sailing, and we do not see how it can be held to mean anything other than its plain terms import. *Gray v. Moore* (C. C.) 37 Fed. 266; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

The appellant finds in some of the correspondence expressions which at first glance give color to its contention that the contracting parties had in contemplation a possible delay in loading until early in July. Thus, on June 13, Mr. Davis wrote to the appellee, referring to the delay of the Cacique, and saying:

"It is now our hope that she will even be as late as the 10th of July, as we wired recently. \* \* \* We sincerely hope that you will be able to fill the space with your own cars, rather than let it go to another concern for a lower figure."

The inference to be drawn from the letter is that the writer hoped that the delay of the Cacique would relieve the appellee from liability for damages for its failure so far to furnish the whole cargo it had contracted to furnish, and very probably he had in view, in the event of such delay, the possibility of making up the shortage of the cargo so as fully to comply with the contract. We see nothing in the correspondence to indicate that the court below did not properly construe the contract as calling for a loading before the expiration of the month of June.

[3] But the appellant contends, and it alleged in its libel, that there was an anticipatory breach of the contract, in that the appellee in writing expressly refused to perform the same. The letter of the appellee of June 24, stating that 4,075 tons is the appellee's entire cargo for the steamer, and announcing the appellee's purpose to withhold loading of that cargo if the libellant intends to hold the same for the full freight of 6,200 tons, was not a renunciation of the contract, or the expression of a purpose to breach the same, and it was not accepted as such. The answer to that letter states that the appellant stands "strictly upon the contract," that it was ready to perform the contract, and was ready to accept such quantity of automobiles as might be delivered, that it would hold the appellee responsible for all damages, including demurrage, and that the appellant would not accept such smaller quantity as satisfaction of the contract, but only as the partial satisfaction "which it in fact is." The law applicable to the question of anticipatory breach is clear and well settled. In 6 R. C. L. 1025, it is said:

"In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal, and

absolute. \* \* \* The renunciation itself does not ipso facto constitute a breach. It is not a breach of the contract, unless it is treated as such by the adverse party."

Among the authorities which apply that rule are *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Smoots Case*, 15 Wall. 36, 21 L. Ed. 107; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

[4] The appellant argues that under the equitable practice in admiralty the libel should be sustained, even though it were prematurely brought, and that the appellant should be permitted to amend its pleading; but there is no suggestion that other evidence on the merits of the case may be adduced in addition to what is contained in the record. The difficulty which confronts the appellant is not a defect in its pleading, but the nature of the facts which have been disclosed. Obviously every fact relating to the merits of the controversy is before the court. The appellant cannot recover damages for an anticipatory breach, for the reason that the appellee did not renounce the contract, and the appellant did not accept the appellee's communication as a renunciation, but by its own words and conduct recognized the continuing existence of the contract. The appellant cannot recover for an actual breach of the contract, for the reason that no breach had occurred when the suit was brought. Nor does it appear from the facts disclosed that at any time the appellant had a cause of action for breach of the contract, since the evidence indicated its own failure to perform.

The decree is affirmed.

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ALWORTH-STEPHENS CO. v. LYNCH.

(District Court, D. Minnesota, Fifth Division. March 30, 1922.)

1. Internal revenue §7—Mine lessee held entitled to charge depletion against royalty income.

Where a corporation, which had leased mining properties, agreeing to pay the owners a stipulated royalty, leased the properties to others after ore was discovered thereon, reserving a greater royalty, and, before 1913, the ore in the properties had been entirely uncovered ready for mining by the steam shovel method, so that the quantity could be ascertained with substantial accuracy, and it was obvious that the ore would be exhausted in seven years, if mined at the rate required by the lease, the corporation is entitled to deduct from the royalties received during the year 1917, in figuring its net income and excess profits tax, a depletion to the extent of the market value in the mine of the product thereof mined and paid for during the year, figured on a risk rate basis, which was found to be an average of 9 per cent.

2. Internal revenue §7—Corporation held to own valuable property interest in mines.

A corporation, which had leased mining properties, agreeing to pay a stipulated royalty on ores mined, and, after discovery of ores thereon, had leased the properties to others at an increased royalty, owned a valuable property interest or right in the mines, whose value was approximately capable of definite ascertainment, where the total quantity of ore could be determined with substantial accuracy.

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☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

**3. Internal revenue — 7—Corporation held to have more than nominal capital.**

A corporation, whose stockholders had paid in \$25,000 on their stock subscriptions, but which had returned to the stockholders dividends exceeding such payments, had an invested capital in 1917 of the amount paid by the stockholders, which could not be said to be more than nominal capital, so that the levy and assessment of income and excess profit taxes could not be made under either section 209 or 210 of the Revenue Act then in force (Comp. St. §§ 6336½j, 6336½k), but must be made under section 201 (section 6336½b).

At Law. Action by the Alworth-Stephens Company against E. J. Lynch, as Collector of Internal Revenue for the District of Minnesota, in which Margaret C. Lynch, as executrix, was substituted as defendant, after the death of the original defendant. Judgment ordered for plaintiff.

Washburn, Bailey & Mitchell, of Duluth, Minn., for plaintiff.

Alfred Jaques, U. S. Atty., of Duluth, Minn. (Newton K. Fox, of Washington, D. C., of counsel), for defendant.

MORRIS, District Judge. This case having been originally commenced by the plaintiff against E. J. Lynch, as collector of internal revenue for the district of Minnesota, while he was such collector, and he having appeared and answered while he was such collector, and the parties having stipulated in writing, duly filed herein, that the said case should be tried before the court without a jury, and it having come on for trial before the undersigned judge of said court in June, 1921, Washburn, Bailey & Mitchell appearing as attorneys for the plaintiff in said action, Alfred Jaques, Esq., United States District attorney for the district of Minnesota, having appeared as attorney for the defendant, and Newton K. Fox, attorney of the Treasury Department, having appeared as counsel, and a stipulation as to the facts having been made and filed herein and evidence having been taken before the court and briefs having been duly submitted by counsel for the parties, and after the submission of said case said E. J. Lynch having died, and it having been made to appear to the court that he had died since the case was tried and submitted, and that Margaret C. Lynch is the duly appointed, qualified, and acting executrix of the last will and testament and of the estate of said E. J. Lynch, appointed by the probate court of Ramsey county, Minn., and said Margaret C. Lynch, as executrix aforesaid, having entered her appearance herein and consented to her substitution as defendant in the said case, through Alfred Jaques, Esq., United States attorney for the district of Minnesota, and an order substituting said Margaret C. Lynch, as executrix of the last will and testament and of the estate of said E. J. Lynch, deceased, having been entered herein, as defendant herein, in place and instead of said E. J. Lynch as collector of internal revenue for the district of Minnesota, now deceased, and ordering that the said case further proceed in the name of said Margaret C. Lynch, executrix as aforesaid, as defendant, and the court being fully advised in the premises, finds as matters of fact:

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Organization of Company and Only Activities on Property Other Than the Perkins and Hudson Properties, Which Two Latter Properties are Here Directly Involved.

(1) That the Alworth-Stephens Company was incorporated under the laws of Minnesota in 1907, with an authorized capital of \$100,000, which was subscribed for by five persons, who constituted the only stockholders, the subscriptions to be paid in cash at par as called for by the board of directors, and that during 1907 and 1908 five calls, of \$5,000 each, were made and paid, making a fully paid in capital of \$25,000, and no further calls were ever made, and \$24,000 only of stock was issued, and no more ever has been issued. The certificates for this stock were still outstanding during the year 1917.

(2) That upon the organization of said company in 1907 Marshall H. Alworth and wife assigned to said company an exploratory option contract given him by Henry Stephens and Albert L. Stephens, who were the fee owners, covering about 5,000 acres of land in St. Louis county, Minn., which contract, made by said fee owners to said Alworth, was dated September 4, 1907, recorded in the office of the register of deeds of St. Louis county, Minn., September 19, 1907, in Book 4 of Agreements, on page 464, and the said assignment from said Alworth and wife to said Alworth-Stephens Company was dated October 5, 1907, and recorded in the office of said register of deeds on October 5, 1907, in Book 5 of Agreements, on page 180. The said option contract from the said fee owners gave said Alworth and said plaintiff, as his assignee, the right to explore said lands for minerals, and to call for and take leases upon the basis of a royalty of 30 cents per ton, payable to the fee owners, for all ore mined and shipped, such leases to run for a period of 50 years from their date, and to provide for the mining and removal of a quantity of ore equivalent to 25,000 tons per 40 acres annually from the premises described in each such lease, or the payment of a royalty upon said minimum annual amount at the rate of 30 cents per ton, payments to be made quarterly.

(3) That thereupon the plaintiff, Alworth-Stephens Company, with the funds provided by the subscribed stock proceeded to explore certain of said lands during the year 1908, and never conducted any explorations after said year, except that in the year 1912 it expended the sum of \$1,073 in one small exploration, and that the total amount that the Alworth-Stephens Company ever expended for exploration was \$40,068, which included the said \$1,073 expended in the year 1912, and which included the sum of \$17,868.50 expended in exploration on the Perkins property, as hereinafter set forth, and that said amount of \$40,068 is the entire sum ever expended by the company up to and including the year 1917, except for dividends to stockholders, and except for sundry small items of \$1,266.86, and except for the federal income and profits taxes, which were paid the United States government.

(4) That the only amounts which the plaintiff, Alworth-Stephens Company, ever received from any source, from its organization to and including the year 1917, outside of royalties received on the Perkins and Hudson properties, as hereinafter mentioned, were the said sums

of \$25,000 paid in by the stockholders upon their stock, and the sum of \$2,500 paid to it by the fee owners in 1915 for the release of one small tract of land upon which the said plaintiff had expended the above-mentioned sum of \$1,073 in exploration during the year 1912, and the sum of \$17,868.50 paid to it as reimbursement for its exploration expense on the Perkins property as hereinafter set forth.

(5) That after the year 1908 the Alworth-Stephens Company distributed to its stockholders as dividends all sums which it received, and before the end of the year 1909 had paid to its stockholders as dividends sums in excess of all amounts paid in by them for said stock, and that it did not at that time nor thereafter have any debts or obligations.

(6) That in the year 1915 the Alworth-Stephens Company released to the fee owners all the lands covered by the option contract above mentioned, and all claims thereon, except the lands known as the Perkins and Hudson properties, hereinafter mentioned, and the said company never had any other properties than those covered by the said option contracts from the said fee owners, Henry and Albert L. Stephens. That the said plaintiff, previous to said release, had given certain exploratory options to various parties without the receipt of any consideration, but none of such exploratory options had been exercised by the various optionees, and the said Alworth-Stephens Company had conducted no exploration itself, except as above stated.

(7) That during the year 1917, which is the year here involved, the plaintiff Alworth-Stephens Company, therefore owned only two properties, known as the Perkins and Hudson properties, and plaintiff's ownership and relation to said properties is as follows:

#### Perkins Property.

(8) That during the year 1908 the plaintiff, Alworth-Stephens Company, conducted explorations upon the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 26, township 59, range 15, and the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 11, township 59, range 14, St. Louis county, Minn., and in such explorations expended \$17,868.50, upon which property there was discovered by such explorations a body of iron ore, and said property became and was known, as herein referred to, as the Perkins property or mine. That thereupon the plaintiff applied to the fee owners, said Henry and Albert Stephens, for a mining lease upon said property pursuant to said option contract, which was executed by said fee owners, dated August 25, 1908, and was recorded in the office of said register of deeds on the 28th of December, 1908, in Book 6 of Agreements, on page 297, ran for 50 years, and carried a minimum annual output of 50,000 tons and a royalty of 30 cents per ton.

(9) That under date of September 1, 1908, the plaintiff subleased said premises last above described to John S. Lutes by lease recorded in Book 10 of Agreements, page 235, in the office of said register of deeds, which sublease ran for a period of 25 years from its date, and provided for a royalty of 75 cents per ton on iron ore, with a minimum annual output of 50,000 tons per year, or, in lieu thereof, the payment

of an advance royalty on said tonnage, the said royalty of 75 cents per ton, being an increase of 45 cents per ton over and above that which the Alworth-Stephens Company was required to pay the fee owners on said property, and as a further consideration for said sublease the said Lutes paid to said plaintiff the sum of \$17,868.50, being the return of exploration expenditures made by the plaintiff on said lands. That the said Lutes thereupon assigned said lease to the Perkins Mining Company, which assumed the obligations thereof and operated said property until the ore therein was exhausted in September, 1919. That shortly after said Perkins Mining Company obtained said sublease the exploration of said premises was completed, and all the ore proved up, and it proceeded to strip the overburden of dirt and rock from said ore, so as to load the ore therein directly into railroad cars by the steam shovel open pit method, and said stripping was completed as to said property as early as the year 1912, and at that time all the ore therein was developed, and the amount in tonnage thereon was definitely known with substantial accuracy; the said stripping development of said mine making same very valuable as it stood in 1912.

#### Hudson Mine.

(10) That in July, 1908, the said Alworth-Stephens Company granted to one H. G. Dalton, of Cleveland, Ohio, as trustee, an option until August 1, 1909, to explore and take out a mining lease upon certain lands, including N. W.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of section 4, township 58, range 15, St. Louis county, Minn., which is a part of the lands which said plaintiff held under its exploratory option contract. That said Dalton thereupon assigned his option to the Syracuse Mining Company, which company expended considerable sums in exploration, and surrendered all of the lands under its option, except the said N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 4, township 58, range 15, upon which a body of ore was discovered and the mining lease called for. That thereupon the fee owners of the said property, pursuant to said plaintiff's option contract, executed to the plaintiff a mining lease, dated March 12, 1909, recorded April 19, 1909, in Book 6 of Agreements, on page 402, in the office of said register of deeds, which was for 50 years, with a minimum yearly output of 25,000 tons, and thereupon plaintiff executed to said Syracuse Mining Company a sublease on said property, dated March 12, 1909, recorded April 19, 1909, in Book 6 of Agreements, page 408, in the office of said register of deeds, running for 49 years, with 50,000 tons per year minimum, and said property became and was known as the Hudson property or mine. That the royalty provided for in the lease from the fee owners to the plaintiff was 30 cents per ton, and the royalty provided for in the sublease from the plaintiff to said Syracuse Mining Company was 60 cents per ton, being an increase of 30 cents over that provided for in the lease from the fee owners to the plaintiff.

(11) That upon the taking of said sublease by said Syracuse Mining Company said company proceeded to strip the overburden from the ore on said property, and to complete the exploration thereon, and as early as the year 1912 had completed said stripping, and had thoroughly explored said property, so that the tonnage of ore therein was definitely known with substantial accuracy, and the same was ready

for mining by the open pit steam shovel method, into railroad cars, which development had rendered said property as it stood in 1912 very valuable.

(12) On March 1, 1913, both the Perkins and Hudson properties or mines therefore had been thoroughly explored, the overburden had been stripped, and the ore therein was ready for mining by steam shovel operation, and that on said date, considering the tonnage thereof being definitely known and developed, it was known that the ore therein would be completely mined out and exhausted within a period of 7 years from that date, and that it would be mined and removed and paid for by the said sublease at least as fast as in equal annual installments during said seven year period. That the plaintiff from the year 1908 to and including the year 1917 was the owner through said leases of a property interest in said Perkins mine, and from the year 1909 to and including the year 1917 was the owner of a property interest in said Hudson mine. That on March 1, 1913, and ever since said date, to and including the whole of the year 1917, the fair market value of the ore in each of said mines, and the fair market value in the mine of the products thereof, and of each ton therein, was considerably upwards of 75 cents per ton, and that the fair market value on March 1, 1913, of the plaintiff's property interest in the ore in said Perkins mine was not less than 32.355 cents per ton, and of the plaintiff's property interest in the ore in said Hudson mine was not less than 21.57 cents per ton, in each case for each and every ton therein, and which was thereafter removed and paid for; the said fair market value of plaintiff's property interest in said ore in said mines on March 1, 1913, being ascertained by multiplying the total number of tons in the Perkins mine by the net royalty of 45 cents per ton, and the total number of tons in the Hudson mine by 30 cents per ton, to be received by the plaintiff, and considering the same as payable in equal annual installments for 7 years from March 1, 1913, and reducing the total amount so to be received to the present worth as of March 1, 1913, on a 9 per cent. discount basis, and then dividing said total March 1, 1913, value by the number of tons therein and so to be mined and paid for, which gives said amount of 32.355 cents per ton for each and every ton in said Perkins mine, and 21.57 cents per ton for each and every one in said Hudson mine. That inasmuch as the life of each of said mines, or period within which each was to be exhausted and the ore mined and paid for, was not more than 7 years from March 1, 1913, and as the ore was to be mined and paid for quarterly in equal annual installments during said period, it follows that the March 1, 1913, value of each dollar which the plaintiff would receive during the life of said mines for its net property interest was 71.9 cents, and that the March 1, 1913, value of the plaintiff's property interests in each of said mines was 71.9 per cent. of the total royalties that it would receive, and was 71.9 per cent. of the royalty which it would receive on each ton therein when mined, removed, and paid for.

(13) That for the year 1917 the reasonable allowance for depletion to which the plaintiff was entitled as to each of said mines was 71.9 cents for each dollar of net royalties which it received for said year, and which it had left after paying the fee owners for said royalties

due to such fee owners, and from each dollar of such net royalties so received by it, it was entitled to deduct as and for the reasonable amount for depletion the sum of 71.9 cents in arriving at its net taxable income for said year 1917. That no allowance made to the plaintiff prior to the year 1917 had equaled the fair market value of the plaintiff's property interest in said mines, or either of them, as of March 1, 1913, and that the said allowances herein provided for during the year 1917, plus any and all allowances theretofore made, did not equal the fair market value as of March 1, 1913, of the plaintiff's property interest in said mines, or either of them. That the said allowances for depletion, to be deducted as herein set forth, do not exceed the fair market value in the mine of the product thereof, which was mined and sold and paid for during the year 1917, for which the computation herein set forth is made, which market value of said product so mined, sold, and paid for during said year 1917 was in fact in excess of the full amount of all royalties received by the plaintiff from its said lessee, including those which the plaintiff was required to pay to said fee owners.

(14) That the total amount of the net royalties which the plaintiff received from said properties for the year 1917, and which were left and belonged to it after it had paid therefrom all royalties due from it to the fee owners, was \$77,505.98, and that it had no receipts during said year from any other source whatsoever. That its invested capital for and during said year 1917 was not to exceed \$25,000, represented by its certificates of capital stock outstanding; it being true that during the year 1917 said company did not employ any capital in any operations in its business or to produce its income for said year, and it also being true that prior to 1917 the company had paid out to its stockholders several times the amount which originally had been put into said company for said stock, and it being true that if the original \$25,000 so paid in be considered as being returned to its stockholders ratably per ton as the ore was mined and paid for, according to the total tonnage in the properties, there was left on the 1st of January, 1917, only about \$4,500 still unreturned, and if it be considered that its invested capital was the total sum of \$40,068 expended for exploration, plus the sum of \$1,266.86 expended for other small items as set forth in paragraph 3 hereof, which were the only sums it ever spent, and that said sum was returned ratably per ton as the ore was mined and paid for, in proportion to the total tonnage, then said company, on January 1, 1917, had only about \$7,500 remaining still undistributed. That from said total net receipts of \$77,505.98 for said year 1917 the said plaintiff was entitled to the said reasonable allowance of 71.9 per cent. of said receipts as depletion, amounting to \$55,726.80, leaving its net taxable income for said year the sum of \$21,779.18. That the income tax on said amount for said year at the rates specified in the law was \$735.70, and the war and excess profits tax on which was \$9,517.51, or a total income and excess and war profits tax of \$10,253.21. That the computation of said tax is as set forth in Exhibit A, hereto attached.

(15) That for said year 1917 the plaintiff paid to E. J. Lynch, collector of internal revenue for the district of Minnesota, within the time re-

quired by law, as and for internal revenue taxes for that year, \$10,-253.21, which was the full amount due from plaintiff for taxes for said year, and which said sum was paid on the 10th day of June, 1918. That thereafter the said E. J. Lynch, collector, and the Department of Internal Revenue, made additional demands upon this plaintiff for the payment of additional amounts, and demanded of this plaintiff that it pay an additional tax amounting to \$17,128.44, which, pursuant to said wrongful demand, this plaintiff did pay to said E. J. Lynch on the 21st day of February, 1919, making a total paid by this plaintiff for the income and war and excess profits taxes for the calendar year 1917 of \$27,381.65. That at the time of making said payment of \$17,128.44 this plaintiff protested to said E. J. Lynch and the said Internal Revenue Department against the execution of said tax, and paid the same under protest, and in April, 1919, filed its appeal with the Commissioner of Internal Revenue for claim for refund of the taxes erroneously exacted from this plaintiff, and the said claim for refund and appeal was disallowed and objected to by the said E. J. Lynch and the Internal Revenue Department, and this suit was commenced within the time required by law. That said plaintiff was required to and did pay \$17,128.44 internal revenue taxes for the year 1917 in excess of the amount which it was required by law to pay, which payment, as aforesaid, was made on the 21st day of February, 1919.

(16) That, all the ore in the Perkins property having been previously mined out, the said Perkins Mining Company, on the 20th of September, 1919, released to the plaintiff herein all of the lands covered by its sublease, which release was recorded September 24, 1919, in Book 20 of Agreements, page 447, in the office of said register of deeds, and that thereupon the plaintiff herein released said premises to the fee owners thereof by instrument dated December 26, 1919, duly recorded in Book 20 of Agreements, on page 503, in the office of said register of deeds.

(17) That on the 20th day of December, 1918, all of the ore on the said Hudson property or mine having been mined out, the said Syracuse Mining Company released the said lands to the plaintiff herein, which release was recorded December 30, 1918, in Book 22 of Agreements, on page 135. That thereupon the plaintiff herein on January 31, 1919, released said property known as the Hudson mine to the fee owners, which release was recorded on that date in Book 23 of Agreements, on page 51, in the office of said register of deeds.

(18) That all of the ore in both of said properties was mined out and paid for within 7 years from March 1, 1913. That the foregoing constitutes the actual transactions of the plaintiff pertaining to its 1917 tax obligation, and the correct basis upon which the court finds that its tax for said year should be figured. The value of plaintiff's March 1, 1913 property is being reckoned on a 9 per cent. discount basis, to the end that the principles and computation may be simplified, instead of using the 10 per cent. basis on the Perkins mine and the 8 per cent. on the Hudson mine, which might be permissible under the evidence, the result in either case being practically the same. It is deemed unnecessary, and tending to confuse, rather than clarify the issues, to set forth

in detail the contentions or claims which were from time to time made by both the government and the plaintiff.

As conclusions of law it is found: That the plaintiff is entitled to have and recover of and from the defendant the sum of \$17,128.44, with interest thereon from the 21st day of February, 1919, at the rate of one-half of 1 per cent. per month, together with the costs and disbursements of this action.

Let judgment be rendered and entered accordingly.

Stay of execution for 42 days after entry of judgment granted, to enable defendant to sue out writ of error or take such other action as she may be advised.

**Exhibit-A.**

**ALWORTH-STEPHENS COMPANY**

**Computation of Tax for Year 1917**

Net receipts from Perkins lease.....	\$40,896.90
Net receipts from Hudson lease.....	36,608.99
Total net receipts—1917.....	\$77,505.98
Deduct 71.9 per cent. of said receipts as depletion or re- turn of capital assets as established March 1, 1913.....	55,726.80
Balance income for 1917.....	\$21,779.18
Excess profits calculation:	
15 per cent. of invested capital \$25,000 is.....	3,750.00
5 per cent. of invested capital (15-20 per cent.) is.....	1,250.00
5 per cent. of invested capital (20-25 per cent.) is.....	1,250.00
8 per cent. of invested capital (25-33 per cent.) is.....	2,000.00
Balance above 33 per cent.....	13,529.18
Total income—1917.....	\$21,779.18
From total of first and second items of taxable prof- its or.....	\$ 5,000.00
Deduct 7 per cent. of capital.....	\$1,750.00
Specific deduction.....	3,000.00 4,750.00
Balance taxable at 25 per cent.....	\$ 250.00
\$250.00 taxable at 25 per cent.....	\$ 62.50
\$1,250.00 taxable at 35 per cent.....	437.50
\$2,000.00 taxable at 45 per cent.....	900.00
\$13,529.18 taxable at 60 per cent.....	8,117.51
Total excess profits tax.....	\$ 9,517.51
Total income as shown above.....	\$21,779.18
Less excess profits tax.....	9,517.51
Balance taxable at 6 per cent.....	\$12,261.67
6 per cent. of \$12,261.67.....	\$ 735.70
Plus excess profits tax.....	9,517.51
Total tax payable.....	\$10,253.21
Amount assessed and paid.....	\$27,381.65
Amount that should have been assessed.....	10,253.21
Amount overpaid.....	\$17,128.44

## Memorandum.

[1] In this case, after careful consideration of the briefs, I am of the opinion that under the terms of the law in force in 1917, which permitted only net income to be taxed, the plaintiff was entitled, in figuring its net income and excess profits tax, to a depletion to the extent of the market value in the mine of the product thereof mined and paid for during the year, but that depletion should be figured on a risk rate basis of 10 per cent. on the Perkins mine and 8 per cent. on the Hudson mine, or an average of 9 per cent., instead of on a 6 per cent. basis, as contended for by plaintiff; the life of each mine being seven years.

[2] I do not think there can be any question but that on the 1st of March, 1913, the plaintiff owned a valuable property interest or right in both of these mines, and that the value of the property interest or right was approximately capable of definite ascertainment and should be determined on the basis above indicated. The plaintiff on the 1st of March, 1913, owned this property interest or right, and has ever since owned it. It could have sold it on that day for an amount calculated on the above indicated basis, and surely until the part of that amount represented by the ore taken out is deducted, there could be no net income or profit on such ore taken out. This allowance or deduction for depletion would not be a deduction for depletion as against the owner. Under the evidence in this case, both the fee owner and the plaintiff would be entitled to such deduction, and both could get such deduction in full as to the ore taken out, without exceeding the market value of such ore in the mine as of the 1st of March, 1913.

[3] I am also of the opinion that the invested capital of the company was, in 1917, \$25,000, and that the invested capital could not be said to be not more than a nominal capital, and that therefore the levy and assessment could not be made under either sections 209 or 210 of the act (Comp. St. §§ 6336½j, 6336½k), but must be made under section 201 (section 6336½b).

In short, I am of the opinion that the levy and assessment should have been made by first allowing depletion upon the basis above indicated, and then determining the amount to be paid by considering the plaintiff as a corporation having an invested capital of \$25,000.

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**SANDOVAL v. DAVIS. PETERSEN v. SAME. McPEAK v. SAME.**

(District Court, N. D. Ohio, E. D. March 13, 1922.)

Nos. 11113, 11177, 11037.

**I. Railroads 5½, New, vol. 6A Key-No. Series—Company suable for injuries occurring prior to federal control.**

A soldier who was injured through the negligence of the servants of a railroad prior to the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p) while being transported in the line of his duty and on active service might maintain an action against the railroad.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. United States  $\Leftrightarrow$  125—Suit against Director General in effect against government.

The operation of railroads by Director General was in effect operation by the United States, and an action against him for injuries due to negligent operation, was an action against the United States which could be maintained only if consent to be sued was given by some specific provision of law.

3. Railroads  $\Leftrightarrow$  51/2, New, vol. 6A Key-No. Series—Director General's circular intended to bar to suit for soldier's injuries.

Circular No. 4 of the Director General of Railroads, declaring that no claims of soldiers injured or killed while being transported in line of duty shall be allowed, and remitting them to claims for compensation under the war risk insurance acts, was clearly intended to deprive soldiers so injured of any right of action against the Director General; query as to whether said order is valid for that purpose.

4. Army and navy  $\Leftrightarrow$  51 1/2, New, vol. 12A Key-No. Series—Compensation to soldiers in line of duty excludes recovery against Director General.

The provisions of War Risk Insurance Act Sept. 2, 1914, § 300, as amended by Act Oct. 6, 1917, and section 813 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 514qqq, 514tttt) giving compensation to soldiers for injuries contracted in line of duty and requiring them to assign to the United States a right of action for such injuries against a person other than the United States or the enemy, the amount recovered to reimburse the United States for the compensation paid and any excess to be paid to the injured soldier, exclude the right to recover damages from the United States for negligence of the Director General of Railroads.

5. Army and navy  $\Leftrightarrow$  51 1/2, New, vol. 12A Key-No. Series—Exclusive compensation under War Risk Insurance Act controls right of action under Federal Control Act.

The specific provisions of the War Risk Insurance Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514a et seq.) for compensation of soldiers injured in line of duty control the general provisions of Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 1/2 g), and Transportation Act of 1920, § 206, reserving rights of action for injuries resulting from negligent operation of railroads so as to preclude an action against the agent under the Transportation Act for injuries to a soldier while being transported in line of duty.

At Law. Separate actions by Jose E. Sandoval, by Albert L. Petersen, and by B. T. McPeak, as administrator of the estate of Joseph E. Cleary, deceased, against James C. Davis, Agent appointed under Transportation Act of 1920, § 206. On demurrers to the answers. Demurrers overruled.

Payer, Winch, Minshall & Karch, of Cleveland, Ohio, for plaintiffs.  
Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. These three cases are before me on demurrers of the respective plaintiffs to the second defense of the several answers in each case. The questions of law arising thereon are precisely the same. Sandoval, Petersen, and Cleary were soldiers or enlisted men in the military service of the United States, and the two first named were injured and the last named was killed in the line of duty while on active service. Their injuries and death, it is alleged, were due to the negligent operation by employees of the Director General of Railroads in operating certain railroads under federal control. In addition to these facts the said second defense sets up Circular No.

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4, dated October 25, 1918, of the Director General, which, defendant asserts, declares that no liability shall exist in favor of soldiers injured or killed under such circumstances, and remits them to the claim for compensation through the war risk insurance, and further avers that the two injured plaintiffs and the beneficiaries of Joseph Cleary have been awarded and have accepted and received the compensation provided by the War Risk Insurance Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514a et seq.) to soldiers killed in the line of duty while on active service.

The demurrers are general. In support thereof plaintiffs urge that section 10, Federal Control Act March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 $\frac{3}{4}$ j), subjects the Director General to liability for injuries sustained by any person under such circumstances as a right of action would exist against the carrier if not under federal control, and that the consent of the United States is thereby given to the institution and prosecution of actions to recover damages. It is further urged that this right is preserved by section 206, Transportation Act 1920 (41 Stat. 456). The authority of the Director General either to modify or to deny the right of action conferred by section 10, or to withdraw the consent to be sued, therein given, of the United States, is also challenged. It is further said that said Circular No. 4 does not by its terms have the effect claimed for it, but that if, when issued, such was its intended purpose, it has since been superseded by the provisions of section 206, Transportation Act of 1920, which specially provide that actions at law based on causes of action arising out of the operation of railroads under federal control, of such a character as prior to federal control could have been brought and maintained, may now, since the termination of federal control, be brought and prosecuted to judgment. It is also contended that the compensation provisions of the War Risk Insurance Act do not bar nor deprive a soldier or enlisted man injured or killed under such circumstances from maintaining an action against the United States. On behalf of the defendant the contrary of these several positions is maintained.

This brings up for decision a controversy started originally by two departments of the United States government. The Bureau of War Risk Insurance, after having made an award of compensation to soldiers injured or killed in line of duty, demanded of the United States Railroad Administration reimbursement for such compensation whenever the injuries or death was caused by the negligence of employees of the Director General. The United States Railroad Administration has strenuously resisted these demands. These several actions, it was stated in argument, were brought at the request of the Bureau of War Risk Insurance under favor of certain provisions of the War Risk Insurance Act presently to be stated, in order that reimbursement might be obtained from funds subject to the control of the United States Railroad Administration. It was also stated in argument that the Bureau of War Risk Insurance has since abandoned its policy of thus seeking reimbursement, and that these and similar actions may now be prosecuted for the benefit of the individual plaintiffs.

[1] Prior to the Federal Control Act it has been held a soldier in-

jured or killed through the negligence of the servants of a railroad while being transported in the line of his duty and on active service might maintain an action. See *Truex v. Erie R. R. Co.*, 4 Lans. (N. Y.) 198; *Galveston, H. & S. A. R. Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. 64; *Gainer v. Hines*, 194 App. Div. 21, 184 N. Y. Supp. 768. These cases arose, however, before the passage of the War Risk Insurance Act, and were prosecuted against the private owner of the railroad, and not against the Director General, an agent of the United States. They are therefore without special pertinency to the present questions.

[2] It is now also settled law that during federal control the operation of railways by the Director General was in substance and effect operation by the United States; that an action against the Director General to recover for injuries due to negligent operation is an action against the United States; and that a liability arises and an action can be maintained only if created and consent by the United States to be sued is given by some specific provision of law. See *Northern Pacific R. R. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. —, decided by the United States Supreme Court June 1, 1921; *Alabama & V. Ry. Co. v. Journey*, 257 U. S. —, 42 Sup. Ct. 6, 66 L. Ed. —, decided by the United States Supreme Court November 7, 1921; *Erie R. R. Co. v. Caldwell* (6 C. C. A.) 264 Fed. 947; *Haubert v. B. & O. Ry. Co.* (D. C.) 259 Fed. 361; *Hines v. Dahn* (8 C. C. A.) 267 Fed. 105, where the cases are collected; also *Moon v. Hines*, 205 Ala. 355, 87 South. 603, 13 A. L. R. 1020, where also the cases are collected and also commented upon.

[3] The validity of orders of the Director General modifying statutory and common-law rules was sustained by the United States Supreme Court in *Missouri Pacific R. R. Co. v. Ault* and *Alabama & V. Ry. Co. v. Journey*, above cited. Circular No. 4 admits, in my opinion, of no other interpretation than that it was intended to deprive soldiers on active service, injured or killed in the line of duty, of any right of action against the Director General, and to remit them to their claim for compensation under the War Risk Insurance Act. It says:

"Such injured officers and enlisted men \* \* \* will be remitted to their claims for compensation through the War Risk Insurance Bureau and will not receive any payment through the Railroad Administration. No claim for damages for injuries occasioning death or disablement of such persons should be recognized or entertained."

This language does not admit of the interpretation adopted in *Walker v. Atlantic Coast Line R. R. Co.*, 113 S. C. 448, 102 S. E. 513. It may also be noted that this case is authority only for the proposition that the order does not apply when a soldier is not injured in the line of duty, a very different question from the one presented when the soldier is injured in the line of duty, for in the first case he would be entitled to the compensation provided by the War Risk Insurance Act, and in the latter would not. Likewise *Bryson v. Hines* (4 C. C. A.) 268 Fed. 290, 11 A. L. R. 1438, also relied on by plaintiff, is without pertinency. In that case the opinion is expressed that Circular No. 4 applies only to

injuries sustained after it was issued, and not to injuries previously inflicted. In the instant cases the injuries were sustained after Circular No. 4 was issued. It should also be noted that these two cases were decided before the decisions of the United States Supreme Court, above referred to, sustaining the validity of orders made by the Director General, and that the opinions apparently do not recognize the now well-settled law that such actions for injuries are liabilities not of the private owner of the railroad, but of the United States.

However, in the view I take of these cases I deem it unnecessary to decide whether Circular No. 4 is valid; that is, whether, under section 10, Federal Control Act, the President, by order, might modify the provisions of the law subjecting carriers while under federal control to certain liabilities and giving the consent of the United States to be sued, or whether, if valid and effective to withdraw such consent, the liability and consent thus to be sued are restored by the provisions of section 206, Transportation Act of 1920. Plaintiff's argument in this respect is not without force, and the questions may be debatable. A difference may exist between orders such as were sustained in the two decisions above referred to and an order modifying or repealing an express provision of section 10 creating a liability and expressly giving consent to be sued. In our opinion the controlling question here is entirely different.

In my opinion the demurrers must be overruled, and upon the facts stated in the second defenses of the answers the several plaintiffs must be held not to be entitled to recover, because of the compensation provisions of the War Risk Insurance Act.

Section 300 of the War Risk Insurance Act, being an act of September 2, 1914, as amended by the act of October 6, 1917 (U. S. Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, § 514qqq), provides:

"For death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man \* \* \* in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided."

The amount of such compensation need not be stated.

Section 313 of the same act (U. S. Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, § 514tttt) among other things, provides:

"If an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the Director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability."

This section contains other provisions permitting the Director of the Bureau of War Risk Insurance to require the beneficiary to prosecute the action in his own name, subject to regulations, and to require an assignment or prosecution after injury or death. A refusal to comply with these conditions bars the beneficiary from all right to compensation. The recovery inures to the benefit of the United States so far as is necessary to repay the compensation awarded to the injured soldier or his beneficiaries, and, if an amount is recovered in excess of such

compensation, then the injured person or his beneficiary is entitled to such excess.

In this case it appears that the two injured plaintiffs and the beneficiaries in the other case have been awarded and have received and accepted compensation. In this situation the present actions are prosecuted by the plaintiffs to recover additional compensation from the United States, which has already made compensation for such injuries and death, and are not actions against persons other than the United States causing such injury and death.

This produces the exact situation considered in *Hines v. Dahn* (8 C. C. A.) 267 Fed. 105.<sup>1</sup> The person injured in that case was an employee, and the case arose under the act to provide compensation to employees of the United States suffering injuries while in the performance of their duties (Comp. St. §§ 8932a-8932uu). The provisions of that act, however, are precisely the same as the provisions of the War Risk Insurance Act, except only that no provision is made for the disposition of any damages recovered in excess of the compensation awarded or payable to the injured employee. Section 26 (U. S. Comp. Stat. § 8932mm) is in substance and legal effect the same as paragraph 1, § 514tttt, above cited, excepting only such provision making disposition of the surplus. Section 26 provides:

"The surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury."

Apparently it was not contemplated that damages might be recovered in excess of the compensation to which the injured employee might be entitled. The provision of paragraph 1, § 514tttt, is:

"If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made."

The provisions relating to the right of action, if the wrong was inflicted by some person other than the United States, the right to require the beneficiary to assign his claim against such third person, or to prosecute such claim for the benefit of the United States and barring him from his right to compensation if he refuses so to do, are in substance and effect the same in both acts.

The court (*Hines v. Dahn*, supra) was of opinion that the claim of the railway mail clerk for an injury sustained due to negligent operation during federal control was inflicted by the United States, and not by other persons, and that the injured employee could not have double compensation, that is, an award provided by law and recovery of damages against the Director General, both amounts being, in the last analysis, paid from the same funds, that is, the public treasury of the United States. The court says:

"The only question left is as to the right of the plaintiff to not only receive compensation under the Compensation Act, but also to sue the United States for the negligence causing his injuries. In other words, must the United

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<sup>1</sup> Affirmed by United States Supreme Court April 10, 1922. 257 U. S. —, 42 Sup. Ct. 820, 66 L. Ed. —.

States pay both compensation and damages for negligence to the same person for the same injury? Workmen's Compensation Acts are all alike as to the object sought to be attained, but they are so numerous and so varied as to details of administration that each act must be construed by itself. We are of the opinion that as to the United States the act in question is compulsory, if the employee gives the notice and files the claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employee as to whether he will make a claim under the act or not. If he does not, in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive."

In *Moon v. Hines*, 205 Ala. 355, 87 South. 603, 13 A. L. R. 1020, the Supreme Court of Alabama denied a soldier on active service injured in the line of his duty by the negligent operation of a railway train under federal control a right to recover. The opinion contains an able discussion of the principles of law involved and an extended citation and review of the authorities. It is in substance said that neither the Federal Control Act nor the Transportation Act expressly authorize an action *ex delicto* against the United States government by a soldier in its armies for personal injuries sustained while in the service of the government, though that injury was inflicted in or during his transportation as a soldier, and that the compensation provided by the government under the War Risk Insurance Act for death or injuries is exclusive of other measures of, and for liability and remedies provided for the protection of the civilian population of the general public.

In *Seidel v. Director General of Railroads* (La.) 89 South. 308, the Supreme Court of Louisiana held that a sailor in active service injured in the line of duty by the negligent conduct of an employee of the Director General of Railroads is not entitled to recover. It is said, in substance, that the rights and remedies conferred by the War Risk Insurance Act are exclusive of all other rights and remedies of such injured sailor against the United States or any agency of the United States. This is supported by the well-settled rule that, where a right is conferred by a statute and a specific remedy for enforcing that right is provided, the relief can be had only in the mode thus specially provided. It is further said:

"If plaintiff had this remedy by suit in damages he would have against the Government two remedies: One in damages; and one under said act. The government has not so provided; but has provided only the one remedy under said act."

[4, 5] The conclusion in these three cases is the same. The three different courts reached this conclusion by somewhat different argument. It seems to me that the reasoning of all three opinions is sound. Congress did not intend to confer upon an injured or killed soldier or sailor a right to a double recovery of compensation from the United States. It did preserve the right to recover damages in the event his

death or injury was caused "under circumstances creating a legal liability upon some person other than the United States," but the action therefor is preserved primarily for the reimbursement of the United States for the compensation awarded and paid by it. Provision made for the disposition of the excess of such damages over the compensation awarded by the United States is merely incidental, and is not to be taken as creating in the injured or killed soldier or sailor a right of action for double compensation against the United States. The general creation and preservation of rights of action by section 10, Federal Control Act, and section 206, Transportation Act of 1920, must yield to the specific provisions covering the injuries of a soldier or sailor on active service in the line of his duty. The rights and remedies of a soldier or sailor in that situation are specially provided for and limited by the provisions of the War Risk Insurance Act.

The demurrers will be overruled, and exceptions may be noted.

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I. T. S. RUBBER CO. v. UNITED STATES RUBBER CO.  
(District Court, N. D. Illinois, E. D. February 15, 1922.)

No. 1993.

1. Patents ¶288—Jurisdiction in district of infringement does not depend on actual infringement.

Under Judicial Code, § 48 (Comp. St. § 1080), authorizing suits for infringement of a patent to be brought in any district in which the defendant has committed an act of infringement and has a regular and established place of business, the court will not, on motion to dismiss for want of jurisdiction, determine whether the sales by defendant within the district were infringements, which would be a substantial determination of the merits of the controversy; but if the defendant in fact has a regular place of business within the district and made therein sales of the articles claimed to infringe, and the plaintiff makes a bona fide claim that the article was an infringement, the court of that district has jurisdiction of the controversy.

2. Patents ¶288—Suit for second infringement of same patent may be brought in district different from first suit.

Where plaintiff had prevailed in a suit for infringement of a patent against the same defendant in another district, he is not required by Judicial Code, § 48 (Comp. St. § 1030), to bring a subsequent suit against the same defendant for infringement by a different device in the district in which the former suit was tried, but may bring it in any district where the jurisdictional facts exist.

3. Patents ¶327—Suit not dismissed on plea of res judicata which cannot be determined without evidence.

A suit for infringement of a patent by the sale of the device adopted by defendant after a prior decree against it for infringement had been rendered will not be dismissed on defendant's plea that the prior decree was res judicata as to the subsequent infringement, where that plea cannot be determined without the aid of evidence and a full hearing on the merits.

4. Patents ¶327—Decree finding infringement is conclusive in second suit between same parties concerning different device only as to matters actually decided.

A decree in a former suit finding infringement of plaintiff's patent by defendant is conclusive, in a subsequent suit between the same parties

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¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

for infringement of the same patent by a different device adopted by defendant after the former decree was rendered, only as to those matters in issue in the former suit and on the determination of which the decree was rendered, since the second suit is on a different cause of action from the first.

5. Patents  $\S$ 327—Former decree held not conclusive as to maximum scope of plaintiff's patents.

A former decree in a suit between the same parties for infringement of the same patent is not conclusive between the parties as to the maximum scope to be allowed plaintiff's patent, but only that the scope of the patent was sufficient to include the article there alleged to infringe.

6. Patents  $\S$ 327—Decision in another circuit as to scope of patent not directly involved will be followed, so far as clear convictions permit.

Though the decree rendered in another circuit is not conclusive as to the scope of plaintiff's patent, except in so far as it was involved in that suit, the decision of the courts in that suit as to the maximum scope of the patent is very persuasive, and will be followed by the court of another circuit in a suit involving the infringement of the same patent by the same defendant, but by the sale of a different device, except so far as the clear convictions of the latter court prevent.

7. Patents  $\S$ 312(3)—Evidence held to show defendant's heel lift performed same functions as plaintiff's.

In a suit for infringement of a patent for a heel lift, the principal function of which was the creation of suction between the heel and the lift when the latter was flattened by being attached to the heel, evidence held to show that defendant's device, though of a shape different from plaintiff's before being flattened, assumed the characteristic shape when partially flattened, so that thereafter it performed the same function as the patented device.

8. Patents  $\S$ 328—Reissue 14,049, claims 5 to 9, for flexible heel lift, held infringed.

The Tufford reissue patent, No. 14,049, claims 5 to 9, for a flexible heel lift, the upper surface of which was substantially saucer-shaped, held infringed by defendant's heel lift, which, in a normal position, was in the shape of a tilted saucer, but assumed the essential saucer shape in being attached.

In Equity. Suit by the I. T. S. Rubber Company against the United States Rubber Company for infringement of a patent. Defendant's motion to dismiss the bill denied, and decree rendered for plaintiff.

Charles A. Brown, of Chicago, Ill., and F. O. Richey, of Elyria, Ohio, for plaintiff.

Charles S. Jones and Livingston Gifford, both of New York City, and George A. Chritton, of Chicago, Ill., for defendant.

LUSE, District Judge. Suit in equity by the I. T. S. Rubber Company against the United States Rubber Company in which the complainant charges the defendant with infringement of the Tufford reissue patent, No. 14,049, and particularly claims 5 to 9, both inclusive, of said patent. This patent has been so often in litigation that it is not deemed necessary here to enter into a description of the plaintiff's rubber heel lift already adequately described in the opinion of Judge Westenhaver in the District Court for the Eastern Division of the Northern District of Ohio, and reported in *Fetzer & Spies Leather Co. v. I. T. S. Rubber Co.* 260 Fed. 939, 171 C. C. A. 581. Other cases in which various phases of this patent have been dealt with up to date

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are *Fetzer & Spies Leather Co. v. I. T. S. Rubber Co.*, 260 Fed. 939, 171 C. C. A. 581; *United States Rubber Co. v. I. T. S. Rubber Co.* (the same parties as in the instant case) 260 Fed. 947, 171 C. C. A. 589; *Elyria National Rubber Co. v. I. T. S. Rubber Co.* (C. C. A.) 263 Fed. 979; *I. T. S. Rubber Co. v. United Lace & Braid Co.* (D. C.) 266 Fed. 375; *Tee Pee Rubber Co. v. I. T. S. Rubber Co.* (C. C. A.) 268 Fed. 250; *Hill Rubber Co. v. I. T. S. Rubber Co.* (C. C. A.) 269 Fed. 270.

As indicated above, the patent in suit here has been in litigation between these parties before. In January, 1919, the I. T. S. Rubber Company filed a bill in the United States District Court for the Northern District of Ohio, Eastern Division, against the United States Rubber Company, which latter company is a New Jersey corporation and maintains no place of business in the Eastern Division of the Northern District of Ohio, but consented for the purpose of that suit to submit itself to the jurisdiction of that court. On February 14, 1919, a preliminary injunction was granted against the defendant in that court, and the defendant appealed to the Circuit Court of Appeals for the Sixth Circuit, resulting in the affirmance by that court of the injunctive order on October 7, 1919, after which its mandate was returned to the District Court, and on November 12, 1919, the parties having adjusted their differences as to damages and profits, a final decree was entered in the District Court of Ohio in favor of the plaintiff and against the defendant.

To describe in a general way, for the purposes of this opinion, the defendant's rubber heel lift involved in the former suit, it is perhaps sufficient to say that its upper side edges were constructed in the same plane as the rear and upper breast corners of the lift, and that its attaching face was concave in the general sense of the term, with its lowest area centrally disposed. The upper attaching surface of the defendant's heel, as then made, from the center thereof to the breast was on an ascending line. In that case the defendant contested the validity of the plaintiff's patent and claimed noninfringement, partially at least upon the grounds that the upper side edges of its heel as then manufactured was in the same plane as the rear edge and the upper breast corners, while the side edges of plaintiff's patented lift were in the form of a depending arc, and that the line rising from the center of the attaching face of its lift toward and to the breast was straight rather than curved as in the plaintiff's lift. Defendant was unsuccessful in both of these contentions. In March, 1920, the defendant placed upon the market a new rubber heel lift (now involved in this suit), which it claims to have devised in good faith, following the interpretation of plaintiff's patent found in the opinion of the Court of Appeals in the action there between the parties here, as supplemented and explained by the opinion of that court in the Tee Pee Case (C. C. A.) 268 Fed. 250, and which may be said to be characterized by the fact that the central longitudinal line along the attaching face of the lift is in the form of an arc of a true circle, the lowest point of which is at the center of the breast edge.

By way of further description of the defendant's heel lift, it being understood, however, that the figures now given have not exact arith-

metrical accuracy, it may be stated that the defendant makes heel lifts varying in size, the largest thereof being approximately  $3\frac{5}{16}$  inches in length along the attaching face, while the smallest thereof is approximately  $1\frac{1}{4}$  inches in length. In the largest of defendant's heels the low spot at the center of the breast is  $\frac{17}{64}$  inches lower than the upper rear edge while in the smallest heels there is  $\frac{8}{32}$  of an inch difference between those two points; such measurements being taken when the lift is held with the plane of the rear edge, and breast corners in a horizontal position. The breast end of the upper longitudinal center line of the attaching face is approximately  $\frac{1}{16}$  of an inch below the center of such line in the largest of defendant's heels and  $\frac{1}{64}$  of an inch below the center of such line in the smallest. On the largest of defendant's heels the central longitudinal line of the attaching face is the arc of a curve with a radius of  $20\frac{1}{2}$  inches, while on the smallest lift such line is on the arc of a curve having a radius of  $8\frac{7}{64}$  inches. It should be said further that, in the defendant's heels, a lateral line drawn between the upper side edges of the lift in such position thereon as to pass directly over the point of junction between the central longitudinal line with the breast, such lateral line will under the evidence, pass over the low point on each and all of the longitudinal lines of the attaching surface. In other words, such parts of the attaching face of the lift as lie forward of such line so drawn are, theoretically at least, higher than at the point where they intersect the lateral line so drawn. By way of comparison it may be stated here with reference to the Tee Pee heel, which must of necessity be referred to later on in this opinion, that in the size corresponding to the largest of the plaintiff's heels the upper central longitudinal line of the attaching surface is on an arc of a circle with a radius approximately  $8\frac{1}{4}$  inches which continues to a point  $\frac{7}{16}$  inches back of the breast edge, at which point such center line departs from the arc of a circle and extends on a straight line and at a tangent to said arc to the center of the breast, with the result that the difference in height between the low point on the breast edge of the Tee Pee heel and the top of the rear edge is approximately  $\frac{18}{32}$  of an inch and the breast end of such longitudinal line is approximately  $\frac{1}{8}$  inch lower than the center point thereon.

Plaintiff applied to the District Court of Ohio in contempt proceedings, which application was denied by the judge, who in his memorandum in that regard said in effect that the question of whether the defendant's new lift infringed or not should not be determined in a contempt proceeding but only upon a full hearing, either by filing an original bill in a court of competent jurisdiction or by the filing of an ancillary supplemental bill in the Ohio court. The defendant, it seems, maintains an established place of business in Chicago in this district and marketed the new lift there, and plaintiff has instituted this suit as a new and independent one, seeking to establish that the new lift of the defendant is an infringement and the usual relief by injunction and for an accounting.

Before any evidence was introduced the defendant moved to dismiss this suit for lack of jurisdiction in this court, predicated the motion upon the grounds: (1) Because the Act of March 3, 1897 (29 Stat.

695, c. 395, Comp. Stats. § 1030; Judicial Code, § 48), does not permit two suits to be brought in two districts under the same patent, against the same defendant; (2) because under said act it must be established that the defendant has committed acts of infringement within this district and that upon the pleadings and the exhibits attached to plaintiff's interrogatories it is evident that no acts of infringement within this district are properly charged; (3) because plaintiff obtained defendant's consent to the jurisdiction over it for the purposes of the patent here in suit in the District Court for the Northern District of Ohio, Eastern Division. Defendant also moved to dismiss the bill on the ground that plaintiff is estopped by the res adjudicata effect of the final decree against the defendant in the former suit between these parties, sustaining said patent in the Northern District of Ohio, Eastern Division, from contending that the Neger form of heel lift infringes, being the form of heel alleged to infringe and attached to plaintiff's interrogatories herein. Ruling upon such motions was reserved, and defendant presses for decision. I do not deem it necessary to consider whether the jurisdictional question attempted to be raised by the defendant is one of a nature which can be, or whether it has been, waived, as upon the state of the record disclosed I am unable to see wherein there is any lack of essentials to jurisdiction in this court.

[1] Under section 48 of the Judicial Code, District Courts are given jurisdiction in suits brought for the infringement of letters patent—

"In the district of which the defendant is an inhabitant, or in any district in which the defendant \* \* \* shall have committed acts of infringement and have a regular and established place of business."

That the defendant has a regular and established place of business in Chicago is admitted; that it marketed the devices which the plaintiff claims infringe its patent in this district is likewise admitted; but defendant insists that such devices do not infringe plaintiff's patent, and hence it committed no acts of infringement within this district, and the court is therefore without jurisdiction. Manifestly, to test the question on defendant's theory would require substantially a determination of the merits of the entire controversy upon the limited record available upon the motion to dismiss for want of jurisdiction, a record equally as barren of proper opportunity for investigation, if not more so, than the record in a contempt proceeding, such as Judge Westenhaver, no doubt properly, thought inadequate for the determination of the issues presented in this controversy. Furthermore, if defendant's contention be correct, then in every suit for infringement of letters patent brought in a District Court other than one in the district wherein the defendant is an inhabitant, after trial upon the merits, should the court conclude that there was no infringement, its judgment would of necessity be dismissal, not upon the merits, but for want of jurisdiction. Such results weigh heavily against the correctness of defendant's contention. True, in cases like this, there must be under the statute certain preliminary inquiries made by the court and determined favorably to jurisdiction, before same may be assumed. Whether or not the defendant maintains a regular established place of business within the district is one question. Whether the acts complained of

were committed within the district is another. If, in addition to these, the court is satisfied that the plaintiff makes a bona fide claim that the acts so committed within the district constitute an infringement, I am impelled to the conclusion that the court as such has jurisdiction of the controversy.

"This was the effect of the decision of the Circuit Court of Appeals of the First Circuit in *I. T. S. Rubber Co. v. Essex Rubber Co.* (decided November 29, 1921) 276 Fed. 478. See, also, *Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808. The proposition is not unlike that involved in *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, and *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, where it was determined that:

"Suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion."

The acts of which plaintiff complains in the instant suit, if they infringe, constitute a new and distinct cause of action. Plaintiff's rights, it is true, are based upon the same patent that was involved in the former suit; but the invasion thereof, if any, by the defendant is entirely distinct and separate and occurred subsequent to the entry of the final decree in that suit and after all matters of accounting between the parties had been disposed of by agreement and the entire controversy between them finally determined by such decree. Defendant has no regular and established place of business in the Ohio district, and hence a necessary jurisdictional fact is there absent. The result of the acceptance of defendant's contention here that plaintiff must confine itself to proceedings in the Ohio court would be that plaintiff must proceed by supplemental bill in the former suit.\* Whether, in view of the fact that the Ohio court's jurisdiction was by consent of defendant and limited to the purposes of that suit, jurisdiction exists to entertain a supplemental bill, based wholly upon occurrences postdating the entry of the final decree, is a question not free from doubt, but which I do not think it essential to determine. The very doubt goes far to negative the claim that plaintiff's procedure in this court constitutes any abuse of its right to proceed in this jurisdiction, nor can plaintiff's right be changed by the fact that defendant again offers to submit to the jurisdiction of the Ohio court.

[2] Nor am I able to accept defendant's contention that section 48 of the Judicial Code in effect prohibits actions being brought by a given plaintiff upon a single patent against one defendant in more than one judicial district. Undoubtedly all matters in controversy between the parties, occurring prior to the commencement of any suit or during its pendency, should be brought to the attention of the court wherein a suit is pending. But clearly, after the final determination of one suit, if the defendant again violates plaintiff's rights, even under the same patent, by way of a device different from that involved in the first suit, then the plaintiff may seek out the defendant in any district where the jurisdictional facts exist and proceed in any proper court therein. While defendant's counsel have cited several cases wherein

the courts have expressed a preference for supplemental bills over proceedings in contempt and also such preference over a new, independent suit to be brought in the same jurisdiction where there was a suit then depending in which the bill might well be filed, no authority has been brought to my attention whereby a patentee is denied a remedy by a new and independent suit under the circumstances existing here. Rather the contrary is indicated. See *T. B. Woods Sons Co. v. Valley Iron Works* (D. C.) 198 Fed. 869; *California Paving Co. v. Molitor*, 113 U. S. 609, 618, 5 Sup. Ct. 618, 28 L. Ed. 1106; *Chicago Grain Door Co. v. Chicago, B. & Q. Ry. Co.* (C. C.) 137 Fed. 101.

[3] The second of defendant's motions to dismiss, based upon the supposed res adjudicata effect of the final decree in the former suit between these parties, assumes the similarity between the Nerger form of heel lift and the lifts of the defendant involved in this suit, and in addition the dissimilarity between the plaintiff's and the defendant's lifts. The determination of these propositions is the subject of the controversy on the merits in this action, neither of which was sufficiently clear to warrant the court in dispensing with the aid of evidence and a full hearing upon the merits. The defendant's motions to dismiss are therefore denied.

[4] Each party invokes the doctrine of res adjudicata, and claims the other is estopped by the final decree in the Ohio case. Plaintiff claims that the effect of such final decree is to estop the defendant from questioning the validity of plaintiff's patent, plaintiff's ownership thereof, and infringement by the device formerly made by the defendant. This is conceded by the defendant, which claims, however, that the plaintiff is estopped by the same decree to claim that a heel lift having the lowest point of its concave attaching surface at the breast is within the scope of its patent; the Circuit Court of Appeals of the Sixth Circuit having held, on the appeal from the preliminary injunction in the case between the parties here, that the true test for determining whether the attaching surface was concave was to ascertain whether, when it was disposed in the right relation to the plane of the bottom of the heel placed horizontally, there was a low spot which at least theoretically would retain liquid without running out at the breast.

Defendant relies largely upon the case of *Bradley v. Eagle Co.*, 57 Fed. 980, 6 C. C. A. 661. In that case, however, if the machines in the second suit between the parties were not the identical machines involved in the first as indicated by the complaint, they were at least exactly similar as alleged in the answer, so that there was no question involved in the second suit which had not been of necessity determined in the first. Hence the case is not applicable. As already indicated, it is my opinion that where a defendant charged to infringe a patent, after final decree in one case, devises a new and different article also claimed to infringe, a second suit commenced to establish the infringement by way of the second device is upon a different cause of action from the first, and the second resolution of the Supreme Court in the case of *Cromwell v. Sac*, 94 U. S. 353 (24 L. Ed. 195), applies. It was there said:

"But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel

only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

See, also, *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Campbell v. Rankin*, 99 U. S. 261, 25 L. Ed. 435; *Block v. Commissioners*, 99 U. S. 686, 693, 25 L. Ed. 491; *Wilson v. Deen*, 121 U. S. 525, 532, 7 Sup. Ct. 1004, 30 L. Ed. 980; *Bissell v. Spring Valley Township*, 124 U. S. 225, 231, 8 Sup. Ct. 495, 31 L. Ed. 411; *Steam Gauge & Lantern Co. v. Meyrose (C. C.)* 27 Fed. 213; *Packet Co. v. Sickles*, 72 U. S. (5 Wall.) 580, 18 L. Ed. 550. In the case last cited it was said:

"But even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

[5] It is quite clear to my mind that in the former suit between these parties there was no issue as to what the maximum scope of the plaintiff's patent might be. The issue was whether the defendant then infringed, which involved a determination of whether or not the scope of plaintiff's patent was sufficiently broad to include the device then made by the defendant. The former suit was in no sense of the term a declaratory action, in which the parties sought the determination of the ultimate limits of the rights of the plaintiff under its patent, but was confined to the issues of the validity of plaintiff's patent, its ownership, and the infringement thereof by the defendant, and those issues were all that was necessary to be determined in that action, in order to support the decree rendered. Obviously any determination of the maximum scope of plaintiff's patent was outside of such issues, and while the opinion of the court, in so far as it dealt with the maximum scope of plaintiff's patent, is a weighty authority indeed, nevertheless, because in that regard it was outside of the issues, it becomes a part of the law to be considered in the determination of subsequent suits between the parties, but clearly does not cause the decree thereafter entered in that suit to operate as an estoppel as to matters so extrinsic to the issues under the doctrine invoked by the defendant. This view makes it unnecessary to consider the fact that the opinion of the Circuit Court of Appeals in the former case was on appeal from an order granting a preliminary injunction, and the further fact that the final decree was entered partly in response to the mandate of the Court of Appeals and partly by consent of parties.

#### Merits.

[6] It should be noted that defendant's lift, involved in the former suit, had its low spot back of the breast edge on its attaching face, and defendant was contending that it escaped infringement because of other distinctions in form, and hence what was there said by the court to the effect that plaintiff's patent was confined to a lift having a low spot back of the breast was, strictly speaking, obiter dictum. However, in the *Tee Pee Case (C. C. A.)* 268 Fed. 250, the question now presented was directly before the Ohio court, and its former dictum followed. Hence, while the reasoning of the Court of Appeals, Sixth Circuit, with reference to the maximum scope of plaintiff's patent does

not operate to estop the plaintiff, the rule of comity requires that it be followed except so far as the clear convictions of this court prevent. *Mast v. Stover*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 865. The high standing of the courts which have already passed upon the patent here involved, the frequency with which the patent has been before them in various phases, together with the writer's own lack of experience in cases of this character, assure full recognition of the doctrine. In the opinion in the case of *Tee Pee Rubber Co. v. I. T. S. Rubber Co.*, 268 Fed. 250, 255, the Court of Appeals of the Sixth Circuit said:

"We quite agree with Judge Brown in his conclusion (*I. T. S. Co. v. United Lace, etc., Co.* [Dist. of R. I., June 11, 1920] 286 Fed. 375) that Tufford's meritorious advance was in the effect he secured, and we think this was an effect of which suction is not the operative element, but is rather the symptom. Tufford aimed at a lift of such material, and with a surface so shaped that the flattening of the center would produce an automatic intensive sealing at all the edges, including the breast."

In *I. T. S. Rubber Co. v. United Lace & Braid Co.* (D. C.) 266 Fed. 375, 377, Judge Brown said:

"In construing the claims of the patent we should bear in mind that they are not intended to describe merely shape or form, but a structure of resilient material as it appears before application to the performance of its function, and that performance of function is the patentee's main object. We should read the words of the claims primarily as descriptions of a mechanism rather than as descriptive of a peculiarity of shape, irrespective of the functions to be performed. As the specification shows clearly that the form and resilient quality of the material are to co-operate in the performance of a definite mechanical function, after the described form has been distorted and flattened by nailing the lift to a heel it is evident that a mere comparison of forms before attachment should not necessarily be conclusive in determining the question of infringement. The plaintiff's and defendant's structures must be compared in respect to their similarity in mode of operation and performance of their intended functions. \* \* \* The words of the claims also should be read primarily as words of description of a mechanism, rather than as words of limitation to any special peculiarity of form, which is nonessential to the performance of the intended function."

With these pronouncements I am in entire accord, and it becomes, therefore, of prime importance to determine whether the defendant's present lift operates in substantially the same manner to obtain substantially the same results as the plaintiff's patented lift. In other words, does the defendant's lift produce an automatic, intensive sealing at the breast edge, and does it have the suction effect symptomatic of plaintiff's product?

[7] This question has not been easy of solution, although the devices in question are comparatively simple. Considering the upper, central longitudinal line of the defendant's lift by itself, theory readily negatives the proposition that pressure at or near the center of such line upon the tread face thereof can cause such intensive sealing at the low point at the breast. However, when one considers the longitudinal arches in connection with the lateral arches, and all of the arches thus formed and radiating in all directions from any given junction of lateral with longitudinal arches, correct theory becomes obscured. It becomes apparent, however, that the normal tendency of the low point at

the breast to be last to come in contact with the heel of the shoe to which the lift is to be applied may be overcome, neutralized, and counteracted. The compound retractive effort in all of the arches when pressure is being exerted to flatten the lift, it seems to me, must necessarily be considered. Given the low spot in the longitudinal line at the center of the breast, it is theoretically possible to construct a lift with such weak retractive effort at the breast and relatively strong retractive tendency back of the breast that force or pressure necessary to flatten the heel at or near the center of the tread surface would be more than sufficient to bring the low point at the breast in firm contact with the heel of the shoe, thus leaving arches running back from the center of the breast towards the center of the lift unflattened and which, when the flattening process was continued, would result in an intensive sealing at the breast edge. In other words, in the process of flattening the lift the arches of the concave attaching face flatten out, and the upper side edges thereof give way, and if that part of the upper side edges close to the breast first expand and give way under such pressure, the low spot on the central longitudinal line of the attaching face may be shifted from the center of the breast edge to a point back thereof in such manner that the continued pressure and flattening of the lift would operate to flatten the longitudinal arches made by the shifting of the low spot, so as to seal the breast edge. That defendant's lift reflects this theory exactly is not meant to be asserted, but it serves to point out the dangers inherent in a theoretical solution of the problem here presented, and to suggest the necessity of relying largely upon experiments and actual tests with the defendant's lifts themselves. The defendant's lifts do not have the degree of intensive sealing at the breast edge found in the plaintiff's lift, but this is not deemed determinative of the problem.

Without discussing the evidence, it is sufficient to say that the plaintiff has offered evidence by way of tests, demonstrations, and expert evidence to the effect that the defendant's heel operates in the same way and obtains the same results as the plaintiff's lift; and experiments made by the court and such unskillful manipulation as the court has been able to apply corroborate the plaintiff's claims. On the other hand, defendant has offered no positive evidence disputing this claim, except to demonstrate that with the defendant's larger sized heels pressure at the exact center thereof will not cause sealing at the breast. This test is deemed too limited. It is when the convex face of the lift is flattened that plaintiff's lift is to exhibit its peculiar advantages. Tufford Reissue patent, p. 3, lines 70, 87, and page 2, lines 87, 99. Pressure at the exact center is, therefore, but a partial test. Without overlooking the fact that the results are not to be determined by the direct action of the nails upon the rubber, nevertheless it must be borne in mind, as heretofore indicated, that the beneficial results of the Tufford patented lift are to be evidenced when the lift is applied to a shoe in the normal and natural manner; that is, by nailing with the nails sufficiently removed from the edges as to leave a large trimming area. Again, defendant's sales manager, in charge of the sales of its rubber lifts, testified in substance that he had or would represent to the trade

that the defendant's present lift performed about as well as its old lift, the one already held to infringe, and which admittedly had the advantages of the Tufford lift now under discussion. On the whole, I am constrained to hold, under the evidence in this case, that the defendant's lift operates in substantially the same manner, to give substantially the same result, as the plaintiff's lift.

[8] Does the fact that the low spot in the defendant's lift is at the center of the breast prevent infringement? Defendant's counsel concede that its present lift is concavo-convex on every line of cross-section in the general sense of the term, but insist that it is not so in the sense in which it is used in plaintiff's patent, and as construed by the Court of Appeals, Sixth Circuit, in order to distinguish plaintiff's patent from the prior art Nerger patent. The latter has been frequently declared to be scoop-shaped, while plaintiff's patented device has been declared saucer-shaped; both terms being used with reference to the lifts when placed with the upper edges horizontal as in contact with the bottom of the permanent heel, to which the lift is to be attached and before any flattening pressure is applied. In *Fetzer & Spies Co. v. I. T. S. Co.*, 260 Fed. 939, 940, 171 C. C. A. 581, 582, the opinion states:

"It is characteristic of the saucer shape that there should be a somewhat centrally disposed low spot, so that, if the upper edges of the lift were put in contact with the horizontal bottom of the heel, as far as may be without using force to distort the normal shape of the lift, any contained liquid would be retained in this lowest spot, because the edge of the lift towards the breast of the heel would be higher. It is characteristic of the scoop shape, under the same conditions, that the line from the low spot to the edge of the lift at the breast would be substantially horizontal, and the liquid would run out. The effect of this distinction is that when the central part of the depression is forced up against the bottom of the heel, there is a distinctly greater tendency with the saucer shape than with the scoop shape for the breast edges of the lift to maintain tight contact with the heel. If the surfaces are smooth enough, this excludes the air, the atmospheric pressure holds the lift, flattened out, against the heel, and we have the result called 'suction.' We do not regard this suction as of decisive importance in itself, because after one or two leather lifts had been removed, the roughness of the leather and the overlapping by the rubber would make it doubtful whether the suction adherence would be of much practical use; but the suction test is of distinct value as determining whether the rubber lift has or has not that quality which distinguished Tufford from Nerger."

In the Tee Pee Case noninfringement of claims 5, 6, and 8 was found because in the Tee Pee lift, though it was concavo-convex on every line of cross-section, the low spot of the attaching surface was at the breast—in other words, the upper central longitudinal line was a downward curve throughout its extent from the rear to the center of the breast edge. It must be borne in mind, however, that there is a substantial difference between the Tee Pee lift and the defendant's, here in controversy. The former was constructed with a sharp curve on its upper longitudinal center line and the downward curve of such line was substantial, so much so that the court held in that suit that there could be no similarity of operation with respect to the breast edge, and on motion for rehearing in effect held that the downward curve of the Tee Pee lift along its longitudinal center line was so great that,

if it could be demonstrated by experiment that the Tee Pee device disclosed the suction element symptomatic of Tufford, to their minds, it would be a demonstration that the supposed difference between plaintiff's lift and the prior art Nerger lift did not exist. The defendant's lift, however, has an attaching face shaped like a shallow saucer, but slightly tipped, sufficiently so that it may be truthfully said that the lowest point upon its upper central longitudinal line is at the center of the breast, when the upper side and rear edges of the lift are held in a horizontal plane. It is equally true that, when the defendant's lift is laid upon its tread surface the concave attaching face becomes, by reason of the shifting of the center of gravity, truly saucer shaped.

Being convinced that, in these lifts, shape, resiliency, and pressure, when being applied to a heel as indicated in the quotation from Judge Brown's opinion above, all combine to perform a given function, I am impelled to conclude that neither the test of laying the defendant's heel on its tread face upon a flat surface, nor holding it with its upper side and rear edges in a horizontal plane, is conclusive, but rather the position of the saucer with reference to the bottom of the heel to which the lift is to be attached, must be followed into the operation of attachment in the normal and natural manner, and if, during such operation, the low spot at the breast becomes located back thereof in such manner as to present longitudinal arches for further flattening which in being flattened cause the automatic intensive sealing at the breast, then it should be said that defendant's heel is concavo-convex in the sense used in the plaintiff's patent, as well as in the ordinary sense of the words. I am persuaded it is in this fashion that the defendant's lift operates, and which secures to it the meritorious advances made by Tufford of automatic intensive sealing at the breast edge and the symptomatic element of suction.

A study of the Tufford and Nerger patents and file wrappers leads me into accord with the Court of Appeals of the Sixth Circuit upon the propositions that the distinguishing feature between Tufford and Nerger is that the latter is "concavo-convex," while the former is "concavo-convex on every line of cross-section," and my mind assents also to the proposition that the phrase "concavo-convex on every line of cross-section" means a form substantially saucer-shaped, of which it is characteristic that there should be a somewhat centrally disposed low spot. I am unable, however, to bring my mind to assent to the proposition that the true test as to whether or not the concave attaching face of defendant's lift is concavo-convex, in the sense used in the patent, is by any arbitrary positioning of the lift before its application to the heel. The lift is designed to be fastened to a shoe heel, and the advantages which the lift possesses manifest themselves in such operation, and a test which excludes from consideration the operation for which the lift is designed is, to my mind, incomplete.

It is true that, to make a proper comparison of various lifts as to shape, they must be brought to a common standard, and for that purpose, positioning the lifts against the bottom of a shoe heel is not only natural, but proper; but to stop there is, it seems to me, to lose sight of the distinction between an operative device, on the one hand, and

a mere design or shape, on the other. If the tilted saucer of the defendant's lift becomes the true saucer of plaintiff's lift, in the course of the flattening both are intended to undergo, with resultant substantial identity of operation and result, the difference between the two is, I think, in a nonessential. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Abercrombie Co. v. Baldwin*, 245 U. S. 198, 209, 38 Sup. Ct. 104, 62 L. Ed. 240; *Reece Button-Hole Co. v. Globe Co.*, 61 Fed. 958, 10 C. C. A. 194; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494.

Considerations of deference and comity already alluded to have caused me to hesitate greatly in arriving at such conclusion, but I have been unable to avoid it. The evidence in this case, combined with close observation and inspection of the heel lifts of both of the parties, leads me to the conclusion that the defendant's lifts are concavo-convex on every line of cross-section, in the sense in which that phrase is used in the plaintiff's patent, and particularly in claims numbered 5, 6, and 8, and constitute an infringement thereof.

That defendant's lift responds to the suction test, and when applied to a smooth surface, and sudden pressure exerted upon its tread face, suction is so established as to cause the lift to adhere, is sufficiently established by the evidence. Of this test it has been said correctly:

"The suction test is of distinct value as determining whether the rubber lift has or has not that quality which distinguished *Tufford* from *Nerger*." *Fetzer Case*, 260 Fed. 939, 940, 171 C. C. A. 581, 582.

Claim 9 of plaintiff's patent omits the phrase "concavo-convex on every line of cross-section," and describes the attaching face as concave—

"being unbroken and lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby, when the convex tread face is depressed to flatten said lift, a suction will be created," etc.

The term "concave," when applied to the attaching face, is correctly descriptive of the attaching face of the *Nerger* lift, and while the claim evidently contemplates the omission of the *Nerger* metal plate as one distinction between the two lifts, I am of opinion that the term "concave," as applied to the attaching face, calls for such concavity in the attaching face as will create the suction mentioned. The latter element was found to be absent in the *Tee Pee* heel by the Circuit Court of Appeals of the Sixth Circuit, and hence that heel did not infringe. I find, however, that this element is present in the defendant's heel in this case, and that claim 9 also is infringed.

Claim 7 of plaintiff's patent reads as follows:

"A heel lift of substantially resilient material comprising a body portion, the attaching face of which is concave and the tread face of which is convex on every line of cross-section, and normally held in such form by its own inherent resiliency, the concave attaching face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby to cause the entire margin of said lift to exert a uniform pressure on the heel of a shoe when said lift is positioned on the heel and the convex tread face thereof depressed to flatten said lift."

If it be held that the phrase in such claim, "the attaching face of which is concave and the tread face of which is convex on every line of

of cross-section," means the same as the phrase "concavo-convex on every line of cross-section," as used in claims 5, 6, and 8, what has already been said with reference to the last-mentioned claims is determinative of infringement under claim 7. As I view it, however, the two phrases above quoted are not used in the patent as meaning the same thing. I am led to the conclusion in regard to the difference in meaning between the two phrases by the following considerations:

I find nothing in the context of claim 7 which would require or suggest the use of a modification of the phrase "concavo-convex form on every line of cross-section," used in the two preceding claims, if it was desired that the same idea be expressed, and the fact that the phrase in claim 7 appears in different form than that theretofore used without reason, unless it be to convey a different idea, immediately suggests to the mind that a different idea is contemplated. Grammatically, it seems to me, the modifying phrase "on every line of cross-section" relates only to the word "convex," and it seems quite clear that the term "concave," as used in claim 7, is used in the same sense as it appears in claim 9; that is to say, it contemplates any attaching face which responds to the term "concave," so long as the concavity is of such character as will result in the functional statement which is appended to claim 7, as in claim 9.

Again, the original Tufford reissue claims numbered 5 and 6 were as follows:

"5. A cushion heel lift of a concavo-convex form on every line of cross-section.

"6. A cushion heel lift, the attaching face of which is concave and the tread face of which is convex on every line of cross-section"

—indicating that the patentee used the phrases as having distinctive meanings. Original reissue claim 8 contained the phrase found in original reissue claim 6 above quoted, and was thereafter amended to insert after the word "concave" the phrase "and follows a single arc," and while this amendment was later withdrawn the fact that it was offered quite clearly shows the intent to treat the word "concave" independently of the modifying phrase "every line of cross-section." It is true that, if the later phrase, appearing in final claim 7 calling for "a uniform pressure on the heel," demands equality of pressure at the breast with the pressure at the rear and side edges, that it would necessarily bring the upper breast edge at substantially the same height above the low spot in the concavity as the side and rear edges. This, however, is not true of the Tufford lift, either as manufactured or as illustrated in the patent, and hence it seems to me that the word "uniform" is used in a relative sense, rather than in the sense of exact equality, and that it is given sufficient emphasis, if substantial pressure sufficient to effectively seal the breast edge is deemed a compliance with the requirement of uniformity. At any rate, to my mind, the other evidences that the phrase "convex on every line of cross-section," used in claim 7, is not intended to modify the word "concave," outweigh the inferences to be drawn from the use of the word "uniform," when it is clear upon any consideration that that word is used in a relative sense, and not in the sense of exact equality. In

this view of claim 7 (and passing, but not overlooking, the effect of the phrase found only in that claim reading, "and normally held in such form by its own inherent resiliency"), the term "concave" is deemed to have the same significance given to that term as it appears in claim 9; that is to say, it includes such a concavity as when opposed to a tread face which is convex on every line of cross-section and when such convex tread "is depressed to flatten" the lift, will perform the functional office of causing the entire margin of the lift to exert a uniform pressure on the heel of the shoe. In my opinion the defendant's lift responds to this test, and this claim also is infringed.

A draft decree may be drawn by plaintiff's counsel, and served upon defendant's counsel, who will have 10 days from the date of service upon them to file objections to the form of the decree, if any they have, in which event a time and place for a hearing upon the form of decree will be fixed.

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STATE OF ALABAMA v. MONTEVALLO MINING CO. REESE v. SAME.  
In re MONTEVALLO MINING CO.

(District Court, M. D. Alabama, N. D. March 4, 1922.)

1. Bankruptcy ~~§~~47—State and injured convict could not oppose adjudication of bankruptcy under voluntary petition.

Neither a state, contracting with a corporation, nor a convict, which had pending a suit against the corporation for personal injuries, could successfully oppose an adjudication of bankruptcy under a voluntary petition, no matter what the motive for filing the petition, as the state could file its claim for damages against the estate, and the claim of the convict was not affected thereby.

2. Bankruptcy ~~§~~132—Trustee only removed for cause arising subsequent to appointment.

There is no power in the court to remove a trustee in bankruptcy, except for cause arising subsequent to his appointment.

In Bankruptcy. In the matter of the bankruptcy of the Montevallo Mining Company. Petitions by the State of Alabama and by Stafford Reese to annul adjudication of bankruptcy under a voluntary petition. Petitions denied.

Harwell G. Davis, Atty. Gen., of Alabama, Marion Rushton, Asst. Atty. Gen., of Alabama, and J. J. Mayfield, of Montgomery, Ala., for petitioners.

W. H. Sadler, Jr., and E. H. Cabaniss, both of Birmingham, Ala., and Ben P. Crum, of Montgomery, Ala., for bankrupt.

CLAYTON, District Judge. The Montevallo Mining Company, a corporation, having been adjudged a bankrupt in a voluntary proceeding, a receiver was appointed by the referee, and afterwards the creditors elected a trustee, who has qualified. The state of Alabama now petitions the court to vacate the order of adjudication and to dismiss the original petition of the bankrupt.

This petition of the state alleges that by virtue of a contract between the state and the mining company the state convicts were let to the

company, and that thereby the company has become indebted to the state in a large sum, past due and unpaid; that the contract has a considerable period to run, and that, should it be fully performed, the state will become entitled to a further large sum, estimated at about \$250,000. The petition of the state also avers that the company, called the bankrupt, is solvent; that its assets are of a value largely in excess of its liabilities. Furthermore the petition charges that the bankrupt committed a fraud, in that its voluntary petition was not filed in good faith, or for the bona fide purpose on the part of the bankrupt to deliver up its property and thereby be relieved of its debts; but that, on the contrary, the purpose in filing the petition and procuring the election of the trustee was a fraudulent scheme to avoid the liability to the state under contract for the hire of convicts. Certain facts are stated tending to show the friendly personal and business relations existing between the bankrupt, the trustee and the attorneys of the bankrupt and the attorneys of the trustee.

[1] In the view now taken of the allegations of the petition further detailed statement is not deemed necessary. The prayer of the state's petition is, as it has been stated, that the order of adjudication be annulled and the voluntary petition of the bankrupt be dismissed, or, in the alternative, that a receiver be appointed.

Stafford Reese, a state convict, who is plaintiff in a pending suit against the Montevallo Company, the bankrupt, for damages on account of alleged personal injuries, has also brought his petition of similar import to that of the state.

The bankrupt, the trustee, and the other parties or defendants named in the petition, have appeared, and now move the dismissal of the petition upon the grounds set out in the motion. Both petitions have been heard and considered together, but separate order will be entered in each.

I have listened with great interest to the arguments of counsel and have given the matter thoughtful consideration. Whatever my inclinations may be to approve the commendable efforts of the faithful and courageous Governor of the state to protect the public welfare committed to his keeping, I must be guided by the law applicable to the case under consideration.

The Montevallo Company had the undoubted right under the Bankruptcy Law to file its petition in bankruptcy and to be adjudged a bankrupt, whether solvent or insolvent, and whether its purpose was pure or impure, fraudulent or honest. The motive with which a lawful act is done is of no controlling importance, for it is fundamentally sound to say that a lawful act cannot be rendered unlawful, although prompted by an unworthy motive. Numerous authorities sustain this proposition. In this case, if the bankrupt, however solvent, or however impure its motive may have been, or whatever may have been the actuating purpose, saw fit to surrender its assets into the custody and jurisdiction of the court for the benefit of its creditors, the creditors as a matter of law have no cause for complaint.

Unquestionably the Montevallo Company could have made a general assignment, and if it had done so this would have constituted an

act of bankruptcy, and if such event had happened it is hardly doubtful that this matter would have come into the bankruptcy court by that route; and it may be said that no court has the power to compel the Montevallo Company to do business, for it had the incontestable right to quit. That is what it has done, and this court cannot compel it to continue to function, in order to avert some possible hardship to the state or to Reese.

All questions relating to the subjection of its assets to the payment of its debts, to carry out the object and purpose of the law, are matters relating to the administration of the estate and will be dealt with properly and in an adequate way when they arise in the management of the estate. The court has power to supervise such matters, and is always watchful to see to it that the estate of the bankrupt is honestly, economically, and with decent and convenient speed administered.

Moreover, the state has the indisputable right to have its claim for indebtedness and damages ascertained, and to file the same against the estate, and to have payment made as in the case of any other creditor with a provable claim; and as to the petitioner Reese, if his claim is not provable in bankruptcy, it will hardly be contended that it can be discharged or in any wise interfered with by the bankruptcy proceedings. If his claim be established in the way afforded by the law, and the estate of the Montevallo Company is abundantly solvent, as the petitioner asserts, then he can be paid.

[2] In reference to the alternative prayer of the petitioner for the appointment of a receiver, perhaps it is sufficient to say that a trustee has been elected by the creditors as provided by law, at a meeting duly called and in a manner free from any legal objection. If I could deal with it as an original proposition, I might not have entertained the same views as the creditors did in the election of the trustee; but there is now no power in the court to remove him, except for cause subsequently arising. Such cause has not yet arisen, and in the event of such a cause hereafter arising this detail can and will be cared for in the interest of the creditors.

It follows, from what has been said, that each of the petitions must be denied, and separate order will be accordingly entered in respect to each of them.

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THE ASCUTNEY.

SPICE v. UNITED STATES.

(District Court, D. Maryland. February 10, 1922.)

No. 881.

**Maritime Liens** ¶14—Ship's agent held entitled to lien for advances.

Libellant, appointed agent for a ship's business while in port on a particular voyage, by a charterer under a charter which recognized that liens might be created and required the charterer to pay them within a specified time, held entitled to a lien for money advanced on request of the master to pay the ship's bills; the greater part being for charges imposed by law, such as pilotage, tonnage tax, fumigation, etc., and also for his attendance fee.

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¶ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Admiralty. Suit by Wilbur F. Spice, trading as Wilbur F. Spice & Co., against the United States, as owner of the Steamship Ascutney. Decree for libellant.

George Forbes, of Baltimore, Md., for libellant.

Robert R. Carman, U. S. Atty., of Baltimore, Md.

ROSE, District Judge. The home port of the steamship Ascutney is New York. It is owned by the Shipping Board, but was being operated by the charterer, under option to purchase. It arrived in Baltimore early in 1920. Its master asked the libellant herein, who is in business in this city as a ship's agent and broker, to act as agent for the ship's business while in port on the particular voyage in question. The libellant agreed to do so, and with the master's approval paid certain of the ship's bills. These were:

Inward pilotage .....	\$ 96.71
Fees and charges for fumigation required by the health authorities, including therein \$9 for hire of launch for bringing back the fumigation pots from the ship to the quarantine station.....	63.47
Tonnage tax .....	188.82
Custom house and custom brokers' charges .....	7.17
Night engineer for the ship.....	10.60
Two taxi bills, of \$6 each, for taking the master from the city to the wharf at Curtis Bay, where the ship lay.....	12.00
Agents' expenditures for telephone, telegrams, permits, postage, etc..	14.57
Or a total of .....	\$393.34

For this sum, plus the libellant's regular attendance fee of \$100, or \$493.34, the present libel has been filed.

The learned advocates for the owner have raised and argued several serious and far-reaching contentions as to the construction and effect of the act of 1910 (36 Stat. 604 [Comp. St. §§ 7783-7787]), and particularly as to what inquiries the libellant should have made, and how far he was chargeable with notice of what he could have found out, had he made them. Some of these are of great importance to almost everybody having much to do with ships, or with the things ships need. Judicial opinion as to them is probably still in the making, and the temptation to discuss them is strong, but upon the facts here in evidence it will probably matter little what conclusion shall ultimately be reached as to them.

Most of these charges were for things which were absolutely necessary to the ship. The charter in this case, like that in *The South Coast*, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386, recognized that liens might be created upon the ship, and required the charterer to pay them off within a definite number of days. They were of the kind for which it was practically impossible to prevent the master from incurring liability. He had to take a pilot. The law required it. The health authorities insisted that the ship should be fumigated. Its tonnage tax had to be paid, and the other trifling items were those which were absolutely essential to the ship. It was argued that the master could have gone in a street car from the agent's office to the ship, instead of going in a taxi cab. Doubtless he could, but with a

large ship, whose time was perhaps worth \$50 to \$80 an hour, it might have been doubtful economy.

In this technically foreign port, the master had, before the act of 1910, as since, the power to bind the ship for necessities, and, indeed, as to most of them here involved, it would in fact be more nearly accurate to say that neither he nor any one else could prevent her from becoming bound. Taxes, health charges, pilotage fees, etc., are imposed by law. It has, however, been very seriously argued that a person bearing the libellant's relation to the ship does not acquire a lien upon her by paying bills, even of this character. Considerations, which in many cases cited have been held to make it inexpedient to permit a ship's agent, or a ship's husband, to acquire liens upon the ship, have no real application to persons whose relations to the ship are as strictly limited as those of the libellant, employed as he was merely to look after the essential details of her business in a particular port for a particular voyage. He had no control over her, or in any substantial sense over the charges against her, and certainly not over most of those here in controversy. It has been held that even the presumption that a ship's husband or her general agent may not assert liens against her is not conclusive, but rebuttable. *The Sarah J. Weed*, 21 Fed. Cas. 458, No. 12,350. These charges, other than the attendance fee, had to be paid. The libellant swears that he paid them upon the master's request, and that he gave credit to no one but the ship, and there is nothing in the case to suggest that any one would, at the time, have furnished anything on any other credit than that of the ship. That there is a maritime lien for an attendance fee seems to be settled in this circuit at least. *The Wyandotte*, 145 Fed. 321, 75 C. C. A. 117.

It follows that the libellant is entitled to a decree for the amount of his claim.

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**VAN VLAANDEREN et al. v. PEYET SILK DYEING CORPORATION.**

(District Court, S. D. New York. October 19, 1921.)

**Receivers** ⇨ 158(2)—General manager of corporation is not "mechanic," "workingman," or "laborer," entitled to preference; "employee."

Under Labor Law N. Y. § 9, giving a preference to wages of employees of corporations for whom receivers are appointed, and section 2, defining "employee" as "mechanic," "workingman," or "laborer," the president and general manager of a corporation, who was in effect the owner of the business, is not entitled to the preference for his salary, though in his endeavor to make the adventure a success he did much of the work of a mechanic, since manual work was not what he was hired to do, and he could have drawn his salary without doing it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Employé*; *Laborer*; *Mechanic*; *Workingman*.]

In Equity. Suit by Peter Van Vlaanderen and another, copartners, doing business under the firm name and style of the Van Vlaanderen Machine Company, against the Peyet Silk Dyeing Corporation. On

petition by Jerome Peyet against the receiver for preference for his claim against the defendant corporation as a claim for wages. Petition denied.

Clifford Seasongood, of New York City, for petitioner.  
Seidman & Milholland, of New York City, for receiver.

**LEARNED HAND**, District Judge. The phrase, "employees, operatives and laborers," which the original statute of 1885 (Laws 1885, c. 376) contained, led to much uncertainty in the law. Obviously, "employees" meant something more than "operatives and laborers," and something less than the definition to be found by looking in a dictionary. Considerable confusion resulted, as appears from the opinions in *Re Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489, *Palmer v. Van Santford*, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402; and *People v. Remington*, 109 N. Y. 631, 16 N. E. 680, which accepted the opinion in 45 Hun, 329. All this was, however, cleared up by the revision of the statute. Labor Law (Consol. Laws, c. 31) § 9, now reads as follows:

"The wages of the employees \* \* \* shall be preferred."

And the word "employee" is defined in section 2 as "mechanic, workman or laborer." But these three words are plain enough, and there remains no penumbra of uncertainty, such as over-shadowed the use of "employee" in the act of 1885. All three of them include only a man hired to contribute by manual labor to the production of goods or of plant and factory. Hence all the earlier authorities are no longer in point, nor have I found any which construed this particular section in what the petitioner is here pleased to call a broad sense. Its scope, on the contrary, is narrower, designed no doubt to protect only those whose weekly wage was assumed to leave them in most cases no margin of subsistence and who were thought to need some favors in the distribution of what was left. To include a manager, a superintendent, or even a bookkeeper would be a clear disregard of its language and its purpose.

In the case at bar the petitioner was not only the titular president of the corporation, but he was its general manager, engaged to supervise all its work and entitled to a salary of \$200 a week. It is no doubt true that he stayed in the factory early and late and did much of the work of a mechanic. This was because it had been, and in substance remained, his own business, for he and his wife and his assistant were the sole owners of the stock issued. It would be a curious result if these two men, running a business in corporate form, should under the guise of their voluntary manual assistance in the business absorb the greater part of the assets and exclude those from whom they had bought or borrowed. Obviously, the statute means nothing of the sort; it is to protect such manual workers as are genuine employees not of themselves but of the stockholders. Manual work was not what the applicant was hired to do; he did it, in a very natural desire to make the business, his business, a success by every effort in his power. But, if he had not been so moved, he could quite legitimately have

drawn his salary without touching a machine. He was general manager, with only the duty to do whatever might "reasonably be required of him in connection therewith." No general manager can reasonably be required to do the manual work of a mechanic. If he choose to, it is out of abundant good will to his employer, a good will amply accounted for in this case by his general interest.

Petition denied.

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**STANLEY WORKS, Inc., v. GOURLAND TYPEWRITER MFG. CO., Inc.**

(District Court, E. D. New York. February 11, 1922.)

1. Receivers  $\S$  158(2)—Only those performing manual labor are entitled to preference for wages; "employee."

Under Labor Law N. Y., §§ 2, 9, giving preference to the wages of employees of corporations for which receivers are appointed, and defining "employees," only those who perform manual labor for the corporation, either skilled or unskilled, are entitled to the preference.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. Receivers  $\S$  158(2)—Bankruptcy Act held not applicable in determining preference of laborers against receiver.

Where receivers for a corporation were appointed by the United States District Court, which acquired jurisdiction because of diversity of citizenship, the rights of the employees of the defendant corporation to preference for their wages depend on the law of the state and not on Bankruptcy Act, § 64b (4), being Comp. St. § 9648, and section 17, as amended by Act Jan. 7, 1922.

In Equity. Suit by the Stanley Works, Inc., against Gourland Typewriter Manufacturing Company, Inc. On exceptions to the report of a special master, in so far as it disallowed parts of various claims against the receiver of defendant corporation. Exceptions overruled, except as to one claim, as to which the evidence was missing.

Shaine & Weinrib, of New York City, for receiver.

Alfred J. Gilchrist, of Brooklyn, N. Y., for claimant Gibbons.

H. L. Schaefer, of New York City, for Kline.

A. J. Bloch, for Goldenberg.

CHATFIELD, District Judge. Exceptions have been filed to the report of a special master, in so far as it disallows parts of various claims against the defendant herein.

[1] To the extent that the special master has allowed the claims either as priorities or as general claims, the report will stand confirmed. In so far as he has disallowed these claims, each disallowance is based upon the provisions of the statutory law of the state of New York, as set forth in sections 2 and 9 of the Labor Law, being chapter 36 of the Laws of 1909 (Consol. Laws, c. 31). By these sections, the wages of employees are preferred, in case a receiver is appointed, to every other debt or claim, and an employee is defined as "a mechanic, workman or laborer who works for another for hire."

The matter seems to have been considered settled in the courts of

New York, since the decision of *Matter of Stryker*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489. The Stryker Case was based upon the language of a former statute, which used the words "employees, operatives and laborers." This statute was in derogation of the common law, and when construed strictly was held not to include the wages of any persons other than those who performed manual labor as distinguished from a clerical force. When the law of 1909 was substituted, it made more apparent, if anything, the intention of the legislature to include only manual labor, either skilled or unskilled. This has been decided also in the case of *Van Vlaanderen v. Peyet Silk Dyeing Corporation* (D. C.) 278 Fed. 993, recently filed in the Southern District of New York.

[2] The present case was brought in this court and receivers appointed, because diversity of citizenship gave jurisdiction to the United States District Court in the proper district. But the rights of the parties were established according to the laws of the state. The allowance of claims depends upon the rights of the parties rather than upon any rule of procedure in this court, in the absence of any statute by Congress upon the subject. The general bankruptcy statute contains (section 64b[4], being Comp. St. § 9648), a provision giving priority in bankruptcy cases to "wages due to workmen, clerks, \* \* \* or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant."

This is accentuated by the provisions of the law of January 7, 1922, amending section 17 of the bankruptcy statute, so as to except from discharge "wages due to workmen, clerks, traveling or city salesmen, or servants." But priority under the bankruptcy statute is limited to wages for a period of three months. It is evident, therefore, that this court cannot apply, under the general law of the state of New York, in an equity receivership, the language of the bankruptcy statute above quoted. The exceptions, therefore, must be overruled, and the report of the special master upheld.

With respect to the claim of John W. Gibbons, this claimant shows, neither in his claim, in the testimony taken before the special master, nor anywhere in these proceedings, what services he rendered. The special master has by clerical mistake referred to the testimony of another claimant in making his report, but because of the absence in Gibbons' testimony and claim of any statement as to what work he did, the court cannot pass upon the claim without further hearing.

The claim of Gibbons, therefore, will be returned to the special master for hearing, unless the parties hereto stipulate as to the nature of the claim, so that it can be disposed of as a matter of law under the terms of this decision.

**PATHE EXCHANGE, Inc., v. MILLER.**

(Court of Appeals of District of Columbia. Submitted January 6, 1922. Decided February 6, 1922.)

No. 3606.

- 1. Evidence ⇐155(1)—Defendant offering oral evidence as to terms of written contract cannot object to similar evidence for plaintiff.**

Where defendant, who offered a written contract in evidence, did not rely upon it as establishing the terms of the agreement, but introduced oral evidence as to such terms, thereby treating the instrument merely as evidence tending to prove the actual terms, he could not object to oral evidence by plaintiff in rebuttal on that issue.

- 2. Contracts ⇐323(1)—Evidence held not to show conclusively cause of failure to furnish film was beyond control of lessor.**

In an action for breach of a contract to furnish a film for exhibition, which provided that the distributor should not be liable for failure to furnish the film due to any cause beyond its control, evidence as to the agreement between the distributor and a prior exhibitor, to the effect that the prior exhibitor had an option to restrain the film three days before the time for delivery to plaintiff, *held* not to conclusively show that the failure to procure that film was due to a cause beyond the distributor's control.

- 3. Contracts ⇐322(3)—Destruction of film the week before scheduled exhibition held not to excuse failure to deliver.**

The failure to deliver a designated film to an exhibitor on a specified date is not shown to be due to a cause beyond the distributor's control by evidence that one of the distributor's films was destroyed almost a week before it was to be delivered to the exhibitor, where there was no evidence that the distributor exercised due diligence to procure another film, but, instead, the evidence showed that distributor took no steps to that end until the day before the film was to be delivered.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Action by Philip Miller against the Pathé Exchange, Inc. Judgment for the plaintiff, and defendant appeals. Affirmed.

E. C. Brandenburg, of Washington, D. C., for appellant.

H. Winship Wheatley, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, in an action for damages for breach of contract.

On December 19, 1918, the plaintiff, the proprietor of a moving picture theater in Annapolis, Md., entered into a contract with the defendant corporation, appellant here, for the privilege of exhibiting in his theater, on January 1st following, the picture known as "Infatuation." Among the conditions of the contract were the following (paragraph 12):

"That the distributor (defendant) shall not be liable for any loss or damage resulting to the exhibitor (plaintiff) by reason of failure or delay in delivering the films or advertising matter herein referred to, when such failure or delay

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

is due to any \* \* \* failure of films or advertising matter in the custody or control of any other party to be delivered or returned to the distributor in time for delivery hereunder or to be re-forwarded as per distributor's instructions, or to strikes, lockouts, fire, floods, or to any other cause or causes whatsoever beyond the control of the distributor."

In reliance upon this contract plaintiff advertised the picture quite extensively. On the 31st of December he was informed by the defendant that the film would be shipped to him in time for exhibition the day following, "and not to worry about it as it would be all right." At about 8 o'clock on the evening of the 31st he was informed that the defendant could not send him the film. Another film was tendered him but not accepted because it was not of a character that would "take" in Annapolis. This, and evidence on the question of damages, was substantially plaintiff's case.

The defendant moved for a directed verdict, but, when its motion was overruled, elected to introduce evidence in its own behalf.

The first witness for the defendant, "a booker," testified in substance that on the 17th of December, 1918, a Mr. Price of the Blue Mouse Theater in Baltimore, Md., leased "one of the films of 'Infatuation' for the 29th, 30th and 31st day of December"; that Mr. Price had negotiated with the Baltimore agent for the privilege of a three days extension for an additional \$50; that Mr. Champion, the manager of the Washington branch of the defendant company, "declined to consent to this extension at the rate stated," and that this provision therefore was not inserted in the contract; that the dates were furnished by Mr. Price and were inserted in the contract before he signed it. The witness further testified that Mr. Price "sometimes leased pictures for three days only, and sometimes for three days with a privilege of renewal, or for six days with a privilege of surrendering in three days." Contracts between the defendant company and Mr. Price tending to substantiate this statement thereupon were introduced in evidence. The witness further stated, "The other of the two films in the control of the defendant company for this territory was being exhibited during Christmas week at the Rialto Theater in Washington," and that on the 26th of December this film became so damaged that it was necessary to return it to the factory in New York for reconstruction. On cross-examination the witness admitted that the Rialto Theater film had not been censored and that its exhibition in Maryland, therefore, would have been in violation of law.

The next witness for defendant was its Baltimore representative, who testified that, although he knew moving pictures could not be lawfully exhibited in Baltimore on Sundays, he did not look at the calendar when negotiating with Mr. Price, because Mr. Price furnished the dates; "that on the 31st of December, 1918, he called on Mr. Price about the picture 'Infatuation,' and Mr. Price told him he had an agreement with Mr. Champion for an option of another three days, and there was no way, he claimed, to get that picture away from him, because he had that option on it."

Mr. Champion, the next witness for defendant, stated that when Mr. Price came to Washington on the 17th he brought with him a con-

tract in triplicate for December 29th, 30th, and 31st, with the privilege of three days renewal for \$50; "that witness discussed the matter with the said Price and told him that he would not give the privilege of extension for any such price." Thereupon, according to the witness, the proposed contract was destroyed and a new one prepared for the 29th, 30th, and 31st. The witness further testified that the Rialto Theater film "was destroyed on Thursday of Christmas week, making the print absolutely worthless for exhibition purposes." On cross-examination Mr. Champion stated that Mr. Price had paid \$75 for the three days he retained the picture. When his attention was invited to a provision in the contract under which he might have collected \$70 for each day the film was withheld, he stated that he had "made the best settlement possible." Witness further testified that he did not know, until subsequent to January 1, 1919, when his company was fined in Maryland, that uncensored films could not be exhibited legally in that state.

Thereupon the plaintiff, in rebuttal, offered the deposition of Mr. Price, who stated:

That he would not like to say that the dates were in the contract when he signed it; "that he thinks he signed a blank form; \* \* \* that he booked the film for the week beginning December 30th and made the arrangement with both the manager and the booker; he bought the picture for the 30th, 31st, and 1st, with the privilege of an additional three days; that he does not know how the date December 29th appeared in the contract and had no understanding about that date as it was Sunday; that he never bought a thing on Sunday in his life; \* \* \* that he had no understanding for December 29th, which was Sunday, and did not know it appeared on the contract; if he had, he would have shown a mistake was made; that after signing the contract he had no talk with anybody representing the defendant with respect to the dates until the second day he was playing it when he received a phone call from Washington from the Pathé Exchange, late in the afternoon; he informed witness the picture was to be played in Annapolis and he (witness) was to turn it over to Mr. Miller at that point; witness replied he had the picture only two days and the contract called for three with a privilege of six. \* \* \*

All this testimony was admitted without objection. On cross-examination witness stated:

That he had some discussion with the Washington representatives of the defendant company "with reference to the payment of \$50 for three additional days, and as he thought he saw money-making possibilities in the film to warrant his keeping it an additional three days and asked that if he elected to run it for an additional three days what the cost would be, and the price of \$75 was made upon it and not \$50; \* \* \* that he does not recall any discussion with Mr. Champion subsequent to the exhibition over the question of the amount to be paid for the additional days, nor was there any compromise over the charge for the additional three days made some weeks after the exhibition."

On redirect examination the witness again stated:

"That there was a bargain made with respect to the price for the three additional days which the defendant was willing to rent the picture to him for, and that I am sure was \$75."

The sole question discussed in appellant's brief is based upon the refusal of the court to direct a verdict for the defendant at the close

of all the evidence. It is conceded by counsel for appellant that unless the failure of the defendant to fulfill its contract resulted from causes beyond its control, paragraph 12 of the contract, from which we have quoted, is inapplicable.

[1] Both parties, without objection, introduced evidence as to the terms of the collateral contract between Price and the defendant, and our only concern, therefore, is whether that evidence presented any question of fact for the jury. The defendant having deemed it necessary to introduce evidence in support of the terms of the written contract with Price, that is, having treated that instrument merely as evidence tending to prove the actual terms of the contract, could not and did not object to plaintiff's evidence on that issue. It follows, therefore, that no question as to the reformation of the Price contract was involved; the issue being whether plaintiff's or defendant's evidence as to the actual terms of the contract would be accepted.

[2, 3] Mr. Price stated that the contract he made was for the 30th and 31st of December, 1918, and the 1st of January, 1919, with a privilege of three additional days. His testimony on the question of extension is clear, positive, and consistent, and supported, to some extent at least, by the fact that the amount he named as the consideration for that privilege is the amount actually paid. If the jury, then, accepted his testimony on this point, as it had a right to do, the necessary result was that when this contract was entered into defendant knew it could not rely upon the film leased to Mr. Price, regardless of whether the collateral contract with Mr. Price commenced on December 30th, as contended by him, or on December 29th, as contended by defendant. The only other film that could have been available to the defendant "for this territory," according to the record, was under contract "at the Rialto Theater in Washington" for Christmas week, and that film was rendered "absolutely worthless for exhibition purposes" on the 26th of December and had to be sent to the factory in New York. This was almost a week previous to the date in plaintiff's contract, so that, in the absence of evidence that defendant, in the exercise of reasonable diligence, could not have obtained another film, the accident to the Rialto Theater film constituted no defense to this action. That reasonable diligence was not exercised appears from the testimony of one of defendant's local agents, who stated that on December 31st he "phoned to the Philadelphia and Pittsburgh branches in an effort to get said film."

Since there was a question of fact for the jury, the judgment must be affirmed, with costs.

Affirmed.

SMYTH, Chief Justice (dissenting). There is but one question in this case, and that is as to whether or not the written contract between the appellant and Price is binding on the latter. If it is, Price was obligated to return the film on the night of the 31st of December, and this would have been in time for its delivery to Miller before his theater opened, January 1. Miller agreed that the appellant should "not be liable for any loss or damage" resulting "to him \* \* \* by rea-

son of failure or delay in delivering the" film "in the custody or control of any other party," etc. The film was in the control of Price. He by his contract (section 2) was required to deliver it to the office of the appellant on the last day of the last exhibition of it, which in this case was, according to the contract, December 31. He failed to make the delivery, and, consequently, the appellant was not able to keep its contract with Miller.

Miller cannot hold the appellant unless the record shows he produced some substantial evidence that Price was not bound by his contract to return the film December 31. Price was bound, according to the face of the contract, and could escape only by establishing that he had a ground for reformation of the contract. To secure reformation it would be necessary for him to show either a mutual mistake or a mistake on his side and fraud or inequitable conduct on the part of the appellant. And this he would have to do by evidence "sufficiently cogent to thoroughly satisfy the mind of the court." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 435, 12 Sup. Ct. 239, 245 (35 L. Ed. 1063). Reformation is never given except where both parties understood the contract as the bill alleges it ought to have been and as in fact it was except for the mistake. 23 R. C. L. 327; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577. There is not even a suggestion that the appellant was guilty of fraud or inequitable conduct. If, therefore, reformation could be granted, it would have to be upon the theory of mutual mistake.

The testimony of appellant's witnesses who participated in the making of the contract is clear and positive to the effect that the dates, December 29, 30 and 31, were given by Mr. Price to the person who drew the contract; that the appellant never fixes the dates, "as it is always the duty of the exhibitor to state the dates on which he desires to exhibit a picture"; that the contract was executed in triplicate; that at the time of its execution the dates were in it; that Mr. Price signed it, and that a copy was sent to him the next day, which would be the 18th of December. Price does not deny this. All he says upon the point is, to quote the record, that he does not "recall whether he signed the contract after those dates were inserted or not, but will not say that he did not; that he would not say that the exhibitor's contract [the one in question] was mailed to him prior to the exhibition, and that he received it, nor would he say that it was not." Unless this makes out a case for reformation, then the contract as written and signed is binding. I respectfully submit that it is utterly insufficient. Therefore there is no basis in the testimony for the verdict of the jury that the written contract between the appellant and Price was not binding and did not protect the appellant under the contract which it had with Miller.

Much testimony is set forth in the opinion of the court concerning the contract which Price thought he had with the appellant. It nearly all relates to negotiations which preceded the execution of the written contract, and, according to well-settled principles, is merged in that contract, unless it discloses mutual mistake, fraud, or inequitable conduct, which it does not.

There is no question of negligence here. Appellant had no knowledge that Price would not keep his contract, until the 31st, and it then did everything it could to procure for Miller another film. But it was not required to do anything. It was justified in standing on its contract with Miller that it would not be liable for the default of any person to deliver the film according to his contract.

The court makes a new contract for appellant and subjects it to a liability which it expressly and definitely contracted against. I dissent.

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**EQUITABLE SURETY CO. v. NATIONAL CAPITAL BANK OF WASHINGTON, D. C. (CARRY, Intervener).**

(Court of Appeals of District of Columbia. Submitted January 5, 1922. Decided March 6, 1922.)

No. 3513.

1. Principal and surety ⇐175—Evidence held to show stock was deposited on condition not accepted by surety.

Evidence that a government contractor, who had previously deposited securities with the surety on his bond to indemnify it against loss, thereafter made a deposit of other stock owned by one interested in a corporation, which took a partial assignment of the contract to be substituted for the stock originally deposited, *held* to show that the second deposit was made on condition that the stock first deposited be released, so that the surety could not retain the second deposit after having refused to release the first.

2. Appeal and error ⇐231(5)—Exception to each and every letter introduced in evidence is too general.

Where the record showed that certain letters offered in evidence by defendant were admitted over the objection of the plaintiff, and that an exception to the ruling of the court on each and every offer was allowed, the objection was too general for review.

3. Appeal and error ⇐1050(1)—Introduction of letters, whose substance had been stated without objection, is not prejudicial.

A party is not prejudiced by the introduction in evidence on behalf of the adverse party of letters, the substance of which had been previously stated without objection by a witness.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Equitable Surety Company, a corporation, against the National Capital Bank of Washington, D. C., to enjoin the delivery of securities deposited with it, in which Albert Carry intervened. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Thomas C. Bradley, of Washington, D. C., for appellant.

Alexander H. Bell and P. H. Marshall, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellant's bill to restrain the appellee, the National Capital Bank, from delivering certain securities deposited with it by the appellee and intervener Carry for the alleged purpose of indemnifying appellant against loss under a certain bond

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of guaranty between M. A. Brast and the United States, under which Brast was to drill an oil well on each of 32 subdivisions of land of the Osage Indian Tribe in Oklahoma, within a time certain.

The facts as developed by the evidence are substantially as follows: On November 22, 1913, the Department of the Interior approved an oil and gas lease to M. A. Brast, embracing 32 tracts or subdivisions of land in the Osage Reservation, Oklahoma. Appellant was surety on Brast's bond, and, in the event of his failure to drill one well on each of these tracts within one year from the date of the approval of the contract, he and his surety were liable to pay to the United States as liquidated damages the sum of \$2,000 for each well not so drilled. As a condition precedent to appellant's assuming this obligation, it demanded and received indemnity against loss by the deposit with it of collateral securities furnished by A. W. Hurley and others, who, in consideration, received an interest in the Brast contract. On December 2, 1913, Brast assigned 16 of the 32 parcels embraced in his lease to the Summit Oil & Gas Company, a West Virginia corporation, subject to the consent of appellant and the Interior Department. On December 15th following Mr. Carry, who was interested in the Summit Oil & Gas Company, and certain of his associates, arranged with the appellee bank to become the depository of certain shares of stock belonging to Mr. Carry, of the then value of about \$23,000, and the bank issued a certificate under that date, in which it was recited that the stock was to be held by the bank to secure appellant, as its interests might appear, "in connection with a certain bond in the sum of \$96,000 executed by the said the Equitable Surety Company to guarantee the faithful performance of a certain contract by one M. A. Brast," etc. This certificate was in triplicate, one copy being filed with the stock and the others handed a representative of the Summit Oil & Gas Company.

Up to this time appellant, so far as the record discloses, had not been consulted and was without knowledge of what had occurred. Its vice president, who conducted the negotiations relative to the Carry stock, testifying for appellant, was asked as to the circumstances under which he saw the bank certificate of December 15th, and replied:

"Why, the Equitable Surety Company had become surety upon a certain bond or bonds for M. A. Brast covering oil leases, and this certificate was presented for the purpose of making the substitution of the collaterals called for in this certificate for certain indemnities which we had taken on the bonds or on the bond. \* \* \* My understanding was that parties interested desired to substitute the stock for certain other indemnities or collaterals which the company held on the bond."

On cross-examination the witness stated that he—

"carried on the negotiations looking toward the substitution of that [the Carry stock] for other indemnities or collaterals, but does not know whether the Equitable Surety Company still has the original collaterals that were deposited with it."

Mr. Hurley, testifying for appellant, admitted on cross-examination that the securities he had furnished appellant were still held by it. Asked whether Carry and his associates were to supply indemnifying

securities, to be substituted for those that had been deposited with the Equitable Surety Company, he answered in the affirmative. He then was asked whether that substitution ever was made, and replied:

"No, sir; that is, not to the extent of letting our stock down"—in other words, that his stock still was held by appellant.

The witness further testified that the substitution referred to in certain letters he had written and which were shown him—

"was never adjusted; that to the knowledge of witness the Equitable Surety Company never determined the value of the securities mentioned in said Exhibit A (the Carry certificate), and never released any of the securities deposited by the original indemnitors; that on the 14th day of February, 1914, the only real collateral accepted by plaintiff was that put up by witness and his associates, and that the stock deposited by Carry was to be substituted for his [Hurley's], but had never really been accepted in any amount."

Mr. Charles E. Goettman, secretary of the Summit Oil & Gas Company, testifying for appellant, said he was at the National Capital Bank on December 15, 1913, when the Carry certificate was issued and that—"the purpose of the meeting was to get some stocks of Mr. Carry's to substitute as collateral for securities previously put up by Hurley and his associates as indemnity on the original bond of Brast."

Witness took a copy of the certificate to Kansas City, where he interviewed the vice president of appellant company, who "would not agree to substitute it" but expressed a purpose to "investigate it and see the value of it." Witness further stated that—

"the Equitable never refused to consent to the assignment, but they did refuse to substitute this collateral for the collateral that was already up; \* \* \* that the Equitable Surety Company never questioned giving consent to this assignment so long as the original bond was in force; that the only question troubling them out there was the substitution of the Carry stock for the Hurley stock."

Asked why he did not withdraw the Carry certificate of deposit, witness replied that Hurley thought he could get the Equitable to consent to the substitution later on; that in his correspondence Hurley represented:

"That he really had a gentleman's agreement whereby they would substitute it, and now they refused to do so."

Appellant, on December 18, 1913, assented to the assignment to the Summit Oil & Gas Company, and on January 14, 1914, that assignment was approved by the Interior Department.

At the time of the filing of the original bill, suit had been brought by the United States against the Summit Oil & Gas Company, Brast, and the appellant, on account of the failure of Brast and his successors and assigns to drill the oil wells. After judgment had been obtained in that suit, appellant filed a supplemental bill for a receiver to take charge of the stock held by the appellee bank, and for general relief. Thereupon Carry obtained leave and intervened.

The only evidence introduced by defendants were the letters written by Hurley to Goettman, as the representative of the Summit Oil & Gas Company, and concerning which Hurley had been fully questioned without objection.

[1] The trial court found, and in our view the conclusion was irresistible, that—

“the offer of this stock was conditional, and that the only demand that was made for this stock was with a view to the bringing of a suit, but this was after the lease was secured and was not even then, if it was accepted, an acceptance in compliance with the conditions.”

The evidence is all to the effect that this stock was tendered to the appellant company upon the understanding and condition that, if accepted, stock of corresponding value would be released to Mr. Hurley and his associates. In other words, it never was contemplated to increase by the value of this stock the indemnity of appellant, and appellant could not have so understood. It is true that appellant's representative took physical possession of the Carry certificate, but there the matter rested, because appellant failed to assent to the condition that this stock be substituted for an equal amount of Hurley stock. It is, as found by the trial court, largely a question of fact, and that question is so free from doubt that we shall not discuss it further.

[2, 3] One other point remains: The record shows that when the Hurley letters were offered in evidence they were admitted “over the objection of the plaintiff,” and that “an exception to the ruling of the court on each and every offer” was allowed. This objection was altogether too general. *D. C. v. Duryee*, 29 App. D. C. 327, 10 Ann. Cas. 675; *Dixon v. Great Falls & O. D. R. Co.*, 43 App. D. C. 206; *D. C. v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. Moreover, as already intimated, the substance of these letters had been brought to the attention of the court through the cross-examination of Mr. Hurley, so that appellant could not have been prejudiced.

The decree is affirmed, with costs.

Affirmed.

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MONCURE v. MONCURE.

(Court of Appeals of District of Columbia. Submitted February 9, 1922. Decided March 6, 1922.)

No. 3637.

1. Divorce  $\Leftarrow$  37(1)—Separation and intent must exist together to constitute “desertion.”

Actual separation and intention to desert must exist together to constitute desertion, which is made a ground for separation from bed and board by Code of Law 1901, § 966, which fixes no definite period of desertion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desertion (in Divorce Law).]

2. Divorce  $\Leftarrow$  37(6)—Separation and intention to desert need not be identical in their commencement.

Actual separation and intention to desert, which together constitute desertion, need not be identical in their commencement; but, if one antedates the other, the period of desertion dates from the inception of the other element.

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$\Leftarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Divorce  $\Leftrightarrow$  104—Petition charging desertion as of date of intention held not in bad faith.

A petition for divorce and alimony, which alleged desertion by the husband as beginning on the date when a letter from him showed the fixed intention to desert his wife, though thereafter at his solicitation she had lived with him for a short time, does not, in view of the fact that no fixed period of desertion is required by statute, show bad faith on the part of the petitioner, which prevents amendment of her petition, so as to allege the date of desertion as the date of final separation.

4. Divorce  $\Leftrightarrow$  37(8)—Husband's conduct held to require special effort toward reconciliation.

A husband, who had ignored his wife for a long period, and had written her a letter in which he charged her with most serious offenses, which he made no attempt to sustain by evidence, owed her the duty to express regret for his conduct and make special effort toward reconciliation, so that he cannot rely upon a telephone request to her to meet him and talk over their affairs as an effort toward reconciliation, especially when she was justified in assuming it was but another attempt on his part to arrange for divorce on his terms, as he had previously been trying to do.

Appeal from Supreme Court of the District of Columbia.

Suit for divorce by Olga S. Moncure against Thomas Hughes Moncure. From a decree dismissing the petition, plaintiff appeals. Reversed and remanded.

T. M. Wampler, of Washington, D. C., for appellant.

Joseph T. Sherier, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing the petition of plaintiff, appellant here, for a divorce with alimony.

In her petition, filed January 2, 1920, plaintiff alleged desertion as of April 1, 1917, and that her husband thereafter had contributed nothing toward her support. In his answer defendant denied "that he deserted plaintiff on the 1st day of April, 1917," and alleged that the parties cohabited in July and during the month of August, 1917; that "the parties did not separate until about the time the defendant left New York for France, as he was in duty bound to do as an officer in the United States Army."

Plaintiff's testimony was substantially as follows: She was married to defendant in 1912, and from 1916 to April of 1917 they lived in this city, defendant then being employed in the Geological Survey. On the latter date defendant had requested plaintiff to meet him at a place named, and, after waiting for him several hours, she went home and found a note informing her he had left for the field, and would send her some money when he got his check at the end of the month. She was compelled to make inquiries at the Geological Survey to learn his whereabouts, and it was not until some time in May that she heard from him, and she "remembers the letter as being a very ugly one." She next heard from her husband in June following, when he telephoned her from Union Station in this city, requesting her to meet him, which she did, and they were together until 12 o'clock at night. He then informed her that he had received a commission in the army. When pressed for his reasons for the manner of his leaving

$\Leftrightarrow$  For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

in April, defendant's answers were evasive and unsatisfactory. He informed plaintiff that he had been ordered to Newport, R. I., from which point he telegraphed her on August 1st to go there and that he would send her some money. She later received a letter inclosing \$33, the only money she received from her husband after April of 1917, and went to Newport, where she remained for about two weeks, paying her own room rent, and then accompanied defendant to New York (he having received orders to sail for France), where they parted apparently as friends. The next direct communication plaintiff received from her husband was in October of 1918, although she had written him regularly in France about twice a week and sometimes oftener. This communication was in the form of a letter, in part as follows:

"You will probably be surprised to receive this letter, since it is only the second that I have felt that I had occasion to write you in the year and a half that we have been separated, and this one I have given due consideration before finally deciding to write. I do not know what your wish is on the subject, but you certainly have realized from the first day of our separation that any future for us together was impossible. The fact that you came to Newport, R. I., and against my wishes, while I was stationed at Ft. Adams, and that we parted apparently friendly, does not and has not altered this in the least. \* \* \* If it had to be a choice between my having to return home and resume my life with you and having to be killed here in France, I don't think I would hesitate to choose the latter, for there are certainly some things worse than death. My object in writing you this letter is not to make any request of you, nor to make any threats, but rather in the hope that I may induce you to see as I do the desirableness of a divorce being secured by friendly agreement rather than by suit. Of course, you must be aware of the fact, since a long while past, that I placed the matter in Mr. O. Vernon Ford's hands when I left America, to the end that he would sooner or later and perhaps even through your wish be able to work on a divorce in my behalf on a basis of friendly agreement. Take my word for it, as I once before gave it, that I would separate from you if you committed the third time a certain act towards me, which needless to say was committed, that I will get a divorce from you when I return to America by suit, if it has not been obtained in the meantime by your agreeing to a friendly divorce. I hope you will not waste your time in speculating that I cannot do this, for as to that there is no question of doubt, but it is certainly my hope that this method will not have to be resorted to for the following reasons: \* \* \* I will never again live with you."

In addition to the quoted matter, defendant made accusations of a most indecent and reprehensible character against his wife, and informed her that, in the event of a divorce contest, these charges would become public.

The next communication plaintiff received was dated November 15, 1918, in which Moncure informed her that he had written Mr. Ford to cable him—

"whether you have agreed to the divorce on a friendly basis," etc. "If this is not accomplished before my return, I am at least going to get it under way by that time."

The defendant, testifying in his own behalf, confined himself almost exclusively to a statement of his financial condition. He did not deny that he had deserted his wife, and expressed no regret for his conduct toward her, nor a willingness to effect a reconciliation. He testified that early in January of 1920, shortly after his return from France, he

telephoned his wife "asking her to meet him, so that they could talk over their affairs"; that she agreed to do so, but, instead, had service of the petition for divorce made upon him.

At the close of the evidence the learned trial justice expressed the view that, inasmuch as the desertion was alleged as of April, 1917, when the evidence showed cohabitation subsequent to that date, and the plaintiff must have known the averment in her petition was untrue, the petition must be dismissed. Thereupon plaintiff asked leave to amend, so as to make her petition conform to the proof; but this motion the court declined to grant.

[1, 2] A divorce proceeding in this jurisdiction is equitable in character (Code, §§ 85, 963), and under the provisions of section 966 a "legal separation from bed and board may be granted for drunkenness, cruelty, or desertion." It will be observed that no definite period of desertion is prescribed. Intent, therefore, plays an important part in determining the question. While actual separation and intention to desert must exist together to constitute desertion (19 C. J. 63; 9 R. C. L. 354), it is apparent that they need not be identical in their commencement. *Hubbard v. Hubbard*, 127 Md. 617, 96 Atl. 860; *Carroll v. Carroll*, 68 N. J. Eq. 724, 61 Atl. 383. Thus, if the departure antedates the intention to desert, the period of desertion dates from the time such intention was formed (*Hitchcock v. Hitchcock*, 15 App. D. C. 81; *Taylor v. Taylor*, 112 Md. 666, 77 Atl. 133), while if the intention to desert antedates the departure, the period commences to run from the time of the latter (*Middleton v. Middleton*, 187 Pa. 612, 41 Atl. 291).

[3] In this case it is clear that, long prior to his departure for France, the defendant had formed the purpose of deserting his wife. The letter he wrote her in October of 1918 is susceptible of no other interpretation. Moreover, that letter was conceived in such malice and ill will, and couched in such cruel, intemperate, and libelous terms, as to deprive the writer of any further consideration from either his wife or the court. And when we come to consider that defendant offered not a word of evidence to substantiate those charges, his conduct becomes all the more reprehensible. It was an obvious attempt to coerce his wife into a divorce arrangement satisfactory to him.

We are not at all convinced that Mrs. Moncure did not act in good faith in verifying her petition. She then was advised of the duplicity of her husband, and was quite justified in her conclusion that in fact, if not in law, the separation dated back to April of 1917. Indeed, the defendant, in the letter written early in October of 1918, had fixed that date, for he therein referred to "the year and a half that we have been separated," and then stated:

"I do not know what your wish is on the subject, but you certainly have realized from the first day of our separation that any future for us together was impossible. The fact that you came to Newport, R. I., and against my wishes, while I was stationed at Ft. Adams, and that we parted apparently friendly, does not and has not altered this in the least."

Knowing that her husband had consulted an attorney, and that their relations after April of 1917 were the result of his duplicity, it

is not at all strange that Mrs. Moncure should have adopted her husband's theory as to the date of his desertion of her. There could have been no ulterior motive in fixing the date as of April 1, 1917, instead of later, for, as we have seen, the statute prescribes no definite period of desertion. In view of the surrounding circumstances, we are quite convinced that plaintiff had in mind the time when her husband really had formed the definite purpose of deserting her, rather than the mere physical separation. Certainly we are not prepared to withhold relief to this wife upon the mere suspicion that she willfully overstated her case in her petition, when the conduct of her husband, as evidenced by his own letter, has been so reprehensible. It may be observed that the defendant repeatedly sought to induce his wife to enter into an arrangement whereby he might obtain a divorce. In other words, he attempted to persuade her to refrain from making any defense, and thus to impose upon and deceive the court.

[4] In his testimony the defendant evidently wished to create the impression that, because he telephoned his wife, "asking her to meet him so that they might talk over their affairs," he was willing to effect a reconciliation. In view of what had gone before, plaintiff was quite justified in assuming that this was but another attempt to arrange for a divorce on his terms. After writing his wife the letter of October, 1918, and ignoring her for such a long period, it was defendant's duty, when he returned from France, to express regret for his conduct and make a special effort toward reconciliation. *Woolard v. Woolard*, 18 App. D. C. 326; *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422.

We are of the view that, in the circumstances, the court should have permitted the amendment sought, and that plaintiff was entitled to a decree.

The decree appealed from, therefore, is reversed, with costs, and the cause remanded for further proceedings, not inconsistent with this opinion.

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KENNEDY v. MANGAN.

(Court of Appeals of District of Columbia. Submitted February 10, 1922. Decided March 6, 1922.)

No. 8657.

1. Executors and administrators ¶127—Surviving executor can execute power of sale as trustee.

Where a trust was charged on the executors as such, it did not, under Code of Law, § 826, become extinct by death of one of them, and the survivor could make a sale, if both executors were originally authorized to sell.

2. Wills ¶486—Testatrix presumed to know restrictions on holding real estate by aliens.

A testatrix, who gave her property to her brother, if he should be heard from within seven years, or, if not, then to aliens, is presumed to have appreciated the limitation on the holding or enjoyment of real

estate by aliens, under Act March 2, 1897 (Comp. St. §§ 3490-3496), Act Feb. 23, 1905 (Comp. St. § 3497), and the treaties between the United States and Great Britain of March 2, 1899, and January 13, 1902.

3. Wills ¶441—Death of legatee, unknown to testatrix, immaterial in construing the will.

The fact that a bequest had lapsed, because the legatee had predeceased the testatrix, is immaterial in construing the will, where that fact was unknown to testatrix.

4. Wills ¶680, 686(1)—Nature and duration of testamentary trust governed by requirements, in absence of express provision.

The nature and duration of a trust are governed by its requirements, in the absence of express provisions.

5. Wills ¶687(1)—Provisions held to manifest intention alien beneficiary should receive proceeds of sale of realty.

A will giving land to executors in trust, with power to sell realty and invest the proceeds, and providing that if the testatrix's brother, to whom the property was first devised, was not heard from in seven years, the property should go to two aliens, manifests an intention that the alien beneficiaries should receive the proceeds of the alienation of the real estate, instead of the estate itself.

6. Trusts ¶191(3)—Power of trustees to sell held not limited to seven years.

Where the will devised real property to the executors, in trust for the brother of the testatrix, if he should be heard from within seven years, and, if not, provided it should go to two aliens, and authorized the trustees to sell the property whenever they deemed it expedient to do so, they had power to sell after the expiration of the seven years, especially where the delay in selling was for the benefit of the legatees, in which case equity would limit the power to sell only if required by the express terms of the will.

Appeal from the Supreme Court of the District of Columbia.

Suit by John Kennedy, surviving executor of the estate of Margaret King, deceased, against Michael F. Mangan, for specific performance of a contract for the purchase of real estate. Decree for defendant, and plaintiff appeals. Reversed and remanded.

Charles S. Shreve and M. N. Richardson, both of Washington, D. C., for appellant.

T. P. Regan, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, at the close of the evidence for the plaintiff, appellant here, dismissing his bill for specific performance of a contract for the sale to the appellee of part of lot 9, square 345, known as premises No. 735 Eleventh Street, Northwest, this city, by the plaintiff as surviving executor under the will of Margaret King (dated February 12, 1912, codicil dated February 14, 1912), who died in this District on February 18, 1912.

After making several bequests, and directing the expenditure of \$2,000 for the erection of a suitable burial lot memorial, the will provides:

"Tenth. I give to my executors, hereinafter named, the full power to sell, mortgage or otherwise dispose of any or all of my estate (personal, real or mixed), whenever they may deem it expedient so to do, and out of the proceeds to pay all of my just debts and the above legacies, and to reinvest the balance of the proceeds as they may think best. The purchaser or the party

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loaning the money need not see to the application of the purchase money or the money loaned.

"Eleventh. All the interest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my brother, Patrick King, if living, but in the event my brother Patrick is not heard from, or his whereabouts can not be located, for a period of seven (7) years, then in that event the said rest and residue of my estate shall go to Margaret and Ellen Kelly, daughters of John and Catherine Kelly, of Churchtown, county of Waterfoot, Ireland, as tenants in common, their heirs and assigns.

"And lastly, I do hereby nominate, constitute and appoint my friends, John Kennedy and John Quinn, executors of this, my last will and testament, and I desire that my executors hereinbefore named, shall not be required to give bond for the faithful performance of the duties of that office."

The personalty having proved insufficient to pay the legacies, the executors, having been unable to make advantageous sale of the real estate, obtained leave of court in June of 1913 to borrow the sum of \$3,500 by deed of trust on this real estate. Thereafter, in March of 1916, appellant, as surviving executor, was authorized by the court to borrow an additional \$1,000 on this real estate to complete payment of the memorial authorized by the will. Shortly before these trusts became due, appellant sold this real estate at public auction to the appellee for \$10,500, and this sale was ratified by the court below. However, a title company refusing to certify as to the validity of the title, appellee declined to comply with the terms of the sale, and this suit resulted.

The evidence showed that Patrick King had left the District of Columbia several years prior to the death of the testatrix, and appellant had been unable to locate him after diligent effort; that Ellen Kelly predeceased testatrix by 16 years and that Margaret Kelly is a citizen of Great Britain, residing in Ireland.

There being no brief for appellee, we are remitted to his answer for his theory of the case, which in substance is that it was the intention of testatrix to terminate her estate and distribute the assets seven years after her death.

[1] Since a trust was charged upon the executors, as such, it did not become extinct by the death of one of them. Code, § 326; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Wilson v. Snow*, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604. If, therefore, the executors would have been authorized to make this sale, the survivor could make it.

[2, 3] We come now to inquire as to the intent of the testatrix, as expressed in her will. She knew it was uncertain whether her brother ever could be located, and as to the other two residuary legatees she is presumed to have appreciated the limitations surrounding the holding or enjoyment of real estate by aliens. *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101; Act March 2, 1897, 29 Stat. 618 (Comp. St. §§ 3490-3496); Act Feb. 23, 1905, 33 Stat. 733 (Comp. St. § 3497); Treaty Series No. 146, between the United States and Great Britain, March 2, 1899 (31 Stat. 1939), and January 13, 1902 (32 Stat. 1914). That the bequest to Ellen Kelly lapsed because she predeceased the testatrix (*Hamlet v. Johnson*, 26 Ala. 557; *Dorsey v. Dodson*, 203 Ill.

32, 67 N. E. 395), is immaterial in this connection, since testatrix was unaware of the fact.

[4, 5] The nature and duration of a trust are governed by its requirements, in the absence of express provisions. *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044; *Johns Hopkins Univ. v. Middleton*, Ex'r, 76 Md. 186, 24 L. Ed. 454; 31 Cyc. 1051. There are no such express provisions in this will. Reading it as a whole, and having in mind the circumstances surrounding the testatrix, it is apparent to us that she had in mind that the benefits of the residuary bequests would go to the beneficiaries in substituted form; in other words, that they would receive the proceeds of the alienation in lieu of the real estate itself. *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10. The will expressly authorizes the executors, "whenever they may deem it expedient so to do," to sell, mortgage, or otherwise dispose of any or all of the estate, personal, real, or mixed, "and out of the proceeds" to pay the debts and legacies and reinvest the balance as they may deem best.

[6] The provision that this trust should continue at least seven years, unless the brother, Patrick, was sooner heard from, obviously was inserted because of the legal presumption of death after that period of absence, and was not intended as a limitation upon the trust at all. In other words, the language employed and the circumstances surrounding the testatrix at the time indicate an intent that time should not be of the essence of the power. *Marsh v. Love*, 41 N. J. Eq. 112, 6 Atl. 889; *Hale v. Hale*, 137 Mass. 168. The situation confronting the surviving trustee when he made this sale, and which well may have been foreseen by the testatrix, furnishes additional grounds for believing that she did not intend that the power to sell was to cease at the expiration of seven years. In the interests of the legatees the actual sale of the property had been deferred, but at that time such a sale was imperative because of the maturity of the trusts. In circumstances like these a court of equity would limit the power of the executor only when required so to do by the express terms of the will. Not only are such terms lacking here; but, as we have indicated, the language used discloses a contrary intent.

It results that the decree must be reversed, with costs, and the cause remanded for further proceedings.

Reversed and remanded.

EVANS v. NEUMANN et al.

(Court of Appeals of District of Columbia. Submitted February 10, 1922. Decided March 6, 1922.)

No. 3646.

1. Husband and wife ⇨29(4)—Proof of common-law marriage held not to sustain contract in consideration of marriage.

Specific performance of a contract in consideration of marriage cannot be decreed, where there was no proof of a ceremonial marriage, on evidence of a common-law marriage between the parties, in the absence of any indication in the contract of intention to contract a common-law marriage, or any certain evidence as to such intention.

2. Husband and wife ⇨29(4)—Inference that marriage was intended does not show marriage as consideration for contract.

Even though a written agreement between the parties supports an inference that marriage between them was intended, such an inference does not show an agreement to marry in consideration of the promises contained in a contract which the survivor claimed gave him all the property.

3. Specific performance ⇨28(1)—Contract must be certain in its terms.

Specific performance cannot be decreed on a document which is unintelligent, mutilated, and ambiguous, since the contract must not only be certain in all its terms, but its terms must be clearly proved, for it to be specifically enforceable.

4. Specific performance ⇨8—Right to performance of admitted contract is within court's discretion.

Specific performance, even when the contract is admitted, rests in the sound discretion of the court, and will not be decreed merely as a matter of right.

Appeal from the Supreme Court of the District of Columbia.

Suit for specific performance by Charles H. Evans against Margaret Mannix Neumann and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Milton W. King, Morris Simon, Eugene Young, and Lawrence Koenigsberger, all of Washington, D. C., for appellant.

George C. Shinn, Arthur Peter, and H. I. Quinn, all of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Ellen Allen died in the District of Columbia, January 17, 1919, leaving a large amount of real estate, and also personal property of the value of about \$3,000. By will dated August 2, 1918, she made specific bequests to her two children, and devised the residue of her estate to the Washington Loan & Trust Company for the benefit of her four infant grandchildren.

Appellant filed a bill in equity in the Supreme Court of the District, naming the Washington Loan & Trust Company, the children, and the grandchildren as defendants, alleging that he and Ellen Allen entered into an antenuptial agreement, wherein she agreed, in consideration of their becoming united in matrimony, that "he and she were to be joint owners of all the property of the said Ellen Allen, with the right of the survivor to take the whole thereof"; that in pursuance thereof

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they became husband and wife, and that he is entitled to have the agreement specifically enforced, and conveyance of the property decreed to him. The alleged agreement is in words and figures, as follows:

\* \* \* \* \* onice be  
 \* \* \* \* \* llen and Chas H Evans that  
 \* \* \* \* \* isagn of house is gone to  
 \* \* \* \* \* at My disposal, as best of  
 my Judgment to be used. And  
 Also All buisness of of hers to be  
 Conducted by Said C. H. Evans, -  
 Also in case of acident or death  
 the Surviveing one is Subject then  
 to all in his or hers own rite in A  
 greement be tween the both of us  
 this is a true and Just Agreement be  
 twee the both of us So help us God  
 of us both this 9th Day of May 1916  
 Chas. H. Evans and Ellen Allen 9 30  
 P.M.

our corect Signatures on other Side  
 furthermore if after we are Married  
 there Should be diffgulties Ariesse  
 be tween us the both of us can  
 Seperate on Mutial agreement to  
 Sadiesfie our Selves as we chose.  
 We Also agree to keep our Names  
 from the public for one year on  
 account of our Chirldren.

Mrs. Allen is to give up all house  
 repairs, and all other buisness that

\* \* he has looked after before and Said  
 \* \* \* \* ns is to conduct it all and to  
 \* \* \* \* \* All Businesses. A true and  
 \* \* \* \* \* Coppy C. H. Evans."

(Portions of the paper had been torn off and lost. The stars occupy the position of the detached parts.)

From a decree dismissing the bill, plaintiff appealed.

[1] Assuming, without admitting, that the document here in question can be interpreted as a contract in consideration of marriage, it is conceded that no proof of a ceremonial marriage was adduced. It is contended, however, that there was evidence of a common-law marriage between the parties. There is nothing in the paper from which the intention of the parties to contract a common-law marriage can be inferred, and the vague and uncertain evidence on this point indicated no such intention at the time the paper here relied upon was executed. Indeed, in the light of the certainty and definiteness of proof exacted in establishing a contract that would invoke the extraordinary remedy of specific performance, plaintiff has totally failed to establish his case.

[2] If it be inferred from the paper that matrimony was intended, it nowhere appears that plaintiff, in consideration of succeeding to all the property of Ellen Allen, agreed to marry her. Such an inference, therefore, would not be based on a specific agreement, but upon a vague contingency of marriage at a time indefinite and uncertain.

[3] Specific performance cannot be decreed upon a document so unintelligent, mutilated, and ambiguous as this. In order to obtain equitable relief, the contract must not only be certain in all its terms, but the terms must be clearly proved. *Lipscomb v. Watrous*, 3 App. D. C. 1.

[4] It is equally well settled that specific performance, even when the contract is admitted, rests in the sound discretion of the court, and will not be decreed merely as a matter of right. As was stated by Mr. Justice Harlan, delivering the opinion of the court in *Hennessey v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. 109, 111 (32 L. Ed. 500):

"Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case. *Willard v. Tayloe*, 8 Wall. 557, 567; *Marble Co. v. Ripley*, 10 Wall. 389, 357; 1 Story's Eq. Jur. § 742; *Seymour v. Delancey*, 6 Johns. Ch. 222, 224. The question in cases of specific performance, Lord Eldon said, is not what the court must do, but what, under the circumstances, it may do, in the exercise of its discretion to grant or withhold relief of that character. *White v. Damon*, 7 Ves. 30, 35; *Radcliffe v. Warrington*, 12 Ves. 326, 331. It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

It is unnecessary to consider the other errors assigned, since there is no reasonable theory upon which a decree for the specific performance of the alleged contract can be sustained.

The decree is affirmed with costs.

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MOLLOY v. KELLOGG et al.

(Court of Appeals of District of Columbia. Submitted February 7, 1922. Decided March 6, 1922.)

No. 3507.

1. Sales ⇐173—Buyer, breaking contract, cannot question seller's willingness to perform.

A buyer, who admitted he had failed to furnish shipping instructions as required by the contract, cannot be heard to say that the sellers could not or would not have performed their part of the contract, if he had not breached his.

2. Contracts ⇐338(4)—Prior practice of parties immaterial as to point covered by written contract.

Statements in an affidavit of defense as to the practice of the parties under prior contracts are immaterial as to a provision of the contract, which was in writing and must speak for itself.

3. Sales ⇐378—Defense as to market price before termination of contract period held insufficient.

In an action for loss by sale in the open market after the termination of the period during which the buyer was entitled to take the goods, an affidavit of defense that the market price exceeded the contract price prior to the termination of the contract was insufficient.

4. Pleading ⇐155—Affidavit of defense, stating what defendant expects to prove, is insufficient.

An affidavit of defense, stating that defendant expected to be able to prove certain fact, was fatally defective as expressing only an expectation.

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**5. Pleading ¶348—Affidavit of defense viewed in most favorable light before rendering summary judgment.**

The affidavit of defense must be viewed in its most favorable light in determining the right to judgment under the seventy-third rule.

Appeal from the Supreme Court of the District of Columbia.

Action by George Kellogg and another, trading as Kellogg & Miller, against Thomas J. Molloy. Judgment for plaintiffs for insufficiency of the affidavit of defense, and defendant appeals. Affirmed.

L. A. Bailey and J. William Shea, both of Washington, D. C., for appellant.

George E. Hamilton and John J. Hamilton, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the plaintiffs, appellees here, under the seventy-third rule.

Plaintiffs, in their declaration, sought the recovery of \$510, alleged to represent the loss sustained upon the sale on the open market of 20 barrels of oil, which defendant had contracted to purchase, but had not accepted in accordance with the terms of the contract. The declaration was accompanied by the usual affidavit of merit.

In the declaration it is averred:

"Deliveries in 5-barrel lots were to be made between the months of April and September, 1920, upon the buyer furnishing shipping instructions to the plaintiffs, and election of kind of oil desired by him, said shipping instructions to be given in ample time to enable seller to execute the orders within the contract period above named."

After averring their readiness and willingness to make deliveries according to the terms of the contract, plaintiffs set forth that during the contract period they frequently called upon defendant to furnish them with shipping instructions and to accept and receive shipments of oil, and that defendant failed and refused to comply with these requests. Plaintiffs further averred that after the expiration of the contract they sold the oil upon the open market, with the loss indicated.

In his affidavit of defense defendant alleges that he is informed and believes and expects to be able to prove "that, at all times during the life of the contract mentioned in the plaintiffs' declaration," they were not ready and willing to make the deliveries therein called for, and "that during all said period the open market prices of oil at the place of delivery mentioned in said contract exceeded the price fixed by said contract, excepting as to the 5 barrels of oil to be delivered in September; that said open market price on September 30th, 1920, was one dollar and seventeen cents (\$1.17) per 7½ pounds in 5-barrel lots." Defendant further avers that in previous dealings shipping instructions had been waived, and that the contract provided that "in the absence of specifications seller to have privilege of filling contract with raw oil"; that he understood that, if he did not send shipping specifications, plaintiffs would send raw oil; that plaintiffs did not repeatedly request such instructions, and that the only communication from them during the

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life of the contract was a letter from their agent, under date of September 22, 1920, "following his telephone message, when the market price of oil was below the contract price." Finally, defendant avers that he expects to be able to prove that the 15 barrels of oil to be delivered under the contract in April, May, and June were sold "during that period" at prices in excess of the contract price.

[1] Having failed to furnish plaintiffs shipping instructions, as required by the contract, defendant is not in a position to question the ability of plaintiffs to fulfill their part of the contract, and hence the averment that plaintiffs were not ready and willing to fulfill the terms of the contract constitutes no defense. Defendant's failure to give the shipping instructions effected a breach of the contract and he cannot now be heard to say that plaintiffs could not or would not have performed their part of it. *Delker Co. v. Hess Spring Co.*, 138 Fed. 647, 71 C. C. A. 97.

[2-4] Nor is the averment as to practice under prior contracts material here, for the contract, which is in writing, must speak for itself. *Slater v. Van Der Hoogt*, 23 App. D. C. 417. And as to the averments relating to market price it will be noted that they are restricted as to time to the duration of the contract, while the declaration avers that the sale was made "after the expiration" of the contract. Defendant's last averment, that "I expect to be able to prove that the 15 barrels of oil to be delivered to me under the contract" were sold by the plaintiffs during that period at prices in excess of the contract price, is fatally defective, since it expresses nothing more than expectation without stating grounds for even that.

[5] Viewing this affidavit of defense in its most favorable light, as we are bound to do (*Codington v. Standard Bank*, 40 App. D. C. 409), we are constrained to hold that no defense is stated therein. The judgment, therefore, must be affirmed, with costs.

Affirmed.

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MOORE v. MOORE et al.

(Court of Appeals of District of Columbia. Submitted February 8, 1922. Decided March 6, 1922.)

No. 3607.

**Husband and wife** — 52—Misconduct of wife held violation of implied condition of conveyance to her jointly with her husband.

Where a husband purchased property intended to be used by him as a home, and had a conveyance made to himself and wife as joint tenants, there was an implied condition of the gift to the wife that she would continue to live with him as his wife, so that her leaving him to live in adultery with another man, as a result of which her husband obtained a divorce, does not entitle her to a division of the property, which she could not have claimed prior to the divorce.

Appeal from the Supreme Court of the District of Columbia.

Suit by Ida F. Moore against Elmer E. Moore and another, for the sale and division of the proceeds of certain real estate held by the

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parties as joint tenants. From a decree dismissing the original and supplemental bills, plaintiff appeals. Affirmed.

George A. Maddox, of Washington, D. C., for appellant.

Francis P. Sheehy and Vincent A. Sheehy, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellant's original and supplemental bills for a sale and division of the proceeds of certain real estate in this District, held by the parties as joint tenants.

These parties were married on October 25, 1910. On March 26, 1912, the husband entered into a written contract for the purchase of the property in question, namely, improved lot 108, in square 3535, of Wardman & Bones' Subdivision of Block 10, "Highview," and from the evidence it is apparent that the property was to be used by the couple as a home. On April 25th following the sale was consummated, and a deed made to the husband and wife "as joint tenants." Thereafter this was the home of Mr. and Mrs. Moore until June of 1919, when she abandoned her husband and went to live with a man in Maryland. In January of 1920 the husband filed a petition for divorce in Maryland on the ground of adultery, and in July of the same year the court, after trial, found the wife guilty of adultery as charged in the bill and granted a divorce. On May 25, 1920, the petition herein was filed, and on October 15th following a supplemental petition was filed, setting up the divorce decree.

In his answer to the supplemental bill, which he asked to have considered in the nature of a cross-bill, the husband set forth the conditions surrounding the purchase of this home, and prayed a decree establishing title in him, but he noted no cross-appeal.

This property was purchased as a home for these parties, and was so used until the wife abandoned her husband and went to live with another man. After thus bringing disgrace upon herself and humiliation to her husband, she seeks the aid of a court of equity to drive the husband from his wrecked home or compel him to pay her half its value. Had she remained true to her marriage vows, she could not have maintained such a petition. The real basis of her contention, therefore, is her infidelity, resulting in the decree of divorce. To the contention that the deed is without condition we may answer, as did the court in *Evans v. Evans*, 118 Ga. 890, 45 S. E. 612, 98 Am. St. Rep. 180:

"That as it would be insulting and indecent to incorporate in a deed of gift a provision making it void if the wife should be guilty of that crime [adultery], the husband must be supposed to have given and the wife to have accepted with the implied condition that the property should not be used for the support of the paramour, or for the maintenance of one who had not only violated the vows under which he had promised to endow her with his worldly goods, but had outraged him as a man, and repudiated him as a husband; that the real consideration of such a conveyance was marriage and the continuance of the married state, which failed when by such an act the relation was rendered intolerable."

In *Dickerson v. Dickerson*, 24 Neb. 530, 39 N. W. 429, 8 Am. St. Rep. 213, where the wife by importunity had induced the husband to convey to her certain real estate and thereafter abandoned him without cause, it was held that she would not be permitted, under such circumstances, to retain title conveyed at her instance for her support in case of his death. And in *re Nellie Lewis*, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94, although a different point was involved, the court made the following pertinent observation:

"We see no reason in holding that a husband or wife can, by a violation of the marital obligations, obtain an interest in land which she or he does not possess while fulfilling such obligations."

We are of the view, therefore, that when this wife abandoned her husband, to enter into adulterous relations with another man, she violated the implied conditions of the deed making her a joint tenant of the property in question, and disentitled herself to any further interest therein. It follows that the decree must be affirmed, with costs.

Affirmed.

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CONVERY v. BRUCKER.

(Court of Appeals of District of Columbia. Submitted November 15, 1921. Decided March 6, 1922.)

No. 1430.

Patents ⇐ 113(7)—Concurrent decisions of three Patent Office tribunals sustained.

The concurrent decisions of the Patent Office tribunals in an interference proceeding, awarding priority to the senior party, whose filing date was prior to the junior party's earliest claimed date of reduction to practice, *held* correct.

Appeal from the Commissioner of Patents.

Interference proceeding between John J. Convery and F. H. Brucker. From a decision of the Commissioner of Patents, awarding priority to Brucker, Convery appeals. Affirmed.

Robert F. Rogers and Edmund H. Parry, both of Washington, D. C., for appellant.

William F. Hall, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding in which priority was awarded the senior party, Brucker, whose filing date was prior to appellant's earliest claimed date of reduction to practice.

The tribunals below having fully and satisfactorily disposed of every contention made by appellant, we affirm the decision appealed from, without further discussion.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice VAN ORSDEL in the hearing and determination of this appeal.

## MEMORANDUM DECISIONS

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**HARRIS v. DISTRICT OF COLUMBIA.** (Court of Appeals of District of Columbia. Submitted October 15, 1921. Decided March 6, 1922.) No. 2817. Appeal from the Supreme Court of the District of Columbia. Action by Adelbert Harris, by his next friend, Albert Harris, against the District of Columbia. Judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed. R. F. Downing and G. A. Berry, both of Washington, D. C., for appellant. Conrad H. Syme and R. L. Williams, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District upon a directed verdict for the defendant, appellee here, in an action for damages for the loss of a part of a finger through the alleged negligence of an employee of the defendant in operating a water plug for the purpose of refilling a sprinkling cart. The fundamental question in the case, whether the sprinkling of streets is "a public or governmental act as contradistinguished from a private or municipal act, which exempts the District of Columbia from liability for the injuries caused by one of its employees engaged therein," was certified to the Supreme Court of the United States for its opinion, and, that court having answered the question in the affirmative (Harris v. District of Columbia, 256 U. S. 650, 41 Sup. Ct. 610, 65 L. Ed. —), it follows that the judgment of the court below must be affirmed with costs. Affirmed.

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**ÆTNA LIFE INS. CO. OF HARTFORD, CONN., v. GOODSPEED.** (Circuit Court of Appeals, Second Circuit. January 18, 1922.) No. 143. In Error to the District Court of the United States for the Western District of New York. Action by Mae E. Goodspeed against the Ætna Life Insurance Company of Hartford, Conn., to recover the amount of a claim under an accident insurance policy. Judgment for defendant, and plaintiff brings error. Affirmed. Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y. (R. C. Vaughan, of Buffalo, N. Y., of counsel), for plaintiff in error. Botsford, Lytle, Mitchell & Albro, of Buffalo, N. Y., for defendant in error. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

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**AMOSKEAG MFG. CO. v. BAUMAN CLOTHING CORPORATION.** (Circuit Court of Appeals, Second Circuit. January 18, 1922.) No. 101. Petition to Revise Order of the District Court of the United States for the Southern District of New York. Suit in equity by the Amoskeag Manufacturing Company against the Bauman Clothing Corporation. From an order denying the application of A. A. Silberberg for an allowance of a claim for services rendered to one of the members of a creditors' committee, the claimant petitions to revise. Affirmed. A. A. Silberberg, of New York City, in pro. per. Allen R. Memhard and Henry H. Kaufman, both of New York City (Bernard L. Shientag, of New York City, of counsel), for appellees. Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. Order affirmed.

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**BUTLER et al. v. UNITED STATES.** (Circuit Court of Appeals, Fifth Circuit. March 25, 1922.) No. 3785. In Error to the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge. Criminal prosecution by the United States against Barlow Butler and Bob

Terry. Judgment of conviction, and defendants bring error. Affirmed. J. J. Fagan, of Dallas, Tex., for plaintiffs in error. Henry Zweifel, U. S. Atty., of Fort Worth, Tex. (Ben P. Alred, Asst. U. S. Atty., of Fort Worth, Tex., on the brief), for the United States. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment is affirmed.

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CLONTS et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. March 21, 1922.) No. 3747. In Error to the District Court of the United States, for the Southern District of Florida; Rhydon M. Call, Judge. Sam Clonts and others were convicted of breaking and entering a railroad car with intent to steal therefrom property being transported in interstate commerce, and they bring error. Affirmed. G. E. Mabry and Doyle E. Carlton, both of Tampa, Fla., for plaintiffs in error. Maynard Ramsey, Asst. U. S. Atty., of Jacksonville, Fla. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment in this case is affirmed.

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THE GOLDEN RULE. (Circuit Court of Appeals, Second Circuit. January 18, 1922.) No. 148. Appeal from the District Court of the United States for the Southern District of New York. Libel by Katherine Dunnigan and others against the steam tug Golden Rule, of which the Carroll Towing Line, Incorporated, was claimant, in which suit the Associated Operating Company was impleaded under the fifty-ninth rule. From a decree dismissing the libel and petition the libellants appeal. Affirmed. Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City of counsel), for appellants. Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Ralph W. Brown, both of New York City, of counsel), for appellee. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed.

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GULF TOWING & TRANSPORTATION CO. v. MORAN TOWING & TRANSPORTATION CO. (Circuit Court of Appeals, Second Circuit. January 18, 1922.) No. 116. In Error to the District Court of the United States for the Southern District of New York. Action by the Moran Towing & Transportation Company against the Gulf Towing & Transportation Company. Judgment for plaintiff, and defendant brings error. Affirmed. Haight, Sandford & Smith, of New York City (Herbert K. Stockton, of New York City, of counsel), for plaintiff in error. Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for defendant in error. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

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INSURANCE CO. OF NORTH AMERICA v. BRIGHAM et al. (Circuit Court of Appeals, Second Circuit. January 9, 1922.) No. 129. In Error to the District Court of the United States for the Southern District of New York. Action by Henry R. Brigham and another against the Insurance Company of North America. Judgment for plaintiffs, and defendant brings error. Affirmed. Certiorari denied 257 U. S. —, 42 Sup. Ct. 382, 66 L. Ed. —. Harrington, Bingham & Englar, of New York City (Henry B. Potter and George S. Brengle, both of New York City, of counsel), for plaintiff in error. Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for defendants in error. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed, with costs.

**KNICKERBOCKER ICE CO. v. KOCH et al.** (Circuit Court of Appeals, Second Circuit. January 9, 1922.) No. 140. In Error to the District Court of the United States for the Eastern District of New York. Action by Pearl Koch and another against the Knickerbocker Ice Company to recover damages for personal injuries. Judgment for plaintiffs, and defendant brings error. Affirmed. Frank R. Savidge, of New York City (James W. Bailey and William W. Bullis, Jr., both of New York City, of counsel), for plaintiff in error. Elmer J. Ashmead, of Jamaica, N. Y., for defendants in error. Before ROGERS, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed.

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**In re KREINER et al.** (Circuit Court of Appeals, Second Circuit. January, 18, 1922.) No. 152. Petition to Revise Order of the District Court of the United States for the Southern District of New York. In the matter of Louis Kreiner and another, individually and as copartners trading as the Kayanee Waist & Dress Company, bankrupts. From an order affirming a referee's report, which denied the motion of Bromberg Costume Company, Inc., against Robert P. Levis, as trustee in bankruptcy, to require the trustee to pay over to claimant a sum of money, the claimant files petition to review. Order affirmed. Harry Dubinsky, of New York City (Silver & Moscovitz and Samuel J. Rawak, all of New York City, of counsel), for petitioner. Bondy & Schloss, of New York City (Eugene L. Bondy, of New York City, of counsel), for respondent. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Order affirmed.

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**THOMAS v. UNITED STATES.** (Circuit Court of Appeals, Sixth Circuit. February 17, 1922.) No. 3579. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge. Roger Thomas was convicted of having received, knowing it to have been stolen, property stolen while in interstate shipment, and he brings error. Affirmed. D. J. Hartwell, of Youngstown, Ohio (John J. Sullivan, of Cleveland, Ohio, on the brief), for plaintiff in error. Berkeley W. Henderson, Asst. U. S. Atty., of Cleveland, Ohio (Edwin S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for the United States. Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted of having received, knowing it to have been stolen, property stolen while in interstate shipment. He made no motion for an instructed verdict and took no specific exception to the charge of the court. For these reasons some of the questions argued are not sufficiently preserved by the record. Of the three assignments of error which have proper basis, one relates to language which was used by the district attorney in argument, and which clearly was not beyond the proper scope; and one is based upon objection to a question asked the witness, for which objection no ground was stated. These two require no attention. The third relates to the statement of a witness that other property, found in Thomas' store at the same time as this, was also stolen property. When it appeared that the witness had no personal knowledge, the statement was stricken out, and the jury instructed to disregard it. No legal prejudice remained. If we might overlook Thomas' failure to preserve for review the matters most seriously argued to us and give them consideration, we would not think that any injustice was done below. His meritorious defense seems to be that, when the property was offered to him at a fraction of its value, he supposed that the offerers were getting rid of it in preparation for bankruptcy; and even this inference had faint support under the circumstances. The judgment is affirmed.

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**VALLELY v. NORTHERN FIRE & MARINE INS. CO.** (Circuit Court of Appeals, Eighth Circuit. January 13, 1922.) No. 195. Petition to Revise Order of the District Court of the United States for the District of North

Dakota. Involuntary proceedings in bankruptcy against the Northern Fire & Marine Insurance Company, in which John Vallely was appointed trustee in bankruptcy. Adjudication was vacated on application by the company, and the trustee filed petition to revise the order in matter of law, and questions were certified to the Supreme Court (254 U. S. 348, 41 Sup. Ct. 116, 65 L. Ed. 297) and answered to sustain the order. Petition to revise denied, and action of trial court affirmed. C. J. Murphy and T. A. Toner, both of Grand Forks, N. D., for petitioner. Tracy R. Bangs and Philip R. Banga, both of Grand Forks, N. D., for respondent. Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

PER CURIAM. This petition is to revise an order of the trial court setting aside the adjudication of bankruptcy of the respondent and directing restoration to it of the property held by the trustee in bankruptcy. The points here presented were three, as follows: (1) Was a petition to revise the proper method of bringing the above order to this court for review? (2) Was there such absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon motion of the bankrupt after expiration of time to appeal? (3) May an insurance company be estopped by its conduct from questioning such jurisdiction? These questions, stated more in detail, were certified to the Supreme Court. That court affirmed the first and second and negatived the third. *Vallely v. Northern Ins. Co.*, 254 U. S. 348, 41 Sup. Ct. 116, 65 L. Ed. 297. The result of this determination by the Supreme Court is that the petition to revise must be denied, and the action of the trial court affirmed. It is so ordered.

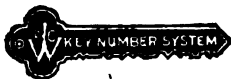
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WILSON et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. March 14, 1922.) No. 3810. In Error to the District Court of the United States for the Southern District of Mississippi; George W. Jack, Judge. Earl S. Wilson and others were convicted of conspiracy to commit an offense against the United States, and they bring error. Affirmed. James A. Teat, of Jackson, Miss. (Chalmers Potter, of Jackson, Miss., on the brief), for plaintiffs in error. Julian P. Alexander, Sp. Asst. U. S. Atty., of Jackson, Miss. (E. E. Hindman, U. S. Atty., of Jackson, Miss., on the brief), for the United States. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment is affirmed.



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↪243 (U.S.C.C.A.N.Y.) Combination claim not infringed, except by substantially the same elements functioning co-ordinately in the same way.—Electro-Dynamic Co. v. U. S. Light & Heat Corporation, 80.

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↔9 (D.C.) "Tabasco Pepper Sauce" is a geographical name.—E. McIlhenny's Son v. B. F. Trappey & Sons, 582.

↔21 (D.C.) Substantial adverse use prevents registration under ten-year clause.—E. McIlhenny's Son v. B. F. Trappey & Sons, 582.

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↔43 (D.C.) "Quaker Maid" *held* likely to be confused with "Quaker City" as mark for candy.—Quaker City Chocolate & Confectionery Co. v. Kernan, 592.

↔45½ (New, vol. 7A Key-No. Series) (D.C.) Disclaimer of descriptive words unavailing, if they are dominating feature.—E. McIlhenny's Son v. B. F. Trappey & Sons, 582.

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